

# A Conversation with Jenine Hulsmann

with Drew Campbell



Jenine Hulsmann

*The U.K. government has published proposals to strengthen its powers to review, and potentially block or unwind, investments on national security grounds. The impacts for infrastructure assets and projects can be significant. What should investors and investment managers know about this process and how to manage it going forward? i3 senior editor **Drew Campbell**, asked **Jenine Hulsmann**, partner, Clifford Chance, about the firm's recent report — U.K. reviews national security impact of foreign investment.*

## **What are the United Kingdom's plans for this policy?**

In October, the Business and Energy Secretary, Greg Clark, announced proposals to enable the U.K. government to intervene in mergers that raise national security concerns, even when they involve smaller businesses. Short-term proposals include amending the thresholds of the existing public interest regime to catch a broader range of investments in the military and dual use sector and the advanced technology sector. These could affect transactions that are currently under contemplation.

## **What types of investments could this policy affect?**

Options include powers to “call in” a wide range of foreign investments — including new projects and acquisitions of bare assets — for screening and/or a mandatory notification regime for foreign investment in certain key sectors such as nuclear, defense, energy, transport and telecoms. Proposals to control foreign investment in critical infrastructure were first announced in September 2016, following the decision to proceed with the Hinkley Point C nuclear project. However, other than nuclear facilities, it was unclear what infrastructure would be regarded as critical.

## **Is there more guidance on what those other infrastructure could be?**

The green paper now clarifies that the government proposes to introduce new

measures in the short term for companies that design or manufacture military and dual use products, and parts of the advanced technology sector, where the target has sales of £1 million (\$1 million) or more in the U.K. or will have a share of 25 percent or more of the supply of the relevant products in any U.K. market. In the longer term, the regime will also cover other sectors including telecommunications and broadcasting infrastructure, the wider (non-nuclear) energy sector, major airports and ports, air traffic control and certain services provided to the government and emergency services.

## **What are the risks for institutional investors?**

While the powers to intervene on national security grounds have been rarely used, the green paper identifies the following specific concerns with the current regime: 1) most small businesses are not covered; 2) new projects (e.g., new build nuclear power stations) are not covered; 3) transactions involving the sale of bare assets that do not amount to a business (e.g., machinery, land or intellectual property rights) are not covered; and 4) the voluntary notification regime and call-in powers may be insufficient or create uncertainty for business.

## **What is different about these risks than the typical risks for investors in these types of transactions?**

While such risks may be more self-evident when dealing with governments or state-

owned entities, the green paper suggests that the foreign nationality of private investors may, of itself, be a risk factor due to divided loyalties — even in cases of dual nationality — or the risk of coercion by a hostile state. While no indication is provided as to the nationalities, which will give rise to concerns, account will need to be taken of the U.K.’s obligations under E.U. and international treaties. The green paper acknowledges that investors from countries which have a free trade agreement covering the U.K. may receive less scrutiny. The green paper suggests that the risk of espionage may be increased where a single investor has multiple areas of investment or ownership across a sector or across various sectors or supply chains. The ownership or control of land that is close to a national infrastructure site may also give rise to “proximity risk.”

### **When do you expect to get more concrete, actionable details on the government’s plans?**

Detailed proposals will be set out in a white paper to be published in 2018. In the meantime, the government at this stage is seeking views on two broad options, which could be implemented alone or in combination: 1) a voluntary notification regime with expanded powers for the government to “call in” transactions which may give rise to national security concerns; and/or 2) a mandatory notification regime for foreign investment in certain key industries, including communications and broadcasting infrastructure, the energy sector, major airports and ports, air traffic control, emergency services and certain services provided to the government. The deadline for responses on the longer-term reforms is 9 January 2018.

### **How could these policies impact transactions?**

Under the current merger regime, ministers may intervene on national security — including public security — grounds where the transaction meets the thresholds under the E.U. Merger Regulation or the U.K. merger regime. The thresholds under the U.K. merger regime are met if: 1) the U.K. turnover of the business being acquired exceeds £70 million (\$92 million); or 2) the transaction results in the creation of, or increase in, a 25 percent or more combined share of sales or purchases

in — or in a substantial part of — the United Kingdom, of goods or services of a particular description.

### **And if these thresholds are not met?**

Ministers may only intervene in relation to transactions where one of the parties is a defense contractor and carries on business in the U.K. or does so by or under the control of a U.K. company.

### **What is the track record of interventions thus far?**

There have been seven public interest interventions on national security grounds in the 15 years since the Enterprise Act 2002 was adopted, the most recent of which was decided in May 2017. All of these cases have involved acquisitions by foreign investors of businesses that supplied systems or equipment to the defense forces or emergency services and all were resolved in Phase 1 by the acquirer giving undertakings to maintain the U.K.’s strategic capabilities in certain areas and to protect sensitive information and technology.

### **What are the longer-term impacts for foreign investment?**

The government is considering two options for the introduction of a more comprehensive regime for screening foreign investments: 1) an expanded version of the voluntary filing regime under the Enterprise Act 2002, to allow government to “call in” and scrutinize a broader range of transactions for national security concerns, including new projects and bare asset sales; and/or 2) a mandatory notification regime for foreign investment into the provision of a focused set of “essential functions” in key parts of the economy, for example, the civil nuclear and defense sectors. Mandatory notification could also be required for foreign investment in key new projects, certain real estate and/or specific businesses or assets. The green paper explains that these options are not mutually exclusive and that the final package of reforms could include some or all of these measures. So, for example, the government might decide that transactions in certain sectors or of certain types could be subject to mandatory filing, while others would come within the extended voluntary regime. ❖