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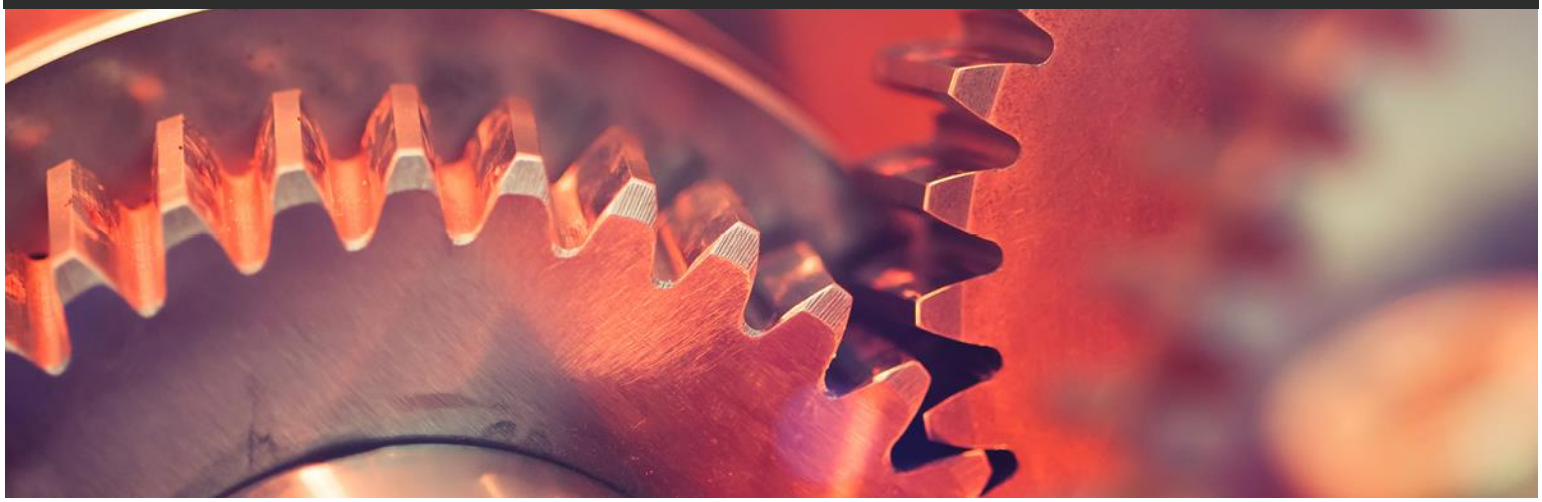

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UK National Security and Investment Act: Impact on M&A

This GT Alert covers the following:

- UK National Security and Investment Act 2021 gives the UK government significantly enhanced powers to scrutinise and intervene in certain acquisitions that could harm UK national security.
- For the first time in the UK, there is a legal requirement to notify the UK government of certain acquisitions in 17 sensitive areas of the UK economy in advance of closing the transaction and to suspend closing until UK government approval has been obtained.
- The Act also confers broad powers to call in any other transactions for national security review, including acquisitions of interests of below 25% in an entity and acquisitions of assets such as real estate, equipment and databases.
- Acquisitions completed before 12 November 2020 are exempt from call-in.

The UK National Security and Investment Act 2021 (**NSIA**) came into force on 4 January 2022. It significantly enhances the UK's investment screening powers. Certain acquisitions will now be subject to mandatory pre-completion notification and must be suspended until approval has been granted by the UK Secretary of State for Business, Energy and Industrial Strategy (**SoS**). Other acquisitions of interests in a business and acquisitions of assets such as real estate do not need to be notified, but may be called in for review by the SoS on national security grounds. This call-in power also applies to transactions completed before 4 January 2022, but on or after 12 November 2020.

Rationale for the Act and overseas reach

The NSIA is designed to protect UK national security by preventing hostile actors from acquiring significant influence or control over UK entities and assets and causing harm to the UK. All acquisitions that may affect UK national security are within its scope – it is not confined to investments by non-UK entities. It will also apply to any cross-border transactions that involve the indirect acquisition of a UK subsidiary or entities with other connections to the UK, such as the supply of products or services to UK persons. The UK government stresses that the NSIA "does not change" the UK's openness to foreign investment or its open and dynamic economy.

No definition of *national security*

The NSIA does not define *national security*. The mandatory notification regime specifies certain sectors that have particular importance to UK national security (see below), but these are unlikely to be the only sectors that can trigger a review under the NSIA.

Dual approach to control

The UK has adopted a dual approach to controlling transactions that could impact on UK national security. It introduces a mandatory notification regime for certain acquisitions of interests in businesses operating on one or more of 17 specified sectors. Other transactions do not have to be notified, but the SoS may review them under the call-in powers conferred by the NSIA.

The mandatory regime

Under the mandatory regime, starting on 4 January, anticipated transactions that meet two main conditions must be notified to the UK government's new Investment Security Unit (ISU) on a prescribed online form and suspended pending clearance. The ISU reports directly to the SoS and is the single point of contact not only for notifications, but also for advice and information on the application of the NSIA.

Conditions

First, the acquisition must involve acquisitions of: (i) an interest of 25% or more in the target entity (ii) shares or voting rights that increase the acquirer's existing holding/rights to each of the following levels:

- from 25% or less to more than 25%,
- from 50% or less to more than 50% and
- from less than 75% to 75% or more; and

(iii) acquisitions of voting rights that, either alone or together with other voting rights held by the acquirer, enable the acquirer to secure or prevent the passage of any class of resolution governing the business of the target. The target does not have to be a company – it can take any form.

Second, the target must carry on business, or supply goods or services to persons operating, in one of 17 sectors in the UK:

Advanced Materials	Advanced Robotics	Artificial Intelligence
Civil Nuclear	Communications	Computing Hardware
Critical Suppliers to 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	Transport	

These broad categories are defined in detail in secondary legislation and guidance.

There is no financial threshold for notification, which means that even low-value transactions that meet the above two conditions must be notified.

Breach of the notification and suspension requirement

Failure to notify and await clearance before completion carries the risk of penalties of 5% of the global revenues of the group to which the acquirer belongs or £10 million, if higher, and criminal prosecution of directors and other officers responsible for the transaction, resulting in up to five years' imprisonment. The transaction itself will likely be treated as void and subject to call-in (see **The call-in regime**, below), but it can be validated retrospectively on application or call-in. (*See also* **Limitation** below.)

Timetable for review

The ISU's formal acceptance of the notification triggers an initial review period of 30 working days. At the end of this period, the government has forecasted that the majority of cases will be cleared through a notification of no further action. The remainder will be subject to a call-in notice, triggering a more detailed assessment lasting a further 45 working days, which can be extended by agreement between the SoS and the acquirer. At the end of the assessment period, the SoS will issue either a final notification of no further action or a final order imposing remedies, for example, mandating or prohibiting certain actions.

The overall merger timetable will need to take account of this timetable as well as the time needed for preparation of the notification.

The call-in regime

The call-in regime applies to all other transactions that may impact on UK national security. These include acquisitions of material influence (i.e., a flexible concept below the level of blocking rights that can include board representation and important contracts) over a target business operating in one of the 17 sectors and acquisitions of control of businesses operating outside the 17 sectors.

The regime also applies to acquisitions of control of assets used or to be used for UK activities or the supply of goods/services to UK persons. These include:

- real estate – including freehold, leasehold, mineral and other rights and interests in land,
- tangible moveable property, for example, physical models and equipment, and
- ideas, information and techniques that have industrial, commercial, or other economic value, such as trade secrets, databases, source codes, formulae, algorithms, designs, plans, drawings, specifications and software.

"Control" means the ability to use the asset, or use it to a greater extent than before, or to direct or control how the asset is used, or use it to a greater extent than before. This covers not only ownership but also licensing.

The government's *Statement of Policy Intent* sets out the matters to be taken into account in determining whether to exercise the SOS's call-in right. It indicates, for example, that the SoS will rarely intervene in a pure acquisition of land unless it is integral to activities in a high-risk sector or close to a sensitive site, for example, where critical infrastructure is located.

Content of national security review and remedies

The assessment of a transaction that has been called in will focus on three risk factors:

- the target risk – whether the target entity or asset is important to UK national security,
- the trigger event risk – whether the transaction gives the acquirer an ability to undermine the UK's national security and
- the acquirer risk – whether the acquirer may seek to use control of the entity or asset to undermine the UK's national security.

The government's *Statement of Policy Intent* illustrates each of these risks.

The SoS has the power to impose conditions on any transaction that raises concerns. These remedies must be necessary and proportionate to the risk identified, and affected parties must have the opportunity to make representations about them. Conditions may relate to site access, supply chain, confidentiality, personnel, compliance and monitoring.

The timetable that applies where a transaction is subject to call-in involves an initial assessment of 30 working days from the issue of the call-in notice; if the SoS decides to take further action, an additional assessment period of 45 working days can be extended by agreement between the SoS and the acquirer.

Limitation

The SoS has five years within which to call in any transaction. This period reduces to six months from the time the SoS becomes aware of the transaction. A clear way of making the SoS aware of a transaction and cutting down the duration of call-in risk is to submit a voluntary notification. This may be particularly important in the early years of the new regime, when government policy may shift.

Appeals

The decision of the SoS in relation to any transaction can be challenged only on the basis of its lawfulness. There is no review of the merits of the decision. However, appeals against financial penalties and criminal offences follow normal appeals processes.

Interaction with UK merger control

The NSIA regime is a separate enforcement regime from the UK merger control regime. However, the principal UK competition regulator, the UK Competition and Markets Authority (**CMA**), and UK sectoral regulators have a duty to inform the SoS of any transactions that may be subject to the NSIA. In addition, the CMA must provide the SoS with assistance and accept directions from the SoS if these are necessary or proportionate in the interests of UK national security.

Interaction with other national security / investment regimes

The NSIA is one of the many regimes that have developed over the last few years, significantly increasing regulatory complexity for investors. International mergers can now be subject to several national security/investment regimes alongside the NSIA, necessitating careful management of differing approval timetables and remedies.

The future

The NSIA is very new, and its principles and procedures have not yet been tested. However, the UK government has said that it expects 1,000-1,830 notifications, 70-95 national security assessments and around 10 cases requiring remedies per year.

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