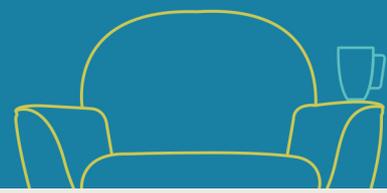


New rules on transactions involving national security - do you need to notify?

November 2021



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We previously set out details of the National Security and Investment Bill which highlighted the trend in the UK (and globally) for greater scrutiny of national security concerns in commercial transactions. (69) [National Security and Investment Bill - what you need to know | LinkedIn](#).

The National Security and Investment Act 2021 ("**NSI Act**") has now been passed and comes into force on 4 January 2022. The government is in the process of publishing a number of statutory instruments and guidance on certain specific areas of the NSI Act.

Here's what we know so far

The NSI Act requires mandatory notification of certain qualifying acquisitions and gives the Secretary of State the power to call in an acquisition for further scrutiny, if it has a reasonable suspicion that the acquisition may pose a risk to national security.

A qualifying acquisition is one which involves:

- the acquisition of a right or interest in, or in relation to an entity (e.g. company, partnership, trust) or an asset (e.g. land, moveable property, IP);
- the entity or asset is from, located in or has a connection to the UK; and
- the level of control acquired meets or passes certain thresholds (e.g. becomes higher than 25%, higher than 50 or higher than 75%), gives voting rights that allow resolutions to be passed or blocked, provides material influence or allows use or the control of use of an asset.

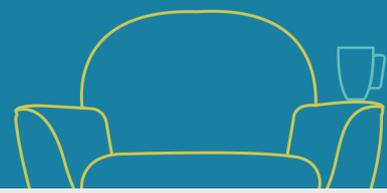
A qualifying asset can include a corporate restructuring or reorganisation even if it takes place within the same corporate group.

From 4 January 2022 an acquirer undertaking a qualifying acquisition of an entity in 17 sensitive areas of the economy, considered more likely to give rise to national security issues, will be required to notify the government ("**Notifiable Acquisition**"). The 17 areas of the economy are:

Advanced Materials	Defence
Advanced Robotics	Energy
Artificial Intelligence	Military and Dual-Use
Civil Nuclear	Quantum Technologies
Communications	Satellite and Space Technology
Computing Hardware	Suppliers to Emergency Services
Critical Suppliers to Government	Synthetic Biology (formerly known as Engineering Biology)
Cryptographic Authentication	Transport
Data Infrastructure	



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The sectors will be specifically defined by statutory instrument (currently in draft) and are not as wide as they might first appear. For example, the Transport sector is further defined and limited to entities that own/operate certain ports, harbours or airports or provide air traffic control services.

Further details can be found on the government information page here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003506/Draft_National_Security_and_Investment_Act_2021__Notifiable_Acquisition__Specification_of_Entities__Regulations_2021.pdf

A qualifying acquisition of an asset is not subject to mandatory notification.

How does the notification procedure work?

A mandatory notification must be submitted online. Following acceptance, the government has 30 working days to review, request further information and determine whether to take no further action or call-in the acquisition for further assessment of national security risks.

At the end of the assessment the government can clear the acquisition, impose conditions or unwind / block the acquisition in whole or part - although the latter is only expected to be used in a limited number of cases.

A Notifiable Acquisition will be void unless it has been notified and approval obtained. There are civil and criminal penalties for completing a Notifiable Acquisition without approval.

Retrospective approval is possible.

Acquisitions of assets are not subject to the mandatory notification regime.

What about qualifying acquisitions which are not Notifiable Acquisitions?

A qualifying acquisition which is not a Notifiable Acquisition does not need to be notified, but the Secretary of State does have the power to call in the acquisition (or any acquisition which may be in contemplation) for further assessment if it reasonably suspects that it may give rise to a risk to national security. This power is retrospective and can be applied to call-in any acquisition completed since 12 November 2020.

If parties are concerned about whether an acquisition may be called in it is possible to make a voluntary notification of the qualifying acquisition following the procedure outlined above in order to obtain clearance.

How will the power to call-in be used?

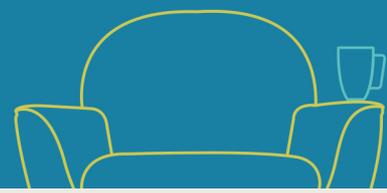
The government has recently published some guidance on how the power to call-in acquisitions will be used. The statement describes some of the characteristics and risk factors the Secretary of State will consider when deciding whether an acquisition is a risk to national security.

Characteristics

The guidance identifies that acquisitions in the 17 areas of the economy identified above (and those closely related to them) are more likely to give rise to risks of national security and therefore are more likely to be called in.



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The call-in power is likely to be used where there may be a potential for immediate or future harm to UK national security. This includes:

- risks to governmental and defence assets (infrastructure, technologies and capabilities);
- the impact on the security of the UK's critical infrastructure; and
- the need to prevent actors with hostile intentions towards the UK building defence or technological capabilities which may present a national security threat to the UK.

Risk Factors

The guidance identifies three primary risk factors:

- **Target Risk**

Whether what the target does, is used for or could be used for gives rise to a risk to national security. Also, whether the target's proximity to a sensitive site might pose a national security risk.

- **Acquirer Risk**

Consideration will be given to characteristics of the acquirer e.g., sector of activity, technical capabilities and links to entities which may seek to undermine / threaten national security.

A history of passive or long term-investment may indicate low / no risk.

- **Control Risk**

How much control does the acquirer have over the target? Greater control may increase the risk of harm to national security or enable a reduction in the diversity of a market or influence the market's behaviour, which may itself give rise to a risk to national security.

The guidance suggests that when the power to call-in is used, all three risk factors are likely to be present, but the power may still be used where some only of the factors are present.

Contact us

This note is provided for general guidance only and should not be relied upon as legal advice. If you have further questions on this act or other acquisitions, please contact Richard Hopkins:

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