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CFIUS v the UK NSI: how similar are they really?

The UK has announced its own CFIUS-style investment regime. While the US may have provided the inspiration, the two regimes do have their differences

By Natasha Teja

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Lawyers are drawing comparisons between the UK's National Security and Investment Bill (NSI), which underwent its [second reading](#) in Parliament on November 17, and CFIUS [Committee on Foreign Investment in the US] – but how similar is it really?

Much like CFIUS, the NSI introduces criminal and civil sanctions for failing to notify on sensitive deals.

The NSI is predicted to receive up to 1,300 notifications per year, while CFIUS only received [213 notifications](#) in 2019; 113 of which proceeded to the investigation stage.

Whether or not the ratio of cleared to investigated notifications for the UK will be higher will depend on a range of factors.

Hardline views on hostile states

One of those factors is how hardline the UK will be towards perceived hostile states such as China and Russia. “given the UK's decision in respect of Huawei's participation in 5G, it seems that China doesn't currently rank number one on the UK government's friend list,” said Akin Gump International trade partner Jasper Helder.

However it was the US that warned the UK back in [December 2019](#) of the potential dangers of accepting 5G networks from Huawei. This led to the UK issuing a [press release](#) in July 2020 stating that buying new Huawei 5G equipment will be banned after December 31 2020.

Despite this, it's unlikely that the UK will take as hardline a stance towards China as CFIUS. The government has reiterated its commitment to staying open for business, and the pressures of both Covid-19 and Brexit may leave the UK little choice but to welcome Chinese companies.

"The UK economy has been hit hard by the pandemic and is not in great shape, and so the country needs foreign investment to help stimulate growth," said Davina Garrod, a competition partner at Akin Gump. "Some funds have Chinese money and a little bit of Chinese influence, but at the end of the day, the UK needs the finance and so will adopt workarounds. So, I don't think the UK will be as aggressive about Chinese investors as CFIUS has been over the past few years."

But Harry Broadman, partner and chair of the emerging markets practice at Berkeley Research Group and previously a member of CFIUS, disagrees that CFIUS is anti-China.

"CFIUS may look as if it is "anti-China," but factually it is important to understand that not only did the sheer number of US inbound deals attempted by Chinese entities dwarf that of other countries, but also many of these proposed transactions were focused in sectors that many countries would deem as sensitive," he said. "The latest CFIUS data show the Chinese have begun to understand this."

CFIUS' political leanings are also dictated by the administration in power.

Differing review processes

The number of notifications the UK not only receives but handles is largely dependent on the final draft of the bill and the manpower allocated to enforce it. Thus, how the regime compares to CFIUS will depend on several practical points including how well staffed it is, and how strictly the law is enforced.

Mark Daniel, competition lawyer at Allen & Overy, explained that there is a high potential for the UK's NSI to be less well- resourced than CFIUS, impacting its comparative performance. He said: "The relevant government department, for Business, Energy and Industrial Strategy (BEIS), does not routinely handle merger reviews on anything like the scale that the Competition and Markets Authority does. One concern, raised by MP Ed Miliband in Parliament, is whether the relevant unit within BEIS will be given the resources needed to handle the very large number of notifications expected."

Foreign reception

The concerns amongst investors lie in the large grey area that the NSI operates in. Allied states of the UK, such as the Commonwealth countries, are less concerned that the bill will disrupt their ability to conduct business.

On the other end of the spectrum, perceived hostile states such as China and Russia understand that it may be a sign of the times in a more politically polarised world. According to Garrod, "those two poles sit higher up the acquirer risk pyramid, but there is quite a big universe in the middle where it is not entirely clear how the UK will treat those investors".

For several years, investors have raised complaints regarding CFIUS' [lack of transparency](#). For example, under the Exon-Florio law, the US president maintains the authority to block or reverse CFIUS recommendations based on classified information. This means that investors are unable to rebut the evidence.

In September 2017, President Trump [blocked](#) a proposed \$1.3 billion acquisition of Lattice Semiconductor Corporation by Canon Bridge Capital Partners. The private equity firm was reportedly funded by the Chinese government. This was only the fourth time a US president had blocked a transaction under the CFIUS statute. Chinese investments within the semiconductor industry continue to receive heavy scrutiny due to semiconductors being part of the defense supply chain.

Nevertheless, in recent years CFIUS has tried to introduce rules that make its processes more transparent. Broadman explains that “CFIUS’ review process has in fact become more regularised and transparent over the years. This is a lesson the UK should take note of.”

With the final draft of the NSI still yet to be published, there are many lessons it can take from its most notable predecessor CFIUS.