



A Matter of National Security – The National Security and Investment Act 2021

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New legislation is coming into force that will allow a Government department to review certain transactions that have an impact on “national security”. [Corporate and Commercial Solicitor Gerard Chalkly-Maber](#) explains the effect of the [National Security and Investment Act 2021 \(NSIA\)](#) and what this will mean for you if your business has completed or is planning to complete any transactions in the defence, energy or aerospace sectors.

The NSIA received Royal Assent on 29 April 2021 and is due to come into force in the Autumn/Winter of 2021.

Once in force, the NSIA will confer certain powers on the Department for Business, Energy and Industrial Strategy (BEIS) which, through its task force the Investment Security Unit (the ISU), will review certain transactions that have an impact on national security.

What does having an “impact on national security” mean?

The NSIA does not define what it means for a transaction to have an impact on national security, nor does it even provide factors to be considered. Instead, it will be up to the discretion of the ISU to interpret its meaning.

That said, under a [statement of policy intent, provided by BEIS](#), the three following factors will be taken into consideration:

1. the nature of the company, business or asset being acquired and whether it is in an area of the economy in which BEIS considers risks more likely to arise;
2. the type and level of control being acquired and how this could be used in practice; and
3. the extent to which the acquirer raises national security concerns.

What rights will the ISU have to review any relevant transactions?

There are three main ways in which the ISU will be able to review transactions that have an impact on national security:

1. **through a mandatory notification regime.** Where the acquirer in a transaction will gain control over or acquire 25% or more of the shares or voting rights in a qualifying corporate entity, they must notify the ISU prior to the transaction completing. A qualifying corporate entity is one that operates in, amongst others, the defence, energy or aerospace sectors (the complete list of pre-defined sectors has been set out by BEIS). The 17 pre-defined sectors caught by the mandatory notification regime may be found [here](#).
2. **through a voluntary notification regime.** Any party to a transaction through which the acquirer obtains control of either an incorporated entity or asset, based in the UK, that could give rise to a national security concern may voluntarily notify the ISU either before or after the relevant transaction completes. The requirements for this differ to the mandatory regime as the target entity will not fall within the list of pre-defined sectors set out by BEIS, and it includes assets; and
3. **through a retrospective “call-in” right.** The ISU will be entitled to call-in for review any transaction completed since 12 November 2020 which it reasonably considers could give rise to a national security risk for up to 6 months from the date on which the ISU became aware of the transaction. This is subject to the review occurring within 5 years of the transaction completion date.

What are the consequences?

Following conducting a review, if the ISU deems the transaction a threat to national security, it can declare it void, i.e. require it to be unwound.

Non-compliance with the NSIA could also result in the imposition of criminal sanctions for both companies and directors, and financial sanctions for a relevant acquirer (up to 5% of acquirer’s global group turnover or £10 million whichever is higher).

I am in the process of completing a relevant transaction. Should I be making a notification to the ISU now?

As of the time of writing (July 2021), there is no way of making any formal notification to the ISU because the necessary regulations have not been passed setting out the form of such notification (these are expected in

Autumn/Winter 2021), or how it is to be submitted to the ISU.

There is also no obligation to notify transactions before the NSIA's commencement, although if it appears that a current transaction could give rise to a national security risk then if the parties contact the ISU now, they can ensure the call-in period would end 6 months after the NSIA's commencement.

However, notifications are expected to be made by way of an online portal, following which the ISU will then have an initial 30 working day period to review the transaction and determine whether approval can be granted or a phase 2 investigation is required. A phase 2 investigation will last for another 30 working day period, which can be extended by another 45 working days if required.

In the meantime, potential parties to relevant transactions are being encouraged to informally contact the ISU by e-mail (Investment.Screening@BEIS.gov.uk) about those transactions and to request advice on the new regime before it fully commences. It has been noted that the ISU is quite helpful and will, if possible, provide an initial view on a transaction.

Contact

If you would like to discuss any questions regarding the NSIA or would like advice in relation to share and/or asset transactions, please do get in touch with [Gerard Chalky-Maber](#) or any other member of our [Corporate & Commercial Team](#) at Online.Enquiries@LA-Law.com.