The voice of the energy industry

National Security & Investment Bill – Mandatory Notification Sectors

6 January 2021

Introduction

Energy UK is the trade association for the energy industry with over 100 members spanning every aspect of the energy sector – from established FTSE 100 companies right through to new, growing suppliers and generators, which now make up over half of our membership.

We represent the diverse nature of the UK's energy industry with our members delivering almost all (90%) of both the UK's power generation and energy supply for over 27 million UK homes as well as businesses. The energy industry invests over £13.1bn annually, delivers around £85.6bn in economic activity through its supply chain and interaction with other sectors, and supports over 764,000 jobs in every corner of the country.

This is a high-level industry response to the consultation on secondary legislation to define the sectors subject to mandatory notification in the National Security and Investment Bill 2020. We would be happy to discuss any of the points made in further detail with BEIS or any other interested party if this is considered to be beneficial.

Executive Summary

Legal and regulatory certainty are essential, as a principle, to enable business to plan, invest and make decisions about the allocation of resources and Energy UK is broadly supportive of the certainty provided by a mandatory regime, such as that in the National Security and Investment Bill (the **Bill**). It is vital that the drafting of the Bill enables certainty in practice as well as principle.

As an overarching point, the timetables within the Bill must be realistic and BEIS should be clear and consistent, to provide sufficient certainty. If mandatory sectors are defined too widely or ambiguously, there is a clear risk that BEIS could be over-whelmed and use long pre-notification processes, which fall outside of the formal statutory timetables, to meet its deadlines. We also note a general point that it must be clear to parties how BEIS will assess national security concerns. Without clear and unambiguous guidance, parties will not be able to self-assess as intended leading to unnecessary filings and reducing business certainty.

Looking at the Energy Sector specifically, there are valid reasons for certain transactions to require mandatory notification, particularly where key national infrastructure is involved. The objective of our comments detailed below is to highlight sector specific considerations which indicate that the current definition is too broad in certain areas and would benefit from additional clarity in others.

Without this clarity, the significant penalties (with potential to attach to inadvertent failures to notify) will drive a cautious approach, leading to unnecessary impacts identified above regarding resourcing and an overwhelming number of filings. For investors in the energy sector (and other impacted sectors),

this could create difficulties with risk assessments and deal timetables. In the long-run this could deter investment.

Energy Sector Definition

1d: Energy suppliers that provide energy to significant customer bases, where "significant customer bases" means 250,000 or more final customers

Lack of national security concerns

This definition appears to have been adopted from the Network and Information Systems Regulations 2018. We belive it is, however, too broad to address the national security implications underpinning this Bill.

There is a clear rationale for protecting those energy suppliers who supply government and those suppliers who are vertically integrated with generation or distribution assets. Notification of the acquisition of these entities is required by other parts of the Mandatory Notification Sectors Document. However, the majority of energy suppliers, including larger ones, do not own any infrastructure. Their main asset is a customer book and their customer operations systems (many of which are off-the shelf solutions). Resilience of these suppliers is vital to their customers and this is governed by Ofgem's regulatory regime, the NIS Regulations and a variety of regulations in the consumer and data sphere. However, it is not clear that there is a systemic national security risk attached to customer books of over 250,000.

Further, notification of their acquisition could have a detrimental impact upon competitive sale/investment processes in the retail energy market. Additional notification processes, particularly where there is ambiguity, risk causing delays and uncertainty in these processes which could cause financial difficulties to suppliers in the process of being sold, undermining the viability of supply to consumers and, if these suppliers have to go into the Supplier of Last Resort process, place additional burdens on Ofgem in the event of supplier failure.

Proposal: Remove this part of the definition and rely on other elements of the Energy sector definition and / or the Critical Suppliers to Government Sector to capture those transactions which have the potential to raise genuine national security issues.

If the definition above is retained even in amended form, consideration needs to be given to its application to customer book purchases.

Acquiring a customer book would not satisfy any of the mandatory trigger events as there is no acquisition of control over an entity. However, it could qualify as the acquisition of an asset with commercial or economic value and, therefore, fall within the voluntary regime. This could be a route to undermine the mandatory notification requirement.

Proposal: Clarify whether acquisitions of customer books should be considered as a mandatory notifiable event.

Interaction with regulatory processes

If the definition above is retained, it is essential that it complements the existing regulatory regime, in particular the Supplier of Last Resort and Special Administration processes, which exist to ensure continuity of a vital supply. As drafted, it is unclear whether an appointment under either mechanism would be a mandatory notifiable event for the appointed businesses. Both processes happen at short notice and rely on rapid appointments to ensure continuity of supply. This leaves no opportunity for preparing a notification and completing the four week initial assessment period.

There is a credible argument that neither process would require a mandatory notification as there is no acquisition of the actual failed corporate entity. However, even if this is correct, we note that appointments could fall within the NSI Bill's voluntary notification regime, on the basis that the transferred customer list is an "asset" which has commercial and economic value. Whilst sufficient

national security risks to justify a call-in would not ordinarily be expected to arise, the potential for a call-in does introduce additional risk and uncertainty for appointed suppliers (including a transaction being unwound). Overall, this may inhibit the willingness of parties to participate in a process designed to protect consumers as speedily as possible.

Proposal: In our view there should be an explicit exclusion to account for the SoLR and Special Administration processes.

1f: Electricity undertakings that: (i) carry out the function of supply […]

There is no clear definition within the Bill as to what "*an electricity undertaking carrying out the function of supply is*". Both "*undertaking*" and "*function of supply*" are terms which are not clearly defined within the industry. For example, there is a difference between a licensed supplier under Ofgem's regime and a supplier in the electricity and gas acts which can include licence exempt suppliers providing private wire networks. As there is no minimum threshold, the acquisition of a private wire network supplier, such as a caravan park, could conceivably require mandatory notification, which is not the purpose of the Bill. The definition also overlaps with energy suppliers in 1d, creating a separate threshold for electricity suppliers only, which is ambiguous and we assume is not the intention.

Proposal: When read alongside parts (ii) and (iii), the reference to supply in 1f(i) appears to be referring to generation and wholesale supply, rather than supply to end consumers. The former would be a more coherent approach than the existing stand alone reference relating to electricity undertakings only. The drafting could be expanded to clarify this point.

In terms of:-

> *1f(ii). Electricity undertakings that: (ii) carry out the function of generation via generators that would have a total capacity, in terms of input to a transmission system, greater than or equal to 100 megawatts*

And

> *1f(iii). Electricity undertakings that: (iii) carry out the function of generation via generators that, when cumulated with the generators of affiliated undertakings, would have a total capacity, in terms of input to a transmission system, greater than or equal to two gigawatts*

It is also not inherently clear from either 1f(ii) or 1f(iii) what is meant by "*carry out the function of generation*". For instance, would this cover early development projects that may have a potential total capacity of greater than or equal to 100 megawatts in the future but may not have even obtained a development consent and/or a generation licence and therefore might never actually be built or operatinal. It is feasible thatcompanies with portfolios over 2GW may have affiliated undertakings that include company offices and leases for land under development, which could be defined as carrying out the function of generation but do not in themselves generate or are operational..

In addition the concept of "*affiliated undertakings*" within the context of the definition is very broad and it is not clear whether this is intended to include affiliates that are themselves part of any sale (ie. where a group portfolio is being sold) or whether it includes affiliates that are not themselves bieng sold. In the latter case this could lead to a situation where an entity that is far below the threshold for individual notification under 1f(ii) could still need to be notified simply because it is owned by a company that is part of a wider group that has a generation capacity of more than 2GW, even though the wider group is unaffected by the sale and where the size of the individual entity that is being sold would clearly present no risk to national security (eg. a 2MW generation asset being sold that is owned by a company that is part of a wider generator group that has a portfolio greater than 2GW notwithstanding that the only entity being sold is the 2MW generation asset). It should also be made clear if the requirement only covers UK affiliated undertakings

Proposal: We suggest, therefore, that the definition should be clarified and limited to entities capable of generation eg. those that are actually transmitting electricity to a transmission

system at the point they are sold as opposed to those that may be capable of transmitting electricity to a transmission system at some point in the future. In addition the concept of affiliated undertakings is very broad and should clarifiy as to whether this applies to entities that are actually being sold or not, and it must be made clear if the requirement only covers UK affiliated undertakings

Critical Suppliers to Government

Coverage

This is a very broad category and further refinement of "government services" and "functioning of the state" would provide much greater certainty.

The inclusion of "indirect" suppliers also creates ambiguity. A plausible interpretation is that this catches secondary or tertiary contractors. However, wider interpretation could include supplying other key government contractors (such as supplying energy to providers of national telecommunications infrastructure). The impact on suppliers who use third party intermediaries, such as brokers, should also be clarified.

Proposals: A more precise definition of the specific public sectors bodies or categories of organisations would provide greater certainty for businesses. This could focus on Central Government Departments and designated key agencies, which are essential to national security. Similarly, a more detailed description of indirect supply would remove ambiguity.

If you would like to discuss the above or any other related matters, please contact me directly on 020 7747 2931 or at steve.kirkwood@energy-uk.org.uk.