

The Treasury

Overseas Investment Act - Phase Two: Policy Advice December 2020 - April 2021 Information Release

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Treasury Report: Implementation of the national security and public order call-in power

Date:	25 February 2021	Report No:	T2020/3749
		File Number:	IM-5-3-8-2

Action sought

	Action sought	Deadline
Minister of Finance (Hon Grant Robertson)	Note the contents of this report.	N/A
Associate Minister of Finance (Hon David Parker)	Agree to a set of final decisions on the design of the call-in power.	4 March 2021

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
Michael Mathieson	Senior Analyst, International	[39]	N/A (mob) ✓
Thomas Parry	Manager, International.	[35]	

Minister's Office actions (if required)

Return the signed report to Treasury.

Refer this report to the Minister responsible for the New Zealand Security Intelligence Service, The Minister Responsible for the Government Communications Security Bureau, and the Minister for Land Information.

Note any feedback on the quality of the report

Attachments: Updated *Foreign Investment Policy and National Interest Guidance*.

Treasury Report: Implementation of the national security and public order call-in power

Executive summary

The national security and public order call-in power (the call-in power) was introduced via the Overseas Investment (Urgent Measures) Amendment Act 2020. It commences once the temporary emergency notification regime (ENR) is repealed. This report seeks your decisions (Hon Parkers' under delegated authority from Cabinet) on final matters relating to the design of the call-in power so regulations can be drafted in advance of commencement.

These decisions build on or confirm earlier advice on how to feasibly implement the call-in power to avoid delays to productive investment (refer TR 2019/2431) and our experience operationalising the ENR, which was based on the original design work for the call-in power.

We recommend supporting stakeholders' understanding of the call-in power by updating the Government's *Foreign Investment Policy and National Interest Guidance* to reflect the call-in power coming into force (see Annex one). The updated guidance also contains other minor improvements reflecting our experience of the national interest test to date.

The Act requires regulations to specify various timeframes. We recommend call-in power notifications are assessed with a total timeframe of 55 days. This process (set out in more detail in Annex two), will be made up of:

- up to 15 days for an initial assessment by the regulator. The regulator will either approve low-risk transactions or inform the investor it will be subject to greater scrutiny and referred to the Minister. This initial decision ensures that the majority of transactions, which should be low risk, are identified early and may proceed quickly; and
- if referred to the Minister, the remainder of the 55 day period for them to make a final decision on what action to take (if any) on the transaction. This decision will be informed by advice from the regulator. If the Minister is unable to adequately consider which risk management action should be taken within this period, a 30 day extension could be granted.

This process is based on our experience with the national interest test and ENR. Compared to the ENR, a slightly longer timeframe for the initial assessment is recommended. This reflects the call-in power only applies to transactions in strategically important businesses, which warrant greater initial scrutiny. The total timeframe aligns with that proposed for a national interest assessment given the similarity of these two functions.

Two other timeframes need to be set in regulations. We recommend:

- when notification is voluntary, allowing investors to notify up to six months after a transaction is given effect to. This strikes a balance between managing risk and minimising burden on investors who wish to notify to obtain 'safe harbour' (that is, protection from future government intervention); and
- if an interim condition is imposed (for example, to protect against sensitive data being accessed), regulations specify the government must make a decision regarding the transaction within 55 days of it being imposed, to align with the timeframe for assessing a notification.

Finally, we recommend clarifying the transitional arrangements that will apply between the ENR and call-in power. The ENR rules should apply to notifications received (or should have been received) before commencement date of the call-in power. The call-in power's rules should then apply to all other transactions.

To give effect to your decisions on this paper, we will instruct Parliamentary Counsel to draft the relevant regulations, commence the relevant Cabinet Legislation Committee process, and prepare delegation and ministerial directive letters.

Recommended Action

We recommend that you:

- a **note** you have delegated authority to make policy decisions necessary to support the implementation of the national security and public order call-in power.
- b **agree** to amend the Government's *Foreign Investment Policy and National Interest Guidance* to reflect the call-in power's operation and other minor updates as set out in Annex one.

Agree/disagree.

- c **agree** that regulations require notifications to be assessed within 55 days, with a 30 day extension available if the Minister is unable to adequately consider what action should be taken within the initial period.

Agree/disagree.

- d **agree** that this 55 day period comprises of:

- up to 15 days for an initial assessment: where the regulator (in consultation with other agencies as appropriate) initially reviews notifications and refers those transactions that could pose significant national security or public order risks to the Minister, and lets the others proceed (under delegated authority from the Minister)
- if referred to the Minister, the remainder of the 55 day period for the Minister to make a final decision on what action to take (if any) with regard to the transaction (on the advice of the regulator, in consultation with agencies).

Agree/disagree.

- e **note** we have considered recommendation (d) as a package, and if you wish there to be Ministerial oversight of the 15 day initial decision, we will need to discuss the implications of this with the regulator, the New Zealand Security Intelligence Service (NZSIS) and the Government Communications Security Bureau (GCSB) before reporting back.

- f **agree** that regulations specify that voluntary notifications can be made up to six months after a transaction is given effect to.

Agree/disagree.

- g **agree** if an interim condition is imposed on a non-notified transaction, regulations specify the government must take a final action within 55 days of such a condition being imposed (unless extended).

Agree/disagree.

- h **agree** to use regulations to clarify that the ENR applies to notifications received, or that should have been received, before the call-in power commences, with the call-in power then applying to all relevant transactions entered into and given effect to after that date.

Agree/disagree.

- i **note** to give effect to your decisions, we will instruct Parliamentary Counsel to draft the relevant regulations, commence the relevant Cabinet Legislation Committee process, and prepare delegation and ministerial directive letters.

- j **refer** this report to the Minister responsible for the New Zealand Security Intelligence Service and the Government Communications Security Bureau, and the Minister for Land Information.

Refer/not referred.

Thomas Parry
Manager, International

Hon Grant Robertson
Minister of Finance

Hon David Parker
Associate Minister of Finance

Treasury Report: Implementation of the national security and public order call-in power

Purpose

1. This paper seeks your (Minister Parker's) decisions to support implementation of the national security and public order call-in power (the call-in power). The call-in power will commence once joint ministers¹ agree that that the temporary emergency notification regime (ENR) is no longer justified and is subsequently repealed.
2. We seek your policy decisions on these relatively minor design issues now to enable Parliamentary Counsel as much time as possible to draft the resulting regulations. You have delegated authority from Cabinet to take these decisions [DEV-20-MIN-0066].

Context

3. The call-in power allows the government to screen foreign investment in strategically important businesses (SIBs) and impose conditions on them (or as a last resort, block or unwind) when they give rise to significant national security or public order risks. The call-in power replaces the ENR once it is repealed. However, the call-in power is a much a narrower tool: it only applies to SIBs, not to all foreign investment, so fewer notifications will be received.
4. To ensure the call-in power's requirements are proportionate to risk, Cabinet agreed that it is:
 - a mandatory for investors to notify the regulator before giving effect to investments in the highest risk SIBs;² and
 - b voluntary for investors to notify the regulator of investments in lower risk SIBs (either before or after the transaction is given effect to). Investors that notify and do not pose significant risks obtain 'safe harbour' from later government intervention. Those that do not notify can have their transaction scrutinised at any later point.
5. The decisions in this paper build on and confirm our final advice on the design of the call-in power (T2019/2431) in which we advised:
 - a the vast majority of notified transactions will not pose significant national security or public order risks, recognising the call-in power's high threshold for action (note this did not mean transactions will be 'risk-free' but simply that any risks identified are unlikely to be of a scale or nature that the call-in power would be appropriate to manage them); and
 - b the regulator must therefore focus its resources on only those transactions that pose a material degree of national security or public order risks to ensure the call-in power is feasible to implement and that other transactions are not held up by in-depth assessments unnecessarily.

¹ The Minister of Finance, the Minister of Foreign Affairs, and the Associate Minister of Finance (Hon Parker).

² Businesses involved in military or dual-use technology, or critical direct suppliers to the New Zealand Defence Force, the Government Communications Security Bureau and the New Zealand Security Intelligence Service.

6. An overview of our recommended process for the call-in power was provided in this advice and was subsequently adapted for the ENR. We therefore seek your confirmation of this process, with minor adjustments to reflect the key differences between the call-in power and the ENR (namely that it is a more targeted tool, with a higher threshold before the government can intervene). The key decisions relate to:
- Supporting stakeholders' understanding of the call-in power by updating the Government's *Foreign Investment Policy and National Interest Guidance*.
 - Who should make decisions on notifications and how long should they have to make them?
 - How long should investors have to make a voluntary notification?
 - How long should an interim condition last before a final decision must be made?
 - Transitional arrangements between the ENR and call-in power.

Advice

Supporting stakeholder to understand the call-in power's requirements

7. To build stakeholder understanding and certainty, Cabinet agreed that you are empowered to publish public guidance on the operation of the call-in power. We therefore recommend updating the Government's *Foreign Investment Policy and National Interest Guidance*.
8. This will include new sections on the call-in power's operation, including what investments may trigger national security or public order risks, and what circumstances would warrant investors making a voluntary notification to the regulator. A draft for your approval is attached as Annex one. Our updates also reflect the amendments we recommended to the Finance and Expenditure Committee via the Departmental Report. Finally, we have also made clarifications to reflect our experience with the national interest test so far (primarily clarifying how the market structure is considered under the national interest test).

Who should make decisions and how long should they have to make them?

9. To ensure the vast majority of transactions that are low-risk proceed promptly, we recommend transactions subject to the call-in power are subject to two decisions within a total 55 day period, with the ability to extend if justified.
10. The recommended process (as set out in a diagram in Annex Two) is:
- a up to 15 days³ for an initial risk assessment: The regulator considers if a transaction has features that could pose a significant risk to New Zealand's national security or public order, consulting with the NZSIS, GCSB and other agencies as appropriate. Those that could⁴ pose a significant risk are referred to the Minister to consider further, while the regulator would let the other transactions proceed (under delegated authority from the Minister).

³ All periods cited in this report refer to working days.

⁴ This is consistent with the threshold for imposing interim direction orders as set out in section 91 of the Urgent Measures Act and therefore reflects Parliament's risk tolerance for use of the call-in power.

- b if referred to the Minister, the remainder of the 55 day period for them to make a final decision on what action to take (if any) with regard to the transaction. This decision would be informed by a risk and benefit assessment provided to the Minister.
 - c if the Minister is unable to adequately consider which risk management action should be taken within this period, a 30 day extension can be granted. This power should be able to be exercised by the regulator to enable the speedy extension of timeframes where justified. We propose extensions be limited to the same circumstances as set out in the current ministerial directive letter relating to the ENR.⁵
11. Consistent with the ENR, the above process will be managed operationally, with only the total timeframe set in regulations to provide flexibility. For example, in very rare scenarios the initial 15 day period may be inadvertently missed due to unforeseen circumstances. The proposed process allows the regulator to let these transactions proceed without automatic referral to the Minister when this is not warranted.
 12. Since only the total 55 day period will be set in regulations, we recommend you publicly commit to the 15 day initial assessment to provide certainty to stakeholders about the process and timeframe for assessing notifications. We will also provide you with a delegation letter to the Chief Executive of the regulator and a ministerial directive letter to give effect to these decisions (alongside any necessary guidance for the regulator).
 13. Finally, we (and the regulator) have considered these decisions as a package. There are dependencies between them. For example, if you wish there to be Ministerial oversight of the 15 day initial decision, we will need to discuss the implications of this with the regulator and the NZSIS and GCSB before reporting back.

This process differs in two ways from the ENR

14. This process differs slightly to that of the ENR—in comparison, the call-in power:
 - a **has a slightly longer total timeframe and initial assessment period.** This reflects that call-in power notifications will generally warrant greater initial scrutiny as they only relate to SIBs (not investments in any sector of the economy). We still expect the majority to be low-risk after this initial examination. The total 55 day timeframe aligns with that proposed for a national interest assessment given the similarity between the two tests (if a transaction is ‘called-in’).
 - b **delegates to the regulator additional responsibility for letting low-risk transactions proceed.** This reflects that the call-in power is a narrower test with a higher threshold for intervention (that is, the more discretionary national interest risks, such as economic impacts or alignment with government policy, are not able to be considered). As such, the initial decision will draw on national security advice from the NZSIS and GCSB. In making this recommendation, we note:
 - your expectations around what types of transactions should (and should not) trigger referral to the Minister can be set in a ministerial directive letter (alongside other matters, such as your expectations around meeting initial timeframes and grounds for extensions); and

⁵ The current ministerial directive limits extensions to cases involving significant complexity, cases where the applicant is operating in good faith and is unable to meet the regulator’s requests in a timely manner, or where there are other exceptional circumstances (for example, the discovery of significant new information late in the assessment process). Relevant circumstances would not include the volume of transactions before the regulator.

- it reserves the Minister having to formally intervene to those few transactions that will have conditions imposed or be blocked. Keeping the Minister independent from decisions to escalate transactions (which will happen more routinely) protects them from aspersions of political considerations being taken into account (which may offer benefits from an international relations perspective).

How long should investors have to make a voluntary notification?

15. You agreed (in T2019/3412, under delegated authority from Cabinet) that when notification is voluntary, investors can choose to notify before a transaction is given effect to, or within a later period that can be set in regulations. This allows investors to choose whether they want certainty of regulatory outcomes in advance of completing a transaction or would prefer the flexibility of additional time to finalise negotiations and to give effect to a transaction before notifying.
16. We recommend regulations specify that notification can be made up to six months after a transaction is given effect to. This strikes a balance between the government's ability to manage risk (which favours a shorter period) and minimising the burden on investors (which favours a longer period).

How long should an interim condition last before a final decision must be made?

17. Interim conditions can be imposed to manage risks while the Minister is considering what final action to take regarding a transaction (for example to preserve sensitive intellectual property or data from being accessed). Interim conditions expire within a time-period to be set in regulations. This period should balance the need to undertake a detailed risk and benefit assessment, while providing investors certainty as to the final outcome of the investment. Consistent with the 55 day period above, we recommend:
 - a for transactions that are notified, the normal statutory timeframe should apply for taking a final risk management action (55 days after notification, unless extended).
 - b for transactions that were not notified, the Minister should be required to take a final action 55 days after making an interim direction order (again, unless extended).

Transitional arrangements between the ENR and call-in power

18. Regulations can clarify the transitional arrangements between the call-in power and ENR. We recommend the ENR rules apply to notifications received (or should have been received) before commencement of the call-in power. The call-in power's rules should then apply to all other transactions, except those entered into, but not yet given effect to, at the time the call-in power commences.

Next steps

19. We will instruct Parliamentary Counsel to draft the relevant regulations and draft a delegation and directive letter for your approval. The resulting regulations will need to go through the Cabinet Legislation Committee (LEG) process. We recommended combining this LEG process with that required to repeal the ENR once joint ministers have agreed to do so.
20. We will also include some other minor regulations in this package that ensure the call-in power operates as agreed by Cabinet, including:
 - a a fix to the definition of sensitive data, to exclude publicly available and anonymised data from scope; and
 - b regulations to ensure the Act's existing exemptions also apply to the call-in power.
21. The regulator will also lead work to develop a notification form for the call-in power for your approval.

Annex one: Updated *Foreign Investment Policy and National Interest Guidance*

See separate document.

Annex Two: Overview of the call-in power assessment process

