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UPDATED: UK NATIONAL SECURITY ACT 2021 - WHAT INVESTORS NEED TO KNOW

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Legal Briefings

A significant new execution risk is coming to UK acquisitions from January.

On 4 January 2022 the UK National Security and Investment (NSI) Act enters into force, introducing a new foreign direct investment (FDI) regime with standalone powers for the review of FDI in the UK. The new regime replaces the existing public interest merger regime provisions of the Enterprise Act 2002 insofar as a transaction involves national security considerations. On 15 November 2021 the Government published further guidance for businesses on how to prepare for the new rules (General Guidance) and detailed guidance on the mandatory notification applying across 17 sensitive areas of the economy (Notifiable Acquisitions Guidance).

The new regime represents an important new execution risk factor, with a similar risk profile to merger control rules. Broadly speaking, the new regime will apply to any acquisition of "material influence" in a company (which may be deemed to exist in relation to a low shareholding, potentially even below 15%), as well as the acquisition of control over assets (including land and intellectual property), which potentially gives rise to national security concerns in the UK. It is worth noting that qualifying acquisitions that are part of a corporate restructure or reorganisation may also be covered. The regime will apply equally to both UK and non-UK investors (although the Government has acknowledged that UK investors will be less likely to give rise to national security concerns in practice), and may capture acquisitions of non-UK entities or assets in certain circumstances (see Guidance on how the NSI Act could affect people or acquisitions outside the UK).

A mandatory notification obligation (and a corresponding prohibition on completion prior to clearance) will apply to certain transactions involving target entities which carry out specified activities in the UK in 17 sectors (including energy, transport, communications, defence, artificial intelligence and other tech-related sectors). The 17 sectors are defined in the Notifiable Acquisitions Regulations and additional guidance, with examples, is set out in the Notifiable Acquisitions Guidance. Such transactions include the acquisition of a shareholding/voting rights of more than 25%.

This mandatory notification obligation will be combined with an extensive call-in power enabling the Government to call-in qualifying transactions for review, which extends to any sector and is not subject to any materiality thresholds in terms of target turnover or transaction value. Acquirers will also have a corresponding option to voluntarily notify a qualifying transaction to obtain clearance, which may be advisable in the interests of legal certainty where potential national security concerns arise.

The substantive provisions of the Act will enter into force on 4 January 2022. However, the Government will have retroactive powers to call in for review as of that date (or potentially up to five years thereafter) any qualifying transaction completed between 12 November 2020 and the commencement date. This means that it is critical for investors to consider the potential application of the new regime for all transactions completed from 12 November 2020 onwards which could potentially raise national security concerns.

KEY PRACTICAL TAKEAWAYS FOR INVESTORS

- Once it enters into force on 4 January 2022, the NSI regime will **empower the UK Government to call in for review – and potentially prohibit – any qualifying transaction which may give rise to UK national security concerns**, including:
    - the acquisition of “material influence” in an entity (which may arise in relation to a low shareholding, potentially even below 15%);
    - an increase in an existing stake which results in the investor’s shareholding or voting rights crossing the 25%, 50% or 75% thresholds;

    - the acquisition of voting rights in an entity which enables the investor to secure or prevent the passage of any class of resolution governing the affairs of the entity; and

    - the acquisition of control over assets (including land and intellectual property).

- This call-in power is exercisable at any time **up to 6 months after the Secretary of State becomes aware of the transaction**, provided this is also **within 5 years of the "trigger event"** (i.e. acquisition of material influence or more) occurring. If the acquisition was subject to mandatory notification and completed without first obtaining clearance (see below), the 5 year time limit does not apply.

- **Mandatory notification obligations** will apply to certain acquisitions of shares/voting rights in **target entities carrying on specified activities in the UK in 17 sectors** (including energy, transport, communications, defence, artificial intelligence and other tech-related sectors), including acquisitions of more than 25% of shares or voting rights.

- **Qualifying acquisitions that are part of a corporate restructure or reorganisation** may be covered by the new rules. This is the case even if the acquisition takes place within the same corporate group. Therefore a mandatory notification may be required even for corporate restructures.

- The **definitions of the 17 sensitive areas of the economy** subject to mandatory notification are set out in the **Notifiable Acquisition Regulations 2021** and the Notifiable Acquisitions Guidance provides more detailed guidance and examples on how the mandatory notification will apply across these sectors.

- Where the mandatory notification obligation applies, there will be a **corresponding "standstill" obligation prohibiting completion prior to obtaining clearance**. Breaching this standstill obligation will result in the transaction being treated as **automatically void** (unless retrospective validation can be obtained).

- **Notification of qualifying acquisitions of entities in non-specified sectors, and qualifying acquisitions of assets in any sector, will be voluntary**. However, it may be advisable to notify in the interests of certainty, if it is considered likely that the transaction might otherwise be called in for review.

- **Guidance on the intended exercise of the call-in power**: Section 3 of the Act requires the Secretary of State to publish a statement setting out how the power to issue a call-in notice is expected to be exercised and on 2 November 2021 the Government published its Statement for the purposes of Section 3. The guidance is very high level but states that it gives as much detail as is possible on how the Secretary of State expects to use the call-in power, given the sensitivity of national security. The statement must be reviewed every five years and may be reviewed more frequently.

- Whilst the focus of the new regime is clearly on foreign investment, it **applies equally to UK investors**, who will be subject to the same notification obligations and potential sanctions (although in practice the regime is inherently likely to have a lesser impact -

and operate as less of a deterrent - where investors of UK origin are concerned).

- It is also important to be aware that whilst the mandatory notification obligation applies only to qualifying acquisitions of an entity carrying out specified activities in the UK, the Government's **call-in power can also be used in relation to qualifying transactions involving non-UK companies or assets**: it is sufficient if the target entity supplies goods or services to persons in the UK, or the target assets are used in connection with activities carried on in the UK or the supply of goods or services to persons in the UK.

- This means that the call-in power could be exercised in relation to, for example, the acquisition of a French company by a Japanese company, where the French company supplies UK customers (amongst others), if the Secretary of State reasonably suspects that the acquisition may give rise to a risk to UK national security.

- Where the NSI regime may be engaged, it will be important for parties to **consider the impact of the notification and review process on the deal timetable**. Once a notification is accepted as complete, the Government will have an initial 30 working days to decide whether to issue a call-in notice, triggering a more in-depth review. If a call-in notice is issued, a final decision must be reached within a further 30 working days, extendable by 45 working days (and potentially longer with the parties' consent). In practice, this timetable may be extended further if "the clock is stopped" due to, for example, further information requests.

- Where national security concerns are identified following an in-depth review, the Government will have **wide powers to impose remedies**. Examples given by the Government include altering the amount of shares an investor is allowed to acquire, restricting access to commercial information, or controlling access to certain operational sites or works. The Government has also made clear that it will have the **power to block (and potentially unwind) transactions as a last resort**.

- **Sanctions for non-compliance with the NSI regime will be severe**: in addition to the risk of the transaction being void if completed prior to clearance where the mandatory notification obligation applies, non-compliance may result in fines of up to 5% of worldwide turnover or £10 million (whichever is the greater) and/or imprisonment of up to 5 years, as well as director disqualification for up to 15 years.

- Once the regime has entered into force on 4 January 2022, **notifications should be made to the new Investment Security Unit (ISU)** (part of the Department of Business, Energy and Industrial Strategy (BEIS)). The Prescribed Form and Content of Notices Regulations 2021 specify the form and content of the different notices (see below). The Government has anticipated that 1,000-1,830 notifications will be made each year, in addition to potentially intervening in non-notified deals on its own-initiative using its call-in powers. We anticipate that these figures will prove to be a significant under-estimate. The Government has said it expects **75-90 transactions to be called-in for in-depth assessment each year** (whether following notification or on its own initiative). This will be a notable sea-change compared to the existing public interest merger regime under the Enterprise Act 2002 (EA02), where the Government has

intervened in just 16 transactions on national security grounds since 2003.

- However, it is notable that the Government has also stated that it is expecting only **around 10 deals per year to require remedies** (significantly lower than the estimate of 50 deals per year made in the context of the voluntary filing framework originally proposed in a 2018 White Paper).

- The Government is encouraging parties to seek **informal guidance** from the ISU as to the application of the new regime to particular transactions, both prior to and after formal commencement of the NSI Act. It has indicated that such guidance will usually be provided within a similar timeframe to that applicable to the initial review of a notification, i.e. **within 30 working days**. In genuinely urgent cases, it should be possible to obtain guidance more quickly, but this cannot be guaranteed.

- Unusually, the NSI regime will have **retroactive effect**: from the commencement date (4 January 2022) the Government will be able to call in for review **any qualifying transaction completed between 12 November 2020 and the commencement date**. This retrospective call-in power may be exercised at any time up to six months after the commencement of the NSI Act or six months after the date on which the Government becomes aware of the transaction, whichever is later (subject to a longstop of five years after completion of the relevant transaction).

- In practice, we expect that the Government's exercise of its retrospective call-in powers will focus on qualifying acquisitions of entities carrying out specified activities in the UK in one or more of the 17 sectors (to which the mandatory notification obligation would have applied had it been in force at the time the transaction in question was completed). However, it cannot be ruled out that it will be used more widely.

- This means that it is **critical for investors to consider the potential application of the new regime for all transactions completed from 12 November 2020 onwards which could potentially raise national security concerns** (broadly defined).

- In particular, **for transactions that have not yet signed**, parties will need to consider whether an **NSI regime condition precedent** should be included in the transaction documents and possibly **factor the NSI review process into the deal timeline and long stop date**. Acquirers may also need to undertake more extensive **due diligence** on any target activities that could be relevant to national security.

- For **deals that have already been signed but not yet completed**, parties should consider obtaining **informal guidance from the ISU** if there is any risk of a potential national security issue.

- The impact of the new regime on foreign investment into the UK remains to be seen. The Government has repeatedly stressed that it **does not wish to deter friendly foreign investment** and has acknowledged the importance of such investment for the UK economy.

- However, there is a **clear risk that the new regime may deter some foreign investment into the UK**, particularly in circumstances where, for example, the mandatory notification and standstill obligations - combined with a greater risk of detailed and more lengthy assessment for certain acquirers - could be enough to disadvantage some bidders in fast-paced auction processes.

DETAILED ANALYSIS OF THE KEY ELEMENTS OF THE NEW REGIME

We have set out below our analysis of the key elements of the new regime. To go directly to specific sections, please use the following links:

- which transactions may be called in for review?;
- how will the Government exercise its call-in powers in practice?;
- which transactions will be subject to mandatory notification obligations?;
- when should a transaction outside the scope of mandatory notification be notified voluntarily?;
- will all investors be equally affected?;
- how will the notification process work?;
- information gathering powers;
- confidentiality during the review and assessment periods;
- use of interim orders preventing integration pending clearance;
- the review process timetable;
- remedies;
- sanctions for non-compliance;
- application to deals completed between 12 November 2020 and commencement date;
- obtaining informal guidance; and

- the interaction between the NSI regime and the UK merger control regime.

Background

Until now, the UK has not had a separate FDI screening regime; instead, under the EA02, transactions meeting the relevant jurisdictional thresholds have been subject to review by the Competition and Markets Authority (CMA) as to their impact on competition.

Broadly, the CMA has jurisdiction to review transactions where the target's UK turnover exceeds £70m and/or where the transactions lead to the creation or enhancement of a share of supply in the UK to 25% or more. The EA02 also sets out limited grounds on which the Secretary of State can intervene for public interest reasons. At the time of writing, these grounds are: national security, media plurality, stability of the UK financial system and - prompted by the Covid-19 pandemic - combatting and mitigating the effects of a public health emergency.

The UK Green Paper on National Security and Infrastructure Investment published in October 2017 presented both short and long term proposals to reform the existing system, in light of concerns that the existing regime was not sufficient to protect UK national security interests. The short term proposals were adopted by the Government on 11 June 2018, by amending the EA02 to reduce the jurisdictional thresholds to £1m UK target turnover or an existing share of supply of at least 25% (i.e. no requirement of any increase in the share of supply) for transactions in the military/dual use, quantum technology and computing hardware sectors (see our previous briefing). With effect from 21 July 2020, these lower jurisdictional thresholds have also been applied to transactions in the artificial intelligence, cryptographic authentication technology and advanced materials sectors (see our blog post).

Longer term proposals regarding a new framework for permanent and significant reforms to the Government's ability to intervene in transactions presenting national security concerns were set out in a July 2018 White Paper. This proposed a voluntary notification regime, allowing companies to flag transactions potentially raising national security concerns, alongside a call in power to enable the Government to review non-notified transactions up to 6 months following completion. Many of the proposals in the White Paper have been carried forward into the NSI Act. However, as discussed below, the NSI regime also departs from those original proposals in a number of significant ways, most notably by introducing a mandatory notification obligation for certain transactions.

Which investments may be called in for review?

Once the NSI Act enters into force on 4 January 2022, the Secretary of State will be able to issue a "call-in notice" where arrangements are in progress or in contemplation which would, if carried into effect, result in a "Trigger Event" taking place, and he/she reasonably suspects that the event may give rise to a risk to UK national security.

For this purpose, "Trigger Events" are defined as:

- the acquisition of “material influence” over the policy of the target entity (which may be deemed to exist in relation to a low shareholding, potentially even below 15%). The concept of "material influence" is part of the jurisdictional threshold under the UK merger control regime and the CMA's merger control guidance on jurisdiction and procedure will be relevant in the interpretation of this concept;

- an increase in the percentage of shares or voting rights held which results in crossing the 25%, 50% or 75% thresholds (for example, increasing a shareholding in a qualifying entity from 25% to 50% would be caught, whereas increasing it from 30% to 49% would not);

- the acquisition of voting rights in the target entity that (whether alone or together with other voting rights held by the acquirer) enable the acquirer to secure or prevent the passage of any class of resolution governing the affairs of the entity; and

- in relation to acquisition of assets, the acquisition of the ability to use or direct the use of the asset to a greater extent than before. Assets for these purposes include land, tangible property and intellectual property (including trade secrets, databases, code, algorithms, formulae, designs, plans or software).

> It is also worth noting that qualifying acquisitions that are part of a corporate structure or reorganisation may also be covered by the new rules, even if the acquisition takes place within the same corporate group. Therefore, even for corporate restructures, it may be mandatory to notify.

Determining exactly when such arrangements can be said to be sufficiently “in progress or contemplation” to permit the Secretary of State to issue a call-in notice will turn on the particular facts of the transaction in question. The General Guidance clarifies that the signing of heads of terms in the context of acquisition negotiations is likely to be interpreted as a qualifying acquisition that is in contemplation and even though the acquisition has not yet happened it may be called in. Also, by analogy with the CMA’s decisional practice under similar provisions of the UK merger control regime (and our experience of advising clients in that context), it is likely that the relevant point in time may occur much earlier than parties might typically expect. For example, the CMA’s decision last year in *Gardner/Impcross* suggests that having inter-party talks and providing an information memorandum, combined with evidence of the parties’ mutual contemplation of the transaction and the acquirer’s ability to bring it about, is sufficient to establish that arrangements are “in contemplation” for the purposes of enabling the transaction to be reviewed under the merger control regime. Investors should therefore be aware that the risk of call-in under the NSI regime could, in principle, arise very early in the M&A process, including where a non-binding offer has been submitted or heads of terms agreed (as these could be considered agreements or arrangements which enable an acquirer - contingently or not - to do something in the future that would result in a Trigger Event taking place).

It is also important to be aware that, in contrast to many other FDI regimes, the scope of the Government's call-in power will also extend to qualifying transactions (i.e. Trigger Events which potentially give rise to national security concerns) involving non-UK companies or assets: it is sufficient if the target entity supplies goods or services to persons in the UK, or the target assets are used in connection with activities carried on in the UK or the supply of goods or services to persons in the UK. The Government has published separate Guidance on how the NSI Act could affect people or acquisitions outside the UK.

This means that the call-in power could be exercised in relation to, for example, the acquisition of a French company by a Japanese company, where the French company supplies goods or services to UK customers, if the Secretary of State reasonably suspects that the acquisition may give rise to a risk to UK national security. In practice, this will be more likely if the supply of goods/services is in one of the 17 specified sectors, but this is not a pre-requisite.

The Secretary of State may exercise the call-in power at any time up to 6 months after he/she becomes aware of the transaction, provided this is also within 5 years of the "trigger event" occurring. If the acquisition fell within the scope of the mandatory notification and was completed without first obtaining clearance (see below), the 5 year longstop does not apply.

How will the Government exercise its call-in powers in practice?

Guidance on the Government's intended exercise of its call-in power is set out in its Statement for the purposes of Section 3, which was published on 2 November 2021. Broadly speaking, the decision as to whether to call-in a non-notified transaction for review will focus on three key considerations:

- the Target Risk – the nature of the target (what it does, is used for or could be used for) and whether it is in an area of the economy where the Government considers risks are more likely to arise;
- the Acquirer Risk – taking into account characteristics such as the sectors of activity, technological capabilities and links to entities which may seek to undermine or threaten the national security of the UK; and
- the Control Risk – the type and level of control being acquired and how this could be used in practice. The control risk will be assessed alongside the target and acquirer risks (where these have a low risk the level of control acquired is less likely to give rise to a risk to national security).

The Section 3 Statement considers each of these risks in turn, and includes some helpful clarifications. For example, it states that acquisitions in areas of the economy which are closely linked to the 17 sectors specified as requiring mandatory notification (but which are not subject to mandatory notification) could be more likely to be called in than those in other areas of the economy. Qualifying acquisitions which occur outside these areas of the economy are unlikely to be called in as national security risks are expected to occur less frequently in these areas.

Acquisitions of control over qualifying assets are also in scope of the call-in power and the Secretary of State will consider what the asset could be used for and whether that use could give rise to a risk to national security. The call-in power is more likely to be used for assets that are or could be used in connection with the 17 mandatory notification sectors. Land is mainly expected to be an asset of national security interest where it is, or is proximate to, a sensitive site, but the Secretary of State may also take into account the intended use of the land. The Statement makes it clear that, overall, the Secretary of State expects only rarely to call in acquisitions of assets that do not fall into these categories.

The Statement also clarifies that loans, conditional acquisitions, futures and options are unlikely to pose a risk to national security and are therefore unlikely to be called in.

Despite providing some helpful clarifications the Statement is very high level and makes it clear that it provides as much detail as is possible "given the sensitivity of national security". In practice it seems therefore likely that investors will also need to consider seeking informal guidance from the ISU for specific transactions (see below).

Which transactions will be subject to mandatory notification obligations?

Alongside the Government's extremely wide call-in powers, the NSI regime introduces a mandatory notification obligation for certain transactions, which applies even if it is clear that – in the context of the particular transaction - no national security concerns will arise in practice. Following acceptance of a mandatory notification, the Secretary of State must then decide whether to issue a call-in notice (and initiate an in-depth review) within 30 working days (see further below).

The mandatory notification obligation does not apply to all Trigger Events. It only applies to "notifiable acquisitions", which are expressly defined as transactions involving a target entity which carries on activities in the UK of a specified description in one of 17 specified sectors, which result in:

- the percentage of shares or voting rights that the acquirer holds in the entity increasing and crossing the 25%, 50% or 75% thresholds (for example, increasing a shareholding from 25% to 40% would be caught, whereas increasing it from 26% to 49% would not); or

- the acquisition of voting rights in the target entity that (whether alone or together with other voting rights held by the acquirer) enable the acquirer to secure or prevent the passage of any class of resolution governing the affairs of the entity.

For such transactions, there is also a corresponding “standstill obligation”, which prohibits completion prior to clearance. Breach of the standstill obligation will result in the transaction being deemed automatically void and of no legal effect (subject to successfully obtaining retrospective validation from the Secretary of State).

It is important to note that whilst the acquisition of material influence constitutes a Trigger Event for the purposes of the Government’s call-in powers (and the corresponding possibility of voluntarily notifying a qualifying transaction), it does not (in itself) amount to a notifiable acquisition requiring mandatory notification, even if the target entity carries on activities in the UK of a specified description in one of the 17 specified sectors.

Similarly, the mandatory notification obligation does not apply to any acquisition of control over assets, in any sector (subject to any future amendments made to the scope of the mandatory regime pursuant to Notifiable Acquisition Regulations, which is a possibility expressly envisaged in the NSI Act).

The precise definitions of the specified activities in the 17 specified sectors are not included in the NSI Act. They are set out separately in the Notifiable Acquisition Regulations and the Government has also published separate Notifiable Acquisitions Guidance with additional guidance and examples. The final sector definitions adopted in the Notifiable Acquisition Regulations will also be kept under review going forward, and may be updated in the future as needed, for example as the relevant technology evolves.

The definitions are very detailed and we have set out in the table below a high level summary for each of the sectors.

Mandatory Sector	Examples of covered activities
Advanced Materials	Researching and producing strategic materials such as advanced composites, semiconductors and nanotechnologies.
Advanced Robotics	Developing robot technology with sophisticated surveillance or autonomous capabilities.
Artificial Intelligence	Developing software and devices with tracking, advanced robotics or cybersecurity applications.
Civil Nuclear	Operating a non-military nuclear site, transporting nuclear material, or holding "Sensitive Nuclear Information".
Communications	Operating certain public electronic communications networks or services (e.g. providing internet access), submarine cable systems, domain name registries or public broadcast infrastructure.
Computing Hardware	Designing, producing and packaging computer hardware including central processing units and integrated circuits.
Critical Suppliers to Government	Contracting goods or services for the government where advanced security vetting or accreditation is required.
Cryptographic Authentication	Developing and producing cryptographic authentication products (e.g. biometric or two factor authentication).
Data Infrastructure	Storing, processing and transmitting data in a digital form for public authorities, as well as facilitating the interconnection of a public electronic communications network (e.g. operating a data centre).
Defence	Researching, developing and producing goods or services which are used for defence or national security purposes.
Energy	Operating certain oil, gas and electricity production facilities in the UK.
Military and Dual-Use	Researching, developing and producing goods or technology which are regulated by UK export controls (e.g. firearms or products with potential military uses).
Quantum Technologies	Developing and producing technologies which employ quantum mechanics (e.g. quantum computing).
Satellite and Space Technologies	Carrying out a wide range of activities involving space technology, including manufacturing satellites and establishing satellite communication links.
Suppliers to the Emergency Services	Supplying certain goods and services which are essential for the delivery of emergency services (e.g. unmanned aircraft or private electronic communication networks).
Synthetic Biology	Researching, developing and producing goods based on the application of engineering to biology (e.g. gene editing and therapy).
Transport	Owning or operating larger ports, harbours and airports, as well as air traffic control facilities.

When should a transaction outside the scope of mandatory notification be notified voluntarily?

A voluntary notification may be made in relation to any transaction which could potentially be called in for review by the Secretary of State, i.e. any Trigger Event (see above), which may give rise to a risk to UK national security. Following acceptance of a voluntary notification, the Secretary of State must then decide whether to issue a call-in notice (and initiate an in-depth review) within 30 working days (see further below).

In practice, deciding whether to make a voluntary notification is likely to depend largely on an assessment of the likelihood of the transaction being called in for review in the event that it is not notified. Where a transaction amounts to a Trigger Event, and there is a potential risk to national security (broadly defined), it may be advisable to voluntarily notify the transaction in the interests of legal certainty, given that the Secretary of State's call-in power could potentially be exercised at any time up to five years post-completion (provided this is not more than six months after the Secretary of State becomes aware of the transaction).

Will all investors be equally affected?

The NSI regime applies in principle equally to all investors, both UK and non-UK. However, when assessing the extent to which a particular acquirer raises national security concerns, the Government's focus will be on acquirers who are either likely to be directly hostile to the interests of the UK's national security or owe allegiance to those who are.

The Government has made it clear that it is affiliations to a hostile party rather than foreign nationality in itself or relationships with foreign powers that will be problematic. In particular, the Government has expressly stated that state-owned enterprises, sovereign wealth funds or other foreign state affiliated entities are not considered to be inherently more likely to pose a national security risk, particularly where they have operational independence and pursue long term investment strategies.

In practice, the NSI regime is inherently likely to have a lesser impact - and operate as less of a deterrent - where investors of UK origin are concerned. However, the Government has indicated that the fact that a transaction does not involve foreign investors would not necessarily preclude it from being called in for review or, indeed, a mandatory notification being required if the transaction constituted a "notifiable acquisition" (see above).

The Secretary of State will have powers under the NSI Act to exempt certain acquisitions from the mandatory notification regime on the basis of the characteristics of the acquirer, but at present no such exemption or "White List" is envisaged.

How will the notification process work?

No notifications (whether mandatory or voluntary) will be accepted prior to the formal commencement of the NSI regime on 4 January 2022. From the date of commencement, notifications will need to be submitted to the ISU via a new online portal (currently in development). No filing fees will apply. Details of the different notification forms and content requirements are set out in the **Prescribed Form and Content Notices Regulations 2021**.

There are three different forms to notify the Government of an acquisition:

- a **mandatory notification form**, in order to submit a notification of a notifiable acquisition in the 17 sensitive areas of the economy;
- a **voluntary notification form**, in order to submit a voluntary notification of a qualifying acquisition that is not covered by mandatory notification;
- a **retrospective validation application form**, in order to apply for validation where a notifiable acquisition has been completed without notifying.

Schedules 1, 2 and 3 of the Regulations set out the specified information required for each type of notification. This is broadly the same for the three categories and includes:

- details of the acquirer and its authorised representative
- details of all notifications submitted to any overseas investment screening regimes within the last 12 months
- acquisition details (areas of the economy; control thresholds; expected date of completion (for mandatory notification); whether the acquisition is in contemplation, in progress or has taken place (for voluntary notification); whether the notice is related to the acquisition of a qualifying asset or a qualifying entity (for voluntary notification))
- details of regulatory approvals given by a regulatory authority in the UK
- details of the qualifying entity (including a description of the activities or services the qualifying entity provides or carries out)
- ownership and structure of the qualifying entity

The Explanatory Memorandum to the Regulations makes it clear that not all of the specified information will be required in each case (eg some information may only be relevant to asset acquisitions and some to the acquisition of entities). Each notification must be accompanied by a declaration that the information provided is true and complete to the notifying parties' knowledge.

With regard to the point in time at which a notification should be made:

- where the mandatory notification obligation applies, the notification must be submitted prior to the acquisition of control. A notifiable acquisition will be void if completed without notifying and gaining approval. Although it is possible under the NSI Act to request retrospective validation for transactions that should have been notified under the mandatory regime but were not, the ISU will be seeking to ensure that this mechanism is not used to circumvent the regime and any such requests will need to be shown to be genuine;
- for voluntary notifications, the notification may be submitted from the point at which arrangements are in progress or contemplation which, if carried into effect, would result in a Trigger Event taking place in relation to a qualifying entity or asset. This is the same point in the progress of a transaction at which the Secretary of State may exercise

his/her call-in power (discussed above).

Once a notification form has been submitted a case reference number will be allocated to the transaction and the Secretary of State will confirm whether the notification form has been accepted or rejected. The notification form will only be accepted for consideration if it complies with the notification requirements and includes all the necessary information. If the form is rejected it will be returned, with reasons why it was not accepted. The review period can only start running once the Secretary of State has accepted and acknowledged the notification form (see below).

Information gathering powers

The Government will actively monitor markets for transactions which may potentially give rise to national security concerns. In addition, the NSI Act grants the Government extensive information gathering powers, enabling it to request any information, at any time, from any person, if it is considered necessary to inform an assessment of the national security risks of a transaction and the request is proportionate in terms of enabling the Secretary of State to carry out his/her functions under the regime. This may include requesting information in circumstances where no notification has been submitted so as to enable him/her to determine whether to exercise the call in power.

Information may be requested by way of a formal notice, which will specify a deadline for responding (not subject to any statutory limit). The Secretary of State may also require the attendance of witnesses to give evidence at a time and place specified in an attendance notice.

Information and attendance notices may be given to persons located outside the UK, but only where the person in question is:

- the acquirer in a transaction which amounts to (or would amount to if the arrangements in progress or contemplation are carried into effect):
    - a Trigger Event involving a qualifying entity which is formed or recognised under UK law;

    - a Trigger Event involving a qualifying asset which is situated in the UK or the territorial sea or used in connection with activities carried on in the UK;
- a UK national;
- an individual ordinarily resident in the UK;
- a body incorporated or constituted under the law of any part of the UK; or
- carrying on business in the UK.

Failure to comply with the requirements of an information or attendance notice without reasonable excuse is punishable by up to 2 years' imprisonment and/or a fine which may be calculated as a fixed penalty of up to £30,000 or a daily rate penalty of up to £15,000 per day (or a combination of both).

Intentionally or recklessly altering, supressing or destroying information required by an information notice (or causing or permitting such alteration, suppression or destruction), or knowingly providing materially false or misleading information in response to an information request or attendance notice (or being reckless as to whether the information is false or misleading in a material respect) is an offence punishable by up to 2 years' imprisonment and/or a fine of up to £30,000.

If the Secretary of State's decision as to whether to allow a transaction to proceed is materially affected by the provision of false or misleading information, the Secretary of State may reconsider the decision and reach a different conclusion. This could include exercising the power to call in a transaction for review, even if the usual time limit for doing so has expired (subject to doing so within six months of the day on which the information was discovered to be false or misleading).

The Secretary of State may disclose information obtained in the course of the review of a transaction under the NSI regime to other public authorities (and vice-versa), both UK and overseas, for certain specified purposes. The NSI Act also amends the overseas disclosure gateway in section 243 of the EA02 to remove the restriction on UK public authorities (including the CMA) from disclosing information they obtain in connection with a merger investigation under that gateway. The Government has indicated that this is intended to strengthen the CMA's ability to protect UK markets and consumers as it takes a more active role internationally post-Brexit.

Confidentiality during the review and assessment periods

The Government has indicated that it will not routinely make public the fact that it has called in an acquisition for national security assessment or that it has issued an interim order. It will inform the businesses concerned if it intends to do so.

During the review and assessment periods the businesses concerned remain subject to all other legislative obligations. For example, a relevant issuer will still need to comply with the applicable transparency and disclosure obligations such as the obligation under the UK Market Abuse Regulation to disclose inside information to the public as soon as possible. Where such disclosure obligations give rise to doubts or concerns in relation to the ability to comply with specific requirements raised during the review and assessment process or as a result of interim or final orders, businesses should contact the ISU.

Use of interim orders preventing integration pending clearance

Where a call-in notice has been issued (either following the initial review of a mandatory or voluntary notification, or on the Secretary of State's own initiative), the Secretary of State may impose an interim order prohibiting pre-emptive action pending the conclusion of the in-depth investigation of the transaction.

Such an order may include prohibiting integration of the businesses pending clearance under the NSI regime, and may extend to cover a person's conduct outside the UK if they are a UK national, an individual ordinarily resident in the UK, a body incorporated or constituted under the law of any part of the UK, or carrying on business in the UK. Such interim orders will not necessarily be made public.

It appears likely that interim orders under the NSI regime will operate in a similar manner to the "initial enforcement orders" (IEOs) regularly imposed by the CMA when investigating the potential impact of a merger on competition. It is worth noting in this context that the CMA now routinely imposes IEOs in completed mergers, and is increasingly also doing so in anticipated mergers, as well as stepping up its enforcement action in relation to breaches of IEOs (see our blog post for further background). It remains to be seen whether the Secretary of State will take a similar interventionist approach in the context of the NSI regime.

The review process timetable

Pursuant to the review timetable set out in the NSI Act, the Secretary of State must reach an initial decision within 30 working days as to whether to clear a transaction following acceptance of a mandatory or voluntary notification. However, if the Secretary of State decides that further detailed scrutiny is required and issues a call-in notice, he/she then has a further 30 working days to carry out a detailed assessment, which may be extended by up to an additional 45 working days. This means that the total time for review is potentially 105 working days (or even longer if the parties consent to a further voluntary extension, which it seems likely they would do if, for example, more time was needed to finalise discussions relating to remedies).

Where an information notice or attendance notice is issued requesting information to be provided, this will also "stop the clock", and the review timetable will not start running again until the Secretary of State confirms that either the requirements of the notice have been complied with or that the deadline for compliance has passed.

Furthermore, the review timeline only starts to run in the first place once the Secretary of State has formally accepted a notification (or exercised his/her power to call in the transaction on his/her own initiative). The Secretary of State may initially reject a notification on a number of grounds, including where it does not include all necessary information. This could potentially result in one or more rounds of submission and rejection, before the formal review timeline starts to run. However, it is understood that the Government will be encouraging proactive pre-notification contacts (potentially akin to pre-notification discussions with the CMA in the context of the EA02 merger control regime) which may enable parties to obtain confirmation that a notification will be deemed "complete" prior to formal submission.

Where the NSI regime may be engaged, it will be important to factor the review timeline into deal timetable planning, alongside other applicable regulatory approval processes such as merger control (potentially across multiple jurisdictions). This will be particularly important where the transaction falls within the scope of the mandatory notification obligation, given the prohibition on completion of such transactions prior to obtaining clearance.

Remedies

Where national security concerns are identified following an in-depth review of a transaction, the Secretary of State may require remedies in order to allow the transaction to proceed. Examples given by the Government include altering the amount of shares an investor is allowed to acquire, restricting access to commercial information, or controlling access to certain operational sites or works.

The approach taken by the Secretary of State when accepting undertakings to address national security concerns in the context of recent cases considered under the public interest merger regime of the EA02 may offer some guidance as to the sort of remedies which may need to be negotiated. For example, in both *Connect BidCo/Inmarsat* and *Advent/Cobham* it proved possible to address national security concerns by agreeing undertakings relating to the maintenance of strategic capabilities and protection of sensitive information.

However, businesses should not assume that it will always be possible to agree remedies, and the Government has made clear that it will have the power to block (and potentially unwind) transactions as a last resort. Whilst no transactions have been prohibited on national security grounds under the existing public interest merger regime, this should not be seen as providing any precedent for the new NSI regime, which is being introduced against a backdrop of increased global protectionism and a growing number of high-profile examples of deals being blocked under FDI regimes in other jurisdictions (e.g.*Beijing Kulun/Grindr* in the US, *Yantai Taihai/Leifeld* in Germany and *Cheung Kong Infrastructure/APA Group* in Australia).

It is however notable that the Government has stated that it is expecting only around 10 deals per year to require remedies (which is significantly lower than the estimate of 50 deals per year made in the context of the voluntary framework originally proposed in the White Paper; it is unclear on what basis this revised estimate under a stricter regime has been reached).

In terms of remedies process, the positioning under the new NSI regime appears to be somewhat different to the merger remedies process before the CMA: the parties will have some degree of involvement, but the Government has stated that it will make a deliberate and formal decision on the remedies it believes are required.

With regard to extra-territorial application of remedies orders, the NSI Act provides that a final order may only apply to a person's conduct outside the UK if they are a UK national, an individual ordinarily resident in the UK, a body incorporated or constituted under the law of any part of the UK, or carrying on business in the UK.

Sanctions for non-compliance

Sanctions for non-compliance with the NSI regime will be severe:

- fines of up to 5% of worldwide turnover or £10 million (whichever is the greater) and/or imprisonment of up to 5 years;
- director disqualification (up to 15 years); and
- transactions completed in breach of the standstill obligation (which applies to transactions which fall within the scope of the mandatory notification obligation) will be void and of no legal effect.

It remains unclear exactly how the "automatic voidness" sanction will apply to non-UK legally constituted assets or transactions, given the limitations placed on extra-territorial application of final remedies orders. This issue was debated during the passage of the NSI Act through Parliament, and amendments were tabled at the Report stage in the House of Lords to replace the automatic sanction with a power for the Secretary of State to declare the transaction to be void (i.e. "voidable" rather than being automatically void). However, the proposed amendments were rejected.

Application to deals completed between 12 November 2020 and commencement date

Whilst it will not be possible to notify deals and seek formal clearance under the NSI regime prior to formal commencement, the Government will be able to call in from the commencement date any qualifying transaction completed on or after 12 November 2020 which gives rise to national security concerns. This was intended to avoid a "rush" of potentially problematic deals being completed prior to formal commencement of the NSI regime.

For transactions that have not yet signed, parties should consider whether a condition precedent to cover the NSI regime should be included in the transaction documents, and possibly factor the NSI review process into the deal timeline and any longstop date. Acquirers may also need to do more extensive due diligence on any target activities or assets that could be relevant to UK national security.

For deals that have already been signed but not yet completed, parties should consider obtaining informal guidance from the ISU if there is any risk of a potential national security issue.

The Government is encouraging investors to seek informal guidance in relation to transactions which are due to complete prior to the commencement date where questions arise as to the potential application of the new regime (see further below). This is likely to be particularly important in circumstances where the transaction would fall within the scope of the mandatory notification obligation if the NSI regime were already in force at the time of completion, and national security concerns may potentially arise (given the expectation that these will be the transactions which the Government is likely to focus on when exercising its retrospective call-in powers).

Obtaining informal guidance

The Government is encouraging parties to seek informal guidance from the ISU as to the application of the new regime to particular transactions, both prior to and after formal commencement of the NSI Act.

It has indicated that such guidance will usually be provided in a similar timeframe to that applicable to the initial review of a notification, i.e. within 30 working days. In genuinely urgent cases, it should be possible to obtain guidance much more quickly, but this cannot be guaranteed.

Where the ISU has been informed about a transaction prior to the commencement date through the informal guidance route, the Government has confirmed that the potential exercise of its call-in power will be limited to 6 months from the commencement date.

Interaction between the NSI regime and the UK merger control regime

Following formal commencement of the NSI Act, the existing public interest merger regime provisions of the EA02 will fall away insofar as a transaction involves national security considerations (however it should be noted that up until formal commencement the Secretary of State will continue to have and make use of his/her powers under the EA02 if necessary).

However, there is nonetheless likely to be material interaction between decisions taken by the CMA under its EA02 powers to review mergers on competition grounds and decisions taken by the Secretary of State pursuant to the NSI regime, given that a particular transaction may well engage both regimes.

This is expressly recognised in the NSI Act, which makes clear that where a transaction is being reviewed under the NSI regime and under UK merger control by the CMA and the Secretary of State has given a final order under the NSI Act, he/she has the power to give directions to the CMA to ensure that the CMA and NSI regime remedies are complementary and that the CMA's decision does not undermine or cut across remedies agreed for resolving national security concerns. This appears to be similar to the current approach under the public interest merger regime, where public interest considerations may "trump" competition considerations in the event of conflict between the two.

The Government has stated that the CMA and the ISU will prepare a more detailed Memorandum of Understanding to resolve any conflicts between the competition and NSI regimes. In the interim, however, it would seem sensible that if both NSI regime notifications and CMA filings may be required, both regulators are approached at the same time to ensure that timelines for the review and clearance process do not come into conflict.

NEXT STEPS

The substantive provisions of the NSI Act will come fully into force on 4 January 2022. This means that mandatory notification requirements will apply to relevant transactions completing on or after that date, and other transactions (including those which have already completed since 12 November 2020) may be the subject of the Secretary of State's call-in powers as of that date.

To read more about developments of FDI regimes around the world please see our round-up of recent changes **here**.

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