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GREAT INVESTOR INSIGHTS

The National Security and Investment Act (NSIA): A date is set

The UK's strengthened national security regime will commence on 4 January 2022. From that date there will be a dramatic expansion of the UK Government's ability to scrutinise investments. That will include a power for the UK Government to "call in" transactions that completed on or after 12 November 2020 in certain circumstances.

Ultimately, the Government will be able to impose conditions on an acquisition falling under the jurisdiction of the NSIA or, if necessary, unwind completed acquisitions or block anticipated deals. Any acquisition requiring mandatory notification and completed without approval will be regarded as legally void in the UK.

Our publication on the draft legislation provides full details on the new regime, including the key steps in the Government's review process, potential outcomes and the consequences of non-compliance. **An update outlines key developments** during the legislation's passage through Parliament. Allen & Overy FDI experts have been engaged with the UK Government throughout the NSIA's progress through Parliament, and continue to engage as the Act moves towards commencement.

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In terms of scope, in brief from 4 January 2022:

- Mandatory notification: Investors and businesses will have to notify certain acquisitions of qualifying entities in 17 designated sensitive areas. Completing before approval means the acquisition is void and risks significant civil and criminal penalties. The Government's **current description of the 17 sectors** is set out in a draft statutory instrument.

  Broadly, the sectors are advanced materials, advanced robotics, artificial intelligence, civil nuclear, communications, computing hardware, critical suppliers to Government, cryptographic authentication, data infrastructure, defence, energy, military and dual-use, quantum technologies, satellite and space technologies, suppliers to the emergency services, synthetic biology and transport.

  Acquisitions of assets are not subject to mandatory notification.

- "Call in" power: The Secretary of State will have a power to screen and, if necessary, "call in" acquisitions in the wider economy which were not notified to Government but may raise national security concerns. This power will apply to certain acquisitions of both qualifying entities and qualifying assets (such as intellectual property and land). It will catch acquisitions completed on or after 12 November 2020 and those in progress or contemplation. The "call in" power applies retrospectively for up to five years, although the period is reduced to six months if the Government becomes aware of the acquisition.

  The Government has now published for consultation a **draft "Section 3 Statement" explaining how it expects to use this power**. This statement makes clear that qualifying acquisitions of entities or assets that are in or "closely linked to" the 17 sensitive sectors are most likely to be called in. It notes that acquisitions occurring outside those areas of the economy are unlikely to be called in. The statement also clarifies that the level of control acquired over the entity or asset will feed into the assessment of the level of national security risk. However, each acquisition will be treated on a case-by-case basis. Investigations of asset acquisitions are expected to be rare.

- Voluntary notification: Investors are free to notify any acquisitions voluntarily if they consider that there may be implications for national security. Given the "call in" risk detailed above, a desire for legal certainty could make this an attractive route. The Government will be subject to a 30 working day initial review period, after which it must decide to either clear or "call in" the acquisition for a more detailed national security risk assessment.

- Extraterritorial reach: The regime will primarily concern investors in UK companies and UK-based assets. However, the new rules will apply to certain acquisitions of entities or assets that are outside, but have a connection to, the UK. This will cover entities that carry on activities in the UK (such as those doing business from a regional office or R&D facility in the UK) or supply goods or services to people in the UK (including both producers and distributors). And the regime will cover assets used in connection with activities carried on in the UK (such as machinery located overseas used to produce equipment that is used in the UK) or in connection with the supply of goods or services to people in the UK.

  Government guidance provides more detail on common circumstances that would allow the Government to investigate as well as examples.

The reach of the new regime means that many companies, including lenders to UK companies, will need to consider carefully its potential application to a wide range of M&A and debt transactions. With the NSIA applying to investments by domestic and foreign acquirers, public and private M&A transaction documents may need to include a condition to closing, with an appropriate long-stop date. **A range of Government guidance** has already been published to assist interpretation of the new rules; more will follow later this year. In addition, a dedicated hub within the Department for Business, Energy and Industrial Strategy – **the Investment Security Unit** – is open to businesses seeking advice, including ahead of commencement.

From 4 January 2022, notifications will be made to the Investment Security Unit through a digital portal. Subject to statutory timelines, it will review transactions and coordinate cross-government work "to identify, assess and respond to national security risks arising from foreign direct investment".

This article was written by our foreign investment controls group and first published **here**. Please get in touch with your usual Allen & Overy contact if you would like to discuss the implications of the new regime for your business.

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