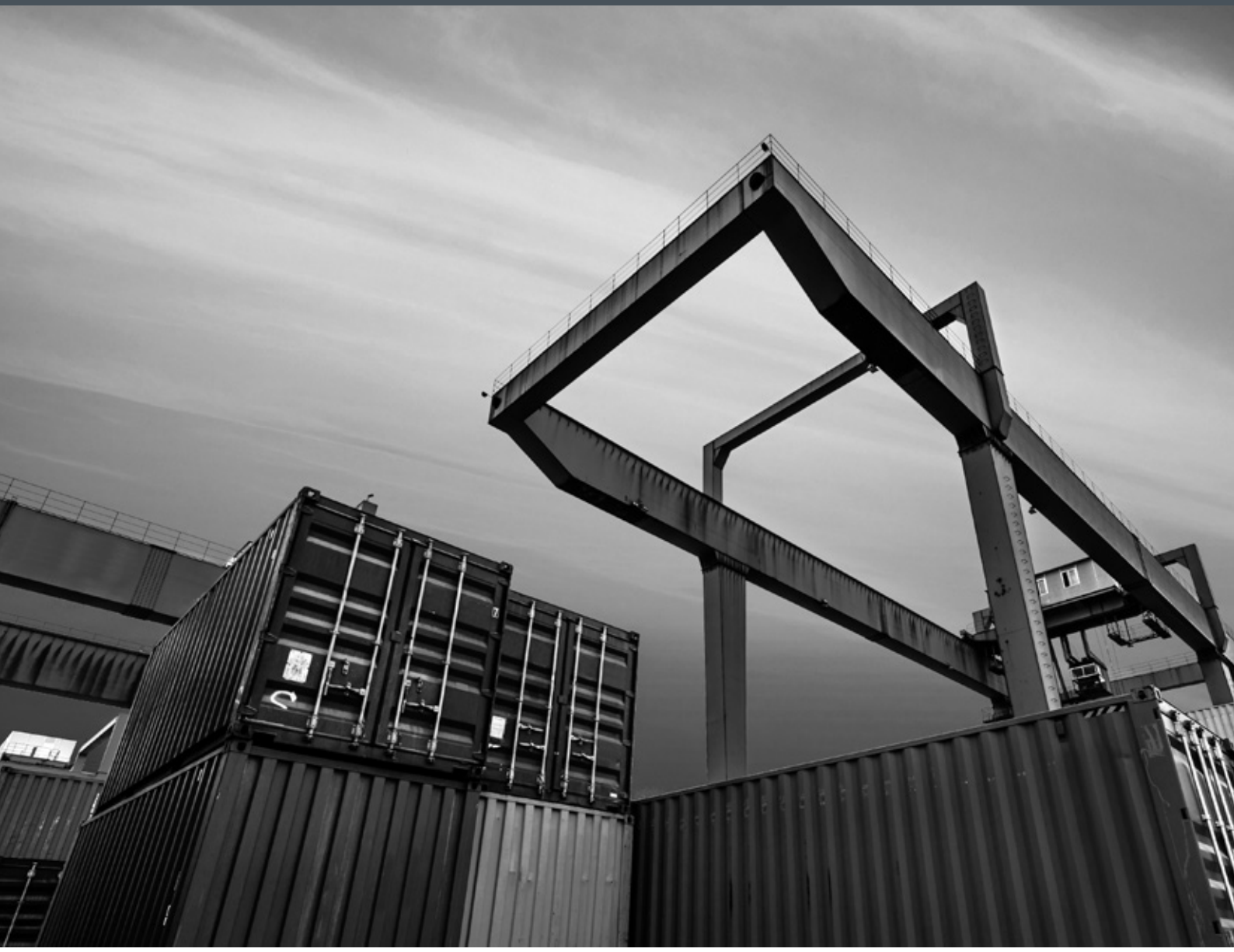

NATIONAL SECURITY AND INVESTMENT ACT 2021

The National Security and Investment Act 2021 (the 'Act') received Royal Assent on 29 April 2021, granting the UK Government new powers to scrutinise investments on national security grounds. The Act is expected to come into force by the end of 2021. In this briefing we recap the Act, review its entry into force including retrospective provisions and consider the Government's proposed revised definitions of three of the Act's 17 sectors for mandatory notification: transport, energy and defence.

"Investors and relevant companies should already begin to review current and prospective transactions to determine if any notification ought to be made..."

The Act will overhaul the current national security review regime under the Enterprise Act 2002 through, among other things, establishing a new Investment Security Unit (within the Department for Business, Energy and Industrial Strategy) and the screening of transactions through a digital portal. For a detailed analysis of the Act's provisions and likely implications for investors, please see our earlier briefing here.[1]

When will the Act come into force?

At the time of writing, the Government has not announced a specific date on which the Act's provisions will come into force but has said that the new regime is expected to commence towards the end of 2021.[2] Businesses are already able to send enquiries and requests for advice on the new regime to the Investment Security Unit. It should be noted that although the Government's 'call-in' power has retrospective effect (as explained below), there is no obligation to notify the Investment Security Unit prior to the new regime commencing.

The Act's retrospective effect

As explored in detail in our previous briefing, the Act allows the Secretary of State to intervene in an acquisition or transaction where it suspects that a 'trigger event' has taken place (or is in progress or contemplation). For example, trigger events include when an investor acquires 25%, 50% or 75% (or 15% in mandatory sectors) or more of the shares or voting rights in a qualifying entity. The Act allows the Secretary of State to intervene by way of a call-in notice for trigger events taking place up to five years in the past, but this is reduced to six months from the day that the Secretary of State became aware of the trigger event. Pursuant to Section 2(4) of the Act, transactions completed between 12 November 2020 (the date when the National Security and Investment Bill was introduced to the UK Parliament) and the day before the commencement date of Section 2 can be subject to call-in notices up to six months after the relevant commencement date.

At the time of writing, Section 2 is not yet in force. Section 66 of the Act lists the sections that came into force on the day the Act was passed (i.e. 29 April 2021). Section 2 is not listed, meaning it will come into force at a later date.

Investors should – as outlined in our previous briefing – now take action to identify any potential national security concerns in present and prospective transactions.

Revised draft definitions of key sectors

In March 2021, the Government published its response to the public consultation on the mandatory notification in specific sectors under the National Security and Investment Bill (opened in November 2020).[3] We focus below on the revised definitions of transport, energy and defence, which are set out in the Annex below. The revised definitions aim to provide clarity and settle concerns raised in the public consultation. These included removing unclear terms such as "involved in" or "form part of" and ensuring terms were used consistently with prior legislation. The definitions are still in draft form and could therefore be subject to further amendment.

Transport

The originally proposed definition included an entity that owned or operated a port or harbour that handled "Category 1 goods" or "vessels capable of carrying at least 12 passengers". The Government has removed these two criteria in the revised definition after industry feedback that they broadened the scope of the definition. The threshold criteria in the revised definition is limited to handling 1 million tonnes or more of cargo annually. The maritime

1 https://www.hfw.com/UK-introduces-National-Security-and-Investment-Bill-to-Parliament-to-increase-the-Governments-powers-to-review-transactions

2 https://www.gov.uk/government/news/national-security-bolstered-as-bill-to-protect-against-malicious-investment-granted-royal-assent

3 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965784/nsi-scope-of-mandatory-regime-gov-response.pdf

definition still captures all 51 major ports in the UK and the Government made clear in its response that this was important due to the ports' ability to handle a variety of goods and any narrower definition of 'key ports' would make it easier to circumnavigate the Act.

For airports, the Government maintained that the threshold requirements did not need to be the same as for the Network and Information Systems (NIS) Regulations 2018 as the regimes address separate aspects of national security.

Energy

Respondents to the consultation raised concerns that the original draft of the definition included *"energy suppliers that provide energy to significant customer bases"* as this seemed to cover many retail energy suppliers who would be administratively burdened if caught under the Act. The Government has removed this reference in its revised definition and in its response confirms that the policy intent was for retail energy suppliers to fall outside the scope of the Act, as they do not own any energy infrastructure.

The Government is also continuing to review the thresholds for oil infrastructure, in response to industry feedback that the thresholds in the definition are too low. The threshold capacity for downstream facilities has been revised from 20,000 tonnes to 50,000 tonnes whereas the threshold capacity for terminals and upstream facilities remains unchanged at 3,000,000 tonnes. In addition, the revised definition contains clarification on the application to prospective terminals, facilities and infrastructure.

Defence

The definition of the defence sector remains largely unchanged from the original definition published by the Government in November 2020. Respondents to the consultation generally agreed that the definition was clear and comprehensive. The only minor amendment that the Government has made is replacing the more generic description of an entity *"involved in the research, development, design, production, creation or application of goods or services which are used or provided for defence or national security purposes"* to *"carries out activities that comprise or include"* such activities.

Conclusion

We await further announcements from the Government as to when exactly the Act's provisions will come into force. As explained above, the definitions of the 17 key sectors subject to mandatory notification under the Act are still subject to change and will need to be finalised before the new national security and investment regime commences. Investors and relevant companies should already begin to review current and prospective transactions to determine if any notification ought to be made to the Investment Security Unit. In this regard, HFW has a dedicated team that can assist with advising on the implications of the Act.

Please see the Annex on the following page.

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ANNEX

Extracts from the Government Response to the consultation on mandatory notification in specific sectors under the National Security and Investment Bill, March 2021.

Revised proposed definition of Transport

"Ports and Harbours

1. A qualifying entity carrying on activities that consist of —

   (a) owning or operating a port or harbour situated in the United Kingdom that handled 1 million tonnes or more of cargo in the year preceding the year in which notification is given under section 14 (Mandatory notification procedure) of the Act, as recorded in the Port Freight Annual Statistics published by the Department for Transport; or

   (b) owning and operating terminals, wharves or other infrastructure situated in a port or harbour described in sub-paragraph (a).

2. In paragraph 1—

   "harbour" has the same meaning as in set out [*sic*] in section 313 (1) of the Merchant Shipping Act 1995;

   "infrastructure" means the infrastructure, facilities and equipment within a port or harbour which enable the effective operations directly related to the movement of freight, passengers or seafarers;

   "operating" means controlling the functioning of the port, harbour, terminal, wharf or other infrastructure situated in a port or harbour; and

   "port" means an area of land and water made up of such infrastructure, facilities and equipment so as to permit—

   (i) the receiving and departing of ships;

   (ii) the loading and unloading of ships;

   (iii) the storage of cargo;

   (iv) the receipt and delivery of cargo; or

   (v) the embarkation and disembarkation of passengers, crew and other persons; and

   "ship" has the meaning set out in section 313 (1) of the Merchant Shipping Act 1995.

Airports

3. Qualifying entities carrying on activities that consist of—

   (a) owning or operating an airport situated in the United Kingdom that handled at least six million passenger movements or 100 000 tonnes of freight in 2018, as recorded in the UK Airports Annual Statements of Movements, Passengers and Cargo published by the Civil Aviation Authority;

   (b) providing en route air traffic control services in the United Kingdom;

   (c) owning a provider of en route air traffic services in the United Kingdom.

4. In paragraph 3 —

   "airport" has the meaning set out in section 66 (1) of the Civil Aviation Act 2012;

   "en route air traffic control services" mean services provided pursuant to a licence under section 6 of the Transport Act 2000;

   qualifying entities owning a provider of an en route air services traffic provider include—

   (i) a company which owns such a provider (C);

   (ii) any parent undertaking of C (P1); and

   (iii) any parent undertaking of P1 (P2);

   qualifying entities owning an airport include—

   (i) a company which owns the airport ("C");

   (ii) any parent undertaking of C ("P1"); and

   (iii) any parent undertaking of P1 ("P2");

   "operating an airport" means having overall responsibility for its management; and

   "parent undertaking" has the same meaning as set out in section 1162 of the Companies Act 2006."

Revised proposed definition of Energy

"1. A qualifying entity that carries out any of the activities set out in paragraph (2).

2. The activities referred to in paragraph (1) are the ownership or operation of—

   (a) terminals, upstream petroleum pipelines or infrastructure which is or will be necessary to a petroleum production project, with (i) a throughput of greater than 3,000,000 tonnes of oil equivalent over the last 12 months or (ii) for prospective terminals, upstream petroleum pipelines or infrastructure, greater than 3,000,000 tonnes of oil equivalent is expected to flow in its first year of operation;

   (b) licensed "transmission" or "distribution" operators as defined in section 6 of the Electricity Act 1989 or section 7 of the Gas Act 1986;

   (c) gas or electricity interconnectors, long range gas storage and gas reception terminals, including Liquefied Natural Gas;

   (d) Authorised Electricity Operators in Great Britain that provide load via:

      (i) individual assets that would have a total installed capacity, greater than or equal to 100 megawatts; or

      (ii) assets that, when cumulated with those of the affiliated undertakings of the acquiring entity, would have a total installed capacity, greater than or equal to one gigawatt;.

(e) aggregators that control assets in Great Britain, that when cumulated have a total capacity greater or equal to one gigawatt;

(f) entities that supply petroleum-based road, aviation or heating fuels (including liquefied petroleum gas) to the United Kingdom market, via

(i) a company that provides or handles more than 500,000 tonnes per annum; or,

(ii) a downstream facility owner if the owned facility has capacity in excess of 50,000 tonnes;

where either carry out any of the following activities:

(aa) the import of any of crude oil, intermediates, components and finished fuels;

(bb) the storage of any of crude oil, intermediates, components and finished fuels;

(cc) the production of intermediates, components and finished fuels through a range of refining or blending processes;

(dd) the distribution of petroleum-based fuels to other storage sites throughout the UK by road, pipeline, rail or ship;

(ee) the delivery of petroleum-based fuels to retail sites, airports or end users.

3. In paragraph (2)—

"aggregator" is a natural or legal person who combines multiple customer loads or generated electricity for sale, purchase or auction in the GB electricity market;

"Authorised Electricity Operators" means any person (other than the licensee) who is authorised to generate, participate in the transmission of, distribute or supply electricity or participate in the operation of an interconnector;

"gas" has the meaning set out in section 2 of the Energy Act 2008;

"gas importation and storage project" means a project carried out by virtue of a licence granted under section 4 of the Energy Act 2008;

"load" is defined pursuant to the Grid Code as "the Active, Reactive or Apparent Power, as the context requires, generated, transmitted or distributed";

"petroleum", has the meaning set out in section 90 of the Energy Act 2011;

"petroleum production project" has the meaning set out in section 90 of the Energy Act 2011;

"terminal" has the meaning given to it by Section 90 of the Energy Act 2011;

"upstream petroleum pipeline" has the meaning given to it by Section 90 of the Energy Act 2011;"

Revised proposed definition of Defence

"1. A qualifying entity that carries out activities that comprise or include the research, development, design, production, creation or application of goods or services which are used or provided for defence or national security purposes where that entity meets the conditions in paragraph (2).

2. The conditions referred to in paragraph (1) are that the entity—

(a) is a government contractor or any sub-contractor in a chain of sub-contractors which begins with the government contractor who provides goods or services; or

(b) has been notified by or on behalf of the Secretary of State of information, documents or other articles of a classified nature which the entity or an employee of his may hold or receive relating to the activities within the scope of paragraph (1).

3. In this Part—

"defence" has the meaning given to it by section 2(4) of the Official Secrets Act 1989; and

"government contractor" has the meaning given to it by section 12 of the Official Secrets Act 1989."