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Kirkland Alert

The UK's New Foreign Investment Screening Regime – What Dealmakers Need to Know

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The UK's National Security and Investment Act 2021 ("NSIA 2021") enters into force on 4 January 2022 with significant implications for deals with a national security angle in the UK. This *Alert* sets out a short summary of the new regime and some key points to consider for transaction planning going forwards.

The new regime in summary

The NSIA 2021 introduces a mandatory and suspensory notification requirement for a defined set of "notifiable acquisitions" and grants the Secretary of State ("SoS") a power to "call-in" a broader set of transactions for a detailed national security investigation where there is a perceived risk to UK national security.

a) The mandatory notification requirement

"Notifiable acquisitions" within the scope of the mandatory notification requirement concern target businesses active within one of the 17 sectors of the economy deemed relevant to the UK's national security interests, as listed below:¹

a. Advanced
Materials

g. Critical
Suppliers to
Government

m. Quantum
Technologies

b. Advanced Robotics	h. Cryptographic Authentication	n. Satellite and Space Technologies
c. Artificial Intelligence	i. Data Infrastructure	o. Suppliers to the Emergency Services
d. Civil Nuclear	j. Defence	p. Synthetic Biology
e. Communications	k. Energy	q. Transport
f. Computing Hardware	l. Military and Dual-Use	

The process for notification will involve an electronic submission to the Investment Security Unit (“ISU”) at the Department for Business, Energy & Industrial Strategy (“BEIS”). Following submission of a complete notification (as confirmed by the ISU), a decision as to whether or not to issue a call-in notice in relation to the transaction will be made within 30 working days (such that deals that do not raise *prima facie* national security concerns should be free to close within 30 working days of submission of a complete notification). Longer review periods will apply in cases that become subject to a call-in notice.²

b) The call-in power

The SoS, through BEIS, has powers under the NSIA 2021 to impose conditions on transactions and even to unwind or block transactions that are found to harm national security following a detailed national security investigation that follows from the issue of a call-in notice.

The call-in power can be exercised both pre-closing and for six months post-closing of a transaction (or up to five years after closing if BEIS remains unaware of a transaction closing). In the first six months of the new regime (i.e., from 4 January 2022), BEIS will have the power to look back and issue call-in notices in relation to transactions completed in the period since 12 November 2020 (when the NSIA 2021

bill was introduced into Parliament).

BEIS has issued a statement that explains that the call-in power is most likely to be used:

- in respect of transactions that present risks in a sensitive sector of the economy (target risk);
- based on acquirer links and allegiances that are hostile to the UK (acquirer risk); and
- where the transaction increases control of a target business, such that there is greater risk of it being used to harm national security (control risk).³

Key points to plan for

1. Transactions that close on or after 4 January 2022 must be checked for a mandatory notification requirement.

A “notifiable acquisition” within the scope of the 17 relevant sectors of the economy must be suspended until it has been approved under the new regime. Closing a notifiable acquisition prior to receipt of approval is a criminal offence that exposes individuals to the risk of a term of imprisonment of up to five years and also businesses to fines of up to £10 million or 5% of their total global turnover (whichever is higher).⁴ In addition, a notifiable acquisition that is completed without approval is deemed legally void within the jurisdiction of the UK. The mandatory notification requirement must therefore be kept on the radar in case any deal that is intended to close by the year end slips to 4 January 2022 or later.

2. The regime is neutral as to investor origin – UK-based acquirers also need to notify.

The NSIA regime is not focussed on foreign investment into the UK – it equally captures transactions undertaken by UK-based acquirers (the regime was deliberately designed to be neutral as to investor origin). All acquirers will therefore need to comply with the requirements of the mandatory NSIA 2021 regime, regardless of where they are located.

3. Minority interest and incremental acquisitions can trigger a mandatory approval requirement or otherwise be called-in for review.

Minority interest acquisitions that give the acquirer sufficient shares to block resolutions of the target company are within the scope of the mandatory notification regime, as are minority interest acquisitions that increase shareholdings, voting rights or shares in capital or profits of a relevant target business over the following thresholds:

- from 25% or less to more than 25%
- from 50% or less to more than 50%
- from less than 75% to 75% or more.

All minority interest and incremental acquisitions will therefore need to be checked for a potential mandatory filing requirement.⁵

4. Deals with limited UK nexus are captured by the regime.

The NSIA 2021 mandatory notification regime captures notifiable acquisitions of “qualifying entities” which include businesses that “carry on activities” in the UK or “supply goods and services” in the UK.⁶

Given these very broad definitions, acquirers should be considering whether there is a requirement to submit a mandatory UK foreign investment filing for any transaction involving a target business with any amount of UK sales. There is no *de minimis* threshold, which would exclude transactions involving a target business with limited UK presence, from the mandatory filing requirement.

The call-in power also exists in relation to a broader set of acquisitions of “qualifying assets” that include land and tangible property as well as intangible “ideas, information or techniques”⁷, even where those assets are located outside of the UK but are used in connection with activities or the supply of goods and services in the UK.

5. Merging parties may wish to submit a voluntary notification to address UK foreign investment regulatory risk up front rather than remain exposed to a potential post-closing review.

Given the broad call-in power, there is a voluntary notification process enabling acquirers to address the risk of investigation and intervention up front. Acquirers undertaking potentially sensitive transactions will want to consider this option and may choose to delay closing pending the outcome for transactions that present a

real risk of being made subject to national security conditions.

1. The National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021 provide further details on specific activities that require mandatory notification, and guidance published by BEIS on 15 November 2021 (National Security and Investment: guidance on notifiable acquisitions) further explains the activities that fall within scope.[↪](#)

2. Following the issue of a call-in notice, an initial review period of 30 working days kicks in, which can be extended for a further 45 working days (these time periods apply on top of the initial 30 working day period for the review of the notification leading to the decision to call-in the transaction). These timelines are subject to possible further extensions with the voluntarily agreement of the parties and to “stop clocks” if information requests remain unanswered. The pace at which these investigations will progress in practice remains to be seen once the new regime is up and running.[↪](#)

3. National Security and Investment Act 2021: Statement for the purposes of section 3, Published 2 November 2021.[↪](#)

4. The business’s total revenue includes the revenue of any owned controlled businesses within or outside of the UK, for this purpose (Section 41 NSIA 2021).[↪](#)

5. BEIS can also call-in transactions that meet the lower standard of control known as “material interest”, which has been adopted under the NSIA 2021 from UK merger control. This gives BEIS jurisdiction over minority interests of less than 25% of the equity in a target business, where other factors are present that give the acquirer particular influence over commercial decision making by the company. For example, in the merger control setting, Amazon’s acquisition of a 16% shareholding in Deliveroo was deemed to give rise to material influence, given the status and significance of Amazon as a digital platform with likely influence over Deliveroo’s strategy. Competition and Markets Authority, Final Report: Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo (4 August 2020).[↪](#)

6. Section 7(3) NSIA 2021 (qualifying entities).[↪](#)

7. Section 7(4) NSIA 2021 (qualifying assets). Section 7(5) NSIA 2021 sets out a list of examples of qualifying assets and includes trade secrets, databases, source code, algorithms, formulae, designs, plans, drawings and specifications and software.[↪](#)

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