

## The National Security and Investment Act 2021: *A Snapshot of experience so far*

The UK's new national security screening tool has been in force for over 9 months and its impact on deal making is being felt. Determining whether notification is required can be complex and while the notification process itself has so far been smooth, the impact on deal timelines and negotiation of risk allocation for process overrun or adverse outcomes is a hot topic. This update sets out key highlights.

In January 2022, the National Security and Investment Act 2021 (**NSIA**) introduced a requirement for mandatory notification of certain acquisitions associated with entities that carry on activities in at least one of 17 'sensitive sectors' of the UK economy that may raise national security concerns.<sup>1</sup>

Certain acquisitions associated with entities that fall within one or more of these 17 sectors must be notified to the UK Government – through the 'Investment Security Unit' (**ISU**), a department of BEIS – and approval must be received before closing can occur. Completion of a notifiable acquisition without approval is a criminal offence and transactions implemented without approval are legally void.

Once notification is made (and accepted as complete) a 30 *working day* review period applies, in which the ISU can clear the acquisition or issue a 'call-in' notice for further review (which involves another 30 *working day* process, subject to extensions of a further 45 *working days* or longer). Even 'no issues' notifications will therefore have an impact on closing timelines.

### Timelines and outcomes

The Government published statistics on the first three months of the NSIA's operation, which show that:

- It received **222 notifications**, of which **196 (88%) were mandatory**.
- **17 deals were called-in for closer review**, all of which had been notified.
- The **average time to accept a mandatory notification was 3 working days** (4 for voluntary notifications).
- The **average time to call-in a deal was 24 working days**, with 11 working days the shortest time.

- The **most common sectors** triggering a mandatory notification have been **defence, military and dual use, critical suppliers to government, AI and data infrastructure**.

As a matter of course, 'call-ins' are not made public, though we are aware of several call-ins across various sectors and that the ISU is actively monitoring M&A activity for potentially missed notifications. Further, since the NSIA came into force we have seen:

- **Two deals prohibited** (one of which involved the transfer of IP assets only and therefore did not require mandatory notification);<sup>2</sup>

<sup>1</sup> The 17 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 Technology; Suppliers to the Emergency Services; Synthetic Biology; and Transport.

<sup>2</sup> Beijing Infinite Vision Technology's acquisition of certain IP from the University of Manchester; and Super Orange HK's acquisition of Pulsic

- **Four deals cleared with conditions**,<sup>3</sup> and
- **Four other notable deals publicly ‘called-in’**: the acquisition of a majority stake in National Grid (review on-going);<sup>4</sup> the acquisition of a semi-conductor facility (review on-going);<sup>5</sup> and call-ins in relation to stake building by Vesa Equity in Royal Mail plc (review on-going) and by Altice in BT plc (cleared).

## Some key considerations

In July 2022, the Government published ‘Market Guidance Notes’ with guidance on notifications received and its experience of the system over the first six months. Some key considerations include:

1. **Notification forms should be detailed but comprehensible**: parties should provide clear and full details on the relevant sectors that bring a transaction in scope of the mandatory regime, avoiding the use of overly technical language. Providing comprehensive information on shareholder and acquisition structure (and other non-equity rights) in the initial notification is key to a quick acceptance decision.
2. **Minority investor rights require careful assessment**: mandatory notification may not be required where an investor obtains shareholding or voting rights of 25% or less and the shareholder rights they obtain are contractual (e.g. veto rights in a shareholders’ agreement). Minority investor rights should nonetheless be assessed carefully in case they confer ‘material influence’ over the target entity, which would allow the ISU to call the transaction in.
3. **Internal reorganisations**: reorganisations may be subject to suspensory mandatory notification – even if the ultimate beneficial owner remains the same.
4. **Limited transparency**: the Government will not publicise the receipt (or not) of notifications and there is very limited access to the ISU ‘case team’ (with no access to named individuals) meaning that dialogue with the ISU can be difficult. The Government are not required to share details of the nature of the national security concern with the parties. Final orders made with respect to called-in transactions will be made public, but details on remedies imposed are very thin and therefore of limited ‘precedent value’.
5. **Acquisitions of development rights can lead to a qualifying acquisition**: the Government is able to call in acquisitions of energy infrastructure even where the asset in question has not been constructed (e.g. acquisition of development rights).

## Practice points

The following are practical tips and emerging practice for a smooth NSIA process:

- **Filing requirements and conditionality should be considered on all deals with a UK nexus.**
- **Uncertainty over scope of mandatory sectors** may result in precautionary notifications (beware when sell-side, but unlike UK merger control, there is risk for the sell-side in missing an NSIA notification).
- **Pre-acceptance period for no issues filings is quick** so far (c. 3–4 days, often quicker). **ISU appears to be taking a pragmatic approach** to reviewing ‘no issues’ filings.
- **No insight yet on the use of sanctions** for failure to notify or incomplete responses to information requests.
- Factor in **time for preparation** of the notification and information gathering (**at least 2 weeks**).
- If a transaction is called-in, **expect timeline extensions and/or suspensions** (owing to information requests).

<sup>3</sup> Epiris’ acquisition of Sepura; Tawazun’s acquisition of Reaction Engines Limited; Stonehill Energy Storage’s acquisition of the Stonehill project asset development rights; and Viasat’s acquisition of Inmarsat.

<sup>4</sup> Macquarie’s acquisition of 60% of National Grid’s UK gas transmission and metering business.

<sup>5</sup> Nexperia’s acquisition of Newport Wafer Fab.

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