**National Security and Investment Act 2021**

This section considers the effect of the National Security and Investment Act 2021 on corporate transactions

**Introduction to National Security Issues**

A corporate transaction will often involve an acquisition of control either over an entity or over business assets: this is clearly the case with an acquisition by one company of another company or business.

It is important that, at a very early stage in a transaction with a sufficient connection to the UK, both parties’ solicitors consider whether the proposed acquisition is likely to have **national security implications**.

This may either be as a result of **the sector in which the target operates** or as a result of other factors that could give rise to a **risk to national security**.

In either case, the transaction could be **blocked** or be made **subject to conditions** under the National Security and Investment Act 2021.

It should be noted that the parties should also be aware of **similar regimes in other jurisdictions** that might have an impact on the transaction that they are involved in if it has an international element.

National Security: Primary Legislation

Primary legislation:  **National Security and Investment Act 2021 ('NSI Act')**

Regulatory powers:  **The Secretary of State being the Chancellor of the Duchy of Lancaster**

Responsibility for managing the regime:  **The Investment Security Unit ('ISU')**– an operational unit of the Cabinet Office.

**Application of the NSI Act**

The NSI Act applies to specified categories of transaction or investment that involve **the acquisition of control** over **qualifying entities** or **qualifying assets**.

Both qualifying entities and qualifying assets must either be **formed or situated** in the UK or have a **specified connection** to the UK (for example, an entity that carries on activities in the UK) – this is broadly defined.

**Definitions: Qualifying entities** include any type of entity, whether or not a legal person – so could include a company or a partnership.

**Qualifying assets** comprise land, tangible moveable property (for example, machinery) and IP-type assets.

**IP-type assets** for these purposes include ideas, information or techniques which have industrial, commercial or other economic value.

**NSI Act “Trigger Events”**

The acquisition of control “trigger events” comprise:-

1. **the acquisition of voting rights** or **shares** in a qualifying entity exceeding a threshold of **25% or 50%,** or meeting or exceeding a threshold of **75%;**
2. the acquisition of voting rights that enable or **prevent the passage of any class of resolution** governing the affairs of the qualifying entity;
3. the acquisition of **material influence** over a qualifying entity’s policy; and
4. the acquisition of a right or interest in, or in relation to, a qualifying asset providing the ability to
   1. **use the asset**, or use it to a greater extent than prior to the acquisition; or
   2. **direct or control how the asset is used,** or direct or control how the asset is used to a greater extent than prior to the acquisition.

**‘Call in’ Notice**

The ISU may “**call in” for review** any transaction involving a trigger event where there is a reasonable suspicion that it could give rise to a **risk to national security**.

These transactions could include business as well as share acquisitions or even simply the acquisition of a right or licence to use business assets.

A call-in notice may be issued at any time while a transaction is in progress or contemplation, or **within six months** of the Secretary of State becoming aware of a trigger event taking place. If the transaction is NOT subject to mandatory approval any such call-in must occur within **five years of its completion**.

Analysis of ‘**risk to national security’** focuses on the following risk factors:

1. whether the target is or could be used in a manner that poses a risk to national security (‘**target risk’**);
2. whether the buyer has characteristics that suggest a risk to national security (‘**acquirer risk’**); and
3. the level of control being acquired (‘**control risk’**).

**Mandatory Clearance**

In addition to the wider call-in powers, where the trigger event:

* falls within the **first two control categories** on the trigger events slide (so not including any acquisition of material influence or assets); **and**
* involves a **qualifying entity** conducting specified activities in one of the **17 high risk sectors**,

then the acquirer of the shares or voting rights is **required** to seek authorisation and obtain approval from the Secretary of State (through the ISU) **before** completing their acquisition (with an appropriate **condition precedent** in the transaction agreement).

The Government has identified specified activities set out in Government guidance and secondary legislation within these **17 high risk sectors**:

* Advanced Materials
* Advanced Robotics
* Artificial Intelligence
* Civil Nuclear
* Communications
* Computing Hardware
* Critical Suppliers to the Government
* Cryptographic Authentication
* Data Infrastructure
* Defence
* Energy
* Military and Dual Use
* Quantum Technologies
* Satellite and Space Technologies
* Suppliers to the Emergency Services
* Synthetic Biology
* Transport

**Voluntary Notification to ISU**

Many transactions that are not within the mandatory notification regime but are theoretically subject to the call-in power will clearly pose no risk to national security.

However, if the parties to a transaction are concerned that the call-in power could be exercised and conditions imposed on the transaction (see Powers of the Secretary of State slide), and do not wish to complete their transaction with this risk hanging over them, they may use a **voluntary notification regime** to obtain a decision from the Secretary of State/ISU.

As in cases where there may be a competition issue, the parties may then choose to include a **condition precedent** in the transaction agreement, requiring that a positive decision is received following voluntary notification to the ISU.

**Notification- timetable**

Once the application for **authorisation** and **approval** from the ISU has been submitted the ISU will accept or reject the notification as soon as possible. A notification may be rejected for a number of reasons including if insufficient information is provided.

Once a notification is accepted the ISU will follow this process:

* The ISU has 30 working days to complete an initial screening of the transaction. The initial review will either;
  + clear the transaction; or
  + result in the transaction being called-in to a full national security assessment;
* If undertaking a national security assessment, the ISU has a 30 (further) working days to complete the assessment. This can be extended by 45 working days and, potentially further periods (subject to agreement with the parties) .
* (Note: the ISU can issue “information” or “attendance” notices at any point and the clock stops until the notice is complied with or the deadline to comply with the notice has passed.)

**Powers of the Secretary of State**

If a notifiable transaction subject to mandatory clearance is completed without prior approval:

* The transaction is automatically **void**;
* The **directors of the acquirer** commit a **criminal offence**, punishable with a **prison sentence** of up to **five years**, as well as potentially being subject to civil fines;
* **Civil sanctions** for the acquirer may include a penalty up to a **maximum** of the higher of:
  + 5% of the company’s worldwide group turnover; and
  + £10 million (and the acquirer may also have committed a criminal offence).

When a transaction has been referred for a full national security assessment following notification, the ISU will consider if there is a risk to national security.

Following a full national security assessment the Secretary of State has the power to either clear the transaction unconditionally or to impose remedies to address risks to national security including the imposition of conditions (see below) or prohibiting or unwinding the relevant transaction.

**Example conditions that may be imposed for clearance:**

* Minimum number of target directors to be UK citizens
* Maintenance of specific operations in the UK
* Right for Government officials to enter/inspect premises

**NSI Act - summary**

* The purchase of a target company operating in certain high-risk sectors will be a notifiable transaction which will require authorisation and approval by the Secretary of State. If approval is not obtained prior to completion, then the transaction will be void.
* The purchase of a target company or business not subject to the mandatory notification regime or the purchase of qualifying assets may also be subject to a call-in for review by the ISU, on the grounds of risks to national security.
* The Secretary of State can grant clearance with conditions or block or unwind transactions if significant national security concerns are identified.
* To eliminate the risk of a call-in for review, the parties may use the voluntary notification regime to obtain a decision from the ISU. The parties may include a condition precedent requiring a positive decision in the acquisition agreement.
* Risk of call-in and substantive concerns depends on analysis of target risk, acquirer risk and control risk.