

## **Alert** | Antitrust Litigation & Competition Regulation



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### **UK National Security and Investment Act: Comprehensive and Rigorous Control Over Acquisitions of Businesses and Assets**

The UK National Security and Investment Act 2021 (**Act**) was given Royal Assent on 29 April 2021. When it comes into force later this year, it will give the UK government substantial powers to scrutinise a wide range of investments in the UK dating back to 12 November 2020 and to remedy any national security risks they raise.

#### **A comprehensive, rigorous regime**

The Act puts in place a new standalone regime that is significantly more rigorous than the previous public interest regime, which was linked to the UK merger control regime, applied only to mergers and acquisitions of businesses and resulted in only 12 interventions in its 17-year life.

The new regime will cover any acquisitions of assets such as real estate and intellectual property, as well as any acquisitions of shareholdings or other interests in businesses, that give rise to national security concerns. It is retrospective, as it will cover any qualifying investment completed on or after 12 November 2020. It will apply to investments by both UK and non-UK persons – the Government stresses that it welcomes foreign direct investment.

### Power to call transactions in for review

The core of the new regime is the power of the Secretary of State to call in certain investments for review. This power exists wherever there has been a **trigger event**, i.e., an acquisition of control of either a qualifying entity or a qualifying asset.

- A **qualifying entity** is any entity (including a company, partnership, association or trust) carrying on activities in the UK or supplying goods or services to persons in the UK. **Control** is a low threshold and exists where the acquisition confers on the acquirer (or joint acquirers) at least the right materially to influence the policy of the entity. Consequently, it covers a wide range of situations ranging from acquisitions of material influence (but falling short of decisive influence) to acquisitions of 100% of the shares or voting rights in a qualifying entity.
- A **qualifying asset** comprises certain land or moveable property acquired for use in connection with UK activities or the supply of goods or services to UK persons, and also ideas, information or techniques which have industrial, commercial or other economic value (including trade secrets, databases, source codes, designs and software). **Control** for these purposes exists where the acquisition confers on the acquirer (or joint acquirers) the ability to use an asset or use it to a greater extent than before the acquisition, or to direct or control how the asset is used.

The Secretary of State may publish a statement of policy intent setting out how the power to issue a call-in notice will be exercised, including the sectors of the economy, the trigger events and the qualifying entities and assets most likely to generate national security concerns, and the facts to be taken into account in exercising the call-in power. A **draft statement of policy intent** was published at the time the Act was proposed and was then amended in March 2021. The final version is expected to be adopted at the time the Act comes into force.

### Mandatory advance notification of some transactions

The Secretary of State's call-in power is essentially retrospective. However, the regime is also preemptive, as it requires certain acquisitions to be notified to the Secretary of State for review and approval in advance of being completed.

Notification is mandatory for any acquisition of over 25% of the shares or voting rights in an entity and for any acquisition of control of an asset where in either case one or more of 17 sectors of the economy are involved. These are the sole criteria for notification – unlike the UK merger control regime, this regime does not make jurisdiction dependent on any financial or share of supply thresholds being exceeded. An acquisition subject to mandatory notification may not be completed until the Secretary of State has approved it. Failure to notify and/or suspend completion of the transaction until it has been approved carries substantial penalties of up to £10 million or 5% of worldwide annual revenues, whichever is greater, and imprisonment of up to five years for individuals. A non-notified acquisition meeting the above criteria is also void, unless subsequently validated by the Secretary of State, and is at indefinite risk of a call-in notice, although this risk period reduces to six months as soon as the Secretary of State becomes aware of the transaction.

As an exception, acquisitions involving the 17 sectors that are completed on or after 12 November 2020 but before the Act comes into force (**Commencement Day**) will not be subject to mandatory notification after Commencement Day but will be at risk of a call-in notice. If the Secretary of State becomes aware of the acquisition before Commencement Day, the notice must be issued within six months from Commencement Day and cannot be issued after that. If the Secretary of State becomes

aware of the transaction after Commencement Day, the notice must be issued six months from the date of becoming aware, as long as this is within five years of Commencement Day.

Acquisitions outside the 17 sectors may be notified on a voluntary basis where the parties require reassurance that their transaction does not raise national security risks. In the absence of notification, the transaction remains at risk of a call-in notice for a period of five years from completion, reduced to six months as soon as the Secretary of State becomes aware of the transaction.

### **Assessment by the Secretary of State**

In assessing the risk to national security presented by an acquisition, the Secretary of State will consider three risk factors.

- **Target risk** – the nature of the target (entity or asset) and whether it is in one of the 17 sectors of the economy where the Government considers risks more likely to arise. These are set out in the draft statement of policy intent referred to above: advanced materials, advanced robotics, artificial intelligence, civil nuclear, communications, computing hardware, critical suppliers to the Government, critical suppliers to the emergency services, cryptographic authentication, data infrastructure, defence, energy, military and dual-use, quantum technologies, satellite and space technologies, synthetic biology (formerly known as engineering biology) and transport.

The Government generally considers that trigger events occurring in the remaining areas of the economy are unlikely to pose risks to national security, so such transactions are expected to be called in on an exceptional basis only. Land is generally expected to be an asset of national security interest only where it is, or is proximate to, a sensitive site, examples of which include critical national infrastructure sites or Government buildings. However, the Secretary of State may also take into account the intended use of the land.

- **Trigger event risk** – the type and level of control being acquired and how this could be used in practice. The assessment will focus on the potential of the acquisition to undermine national security. Trigger events may, for example, increase the ability of a hostile actor to undermine national security or position themselves to do so. This might involve the ability to corrupt processes or systems; to have unauthorised access to sensitive information and/or to exploit an investment to influence the UK. The risk will be assessed according to the practical ability of the party who will acquire control over the entity or asset to do so to the detriment of national security, for example, controlling the long-term strategy of the entity or allowing others to use the entity's sensitive assets.
- **Acquirer risk** – the extent to which the acquirer raises national security concerns. Factors which will be considered by the Secretary of State will include those in ultimate control of the acquiring entity; the track record of those people in relation to other acquisitions or holdings; whether the acquirer is in control of other entities within a sector or owns significant holdings within a core area or known affiliations of any parties directly involved in the transaction. The Secretary of State will also consider the entity's affiliations to hostile parties, rather than the existence of a relationship with foreign states in principle, or their nationality. The Secretary of State recognises that even where an acquisition of control may have the potential to undermine the UK's national security, the majority of acquirers will not seek to use it in this way, e.g., pension funds investing into entities operating national infrastructure.

## Next steps

Further Government work is required before the new regime can be implemented, including drafting and adoption of secondary legislation and guidance on the application of the regime, on call-in notices and on the notification system. The policy statement setting out how the Secretary of State's call-in power will be used must also be presented to Parliament.

Possible next steps for the parties to transactions concluded on or after 12 November 2020 include approaching the Secretary of State for informal guidance or at least ensuring that the Secretary of State is aware of their transactions before Commencement Day, so that the period during which there is a risk of call-in is kept to a minimum.

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