

Insights

INCREASED CERTAINTY CONCERNING THE UK'S NATIONAL SECURITY & INVESTMENT ACT TRANSACTION SCREENING REGIME

Nov 25, 2021

SUMMARY

November has seen a number of developments in preparation for full implementation on 4 January 2022 of the UK's new investment screening regime, the National Security & Investment Act. The Government has updated and formalised its guidance on how the regime will operate, and published finalised definitions of the 17 "sensitive areas" subject to mandatory filings.

A notable and welcome development is a winding-back of the Government's statement as to the situations in which it expects to exercise the power to call-in transactions: the more expansive focus on harm to the UK's reputation and prosperity contained in earlier drafts replaced by a more detailed focus on direct risks to the UK's military advantage, governmental and defence assets, and the security of critical infrastructure. However, the discretion for Government to define and determine whether a transaction raises national security risk remains, and the proof of the regime's impact on deals not subject to the mandatory filing will be in its implementation.

MANDATORY FILING AND APPROVAL REQUIRED TO CLOSE TRANSACTIONS

From 4 January 2022 the UK's new National Security & Investment (NSI) screening regime requires mandatory notifications of notifiable acquisitions (broadly, share acquisitions with a UK nexus giving rise to over 25%/50%/75% of voting rights/shareholdings (or contractual rights to block company resolutions) in entities active in the 17 "sensitive areas"). Qualifying acquisitions will be subject to prior review and approval by the new Investment Security Unit within the Department for Business, Energy & Industrial Strategy.

Qualifying deals which exchange in 2021, but which will not complete until on or after 4 January are subject to the mandatory filing regime, and completion may not occur until after clearance from BEIS is received. As a practical matter, whilst it may be possible to shorten the 30 working-day initial review period from notification through prior informal interaction with BEIS this year, **parties should be alive to the fact that they may not be able to complete pending "no-issues" transactions**

in the period between 4 January and 14 February 2022. This waiting period may be extended if the application is not accepted as complete or if a detailed investigation is required.

The mandatory filing regime has broad application and will be triggered by deals of any value, and can apply to non-UK target entities carrying out activities in the UK in one of the 17 sensitive areas. Conversely, unlike equivalent regimes in a number of jurisdictions (which focus on “foreign” investment), acquisitions by UK investors are also within the scope of the NSI regime.

MANAGING “CALL-IN RISK”

Transactions which do not meet the criteria for a mandatory filing (because, for example, they are asset acquisitions, or the target’s activities do not fall precisely within the definition of the 17 sensitive areas, or the relevant share thresholds are not crossed) may nevertheless be subject to call-in for review where the Secretary of State reasonably suspects a risk to national security.

The finalised guidance on call-in is notable in reeling back the expansive approach taken to national security risk in the prior draft. The UK’s *economic prosperity, reputation, public safety and democratic integrity* ranked in earlier draft guidance alongside military advantage as factors in determining the threat risk associated with a particular acquirer or entities with which an acquirer may have links. However, the final guidance has removed reference to these broader factors and made express that the Government will use the call in power “*solely to safeguard the UK’s national security and not to promote any other objectives*”.

The Government has also provided some comfort in response to other scope concerns raised during the consultation stage, noting expressly that “*loans, conditional acquisitions, futures and options are unlikely to pose a risk to national security and so are unlikely to be called in*”, and that “*sovereign wealth funds*” or foreign state owned/affiliated entities are “not inherently more likely” to pose national security risk than other acquirers. Nevertheless, transaction and financing parties may be expected frequently to seek to mitigate call-in risk, particularly where transaction timetables allow, by making voluntary notifications for clearance.

This call-in risk applies retroactively to all transactions which are entered into (since 12 November 2020) prior to the 4 January 2022 mandatory filing commencement date.

More broadly, the updated and finalised guidance confirms to a large extent the draft position communicated by the Government in the summer. For more information, see our earlier articles on the regime [here](#), [here](#) and [here](#).

The 17 sensitive areas are below. We would be happy to provide further details on the precise definitions in your sector and how the NSI Act applies to your transactions.

| | | |
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| 1) Advanced Materials | 2) Advanced Robotics | 3) Artificial Intelligence |
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| 4) Civil Nuclear | 5) Communications | 6) Computing Hardware |
| 7) Critical Suppliers to Government | 8) Cryptographic Authentication | 9) Data Infrastructure |
| 10) Defence | 11) Energy | 12) Military and Dual Use |
| 13) Quantum Technologies | 14) Satellite and Space Technology | 15) Suppliers to the Emergency Services |
| 16) Synthetic Biology | 17) Transport | |

It is important to bear in mind that the UK's new investment screening regime is just one example of burgeoning and strengthened regimes globally – and multi-jurisdictional foreign investment screening is a necessary due-diligence item in all transactions with any international component.

If you require any input in relation to the material potential impact of the National Security & Investment Act, and other investment screening regimes, on your commercial activities and transactions, please don't hesitate to get in touch.

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