

Wide-Ranging New UK National Security Regime Comes Into Force

4 January 2022

The [National Security and Investment Act 2021](#), which was passed on 29 April 2021, comes into force on 4 January 2022.

The new regime, which subjects investments in many companies active in the UK to mandatory review on national security grounds, will be among the most wide-ranging in the world. It represents the most significant change in the UK regulatory environment since the Government ceded the power to approve or prohibit mergers on competition grounds to an independent agency in 2002.

Transactions in 17 sectors will require notification to, and pre-closing approval from, a new Investment Security Unit (ISU). The scope of the 17 sectors was defined in [Regulations](#) finalised on 10 November 2021, with additional [guidance](#) published by the Government on 15 November.

The defined sectors are: Advanced Materials; Advanced Robotics; Artificial Intelligence; Civil Nuclear; Communications; Computing Hardware; Critical Suppliers to Government; Cryptographic Authentication; Data Infrastructure; Defence; Energy; Military and Dual-Use; Quantum Technologies; Satellite and Space Technologies; Suppliers to the Emergency Services; Synthetic Biology; and Transport.

The Government will also be able to “call in” transactions that fall outside the mandatory regime if a risk to national security is suspected.

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I. Overview

Scope of application. The mandatory regime applies to acquisitions of more than 25% of shares or voting rights in an entity active in the UK in the relevant sectors, or sufficient voting rights to “secure or prevent the passage of any class of resolution governing the affairs of the entity.” Indirect acquisitions of rights may also need to be notified, pursuant to paragraph 3 of Schedule 1 of the Act.

Possibility to “call in” transactions. The Government will also be able to “call in” transactions that fall outside the mandatory regime if a risk to national security is suspected. The Government published on 2 November 2021 a [statement](#) setting out how the Secretary of State expects to exercise the power to issue a call-in notice. The assessment will take into account three principal risk factors:

1. **Target risk:** “Whether the target of the qualifying acquisition (the entity or asset being acquired) is being used, or could be used, in a way that raises a risk to national security”;
2. **Acquirer risk:** “Whether the acquirer has characteristics that suggest there is, or may be, a risk to national security from the acquirer having control of the target”; and
3. **Control risk:** “A greater degree of control may increase the possibility of a target being used to harm national security.”

Acquisitions of assets, including land and IP, could be called in for review but are not subject to mandatory notification. The Government has indicated that it would only “rarely” call in acquisitions of assets which are not linked to the 17 sectors covered by the mandatory regime.

The Government will be able retrospectively to review transactions that closed on or after 12 November 2020 for a period of up to five years (or up to six months after becoming aware of the transaction).

Broad jurisdictional reach. The regime could capture transactions involving non-UK entities that carry on activities in the UK or supply goods and services in the UK, and non-UK assets that are used in connection with activities in the UK or with the supply of goods or services in the UK, as further explained in [guidance](#) published on 20 July 2021. There is no broad *de minimis* threshold or safe harbour for certain types of investor. Acquisitions by UK investors are not exempt.

Review period. The initial screening period for notified transactions will be up to 30 working days from the time that the ISU confirms the notification has been accepted. There is no specified period within which the ISU must determine whether to accept a notification.

If a transaction is “called in” for full review, the period for review will be up to 30 working days, which can be extended by up to 45 working days, and can be extended further with the agreement of the acquirer.

Decisions will be taken by the Secretary of State for Business, Energy and Industrial Strategy, who will assess the risk to national security and the need for, and scope of, any remedies.

Process. On 17 December 2021, the Government [published](#) forms for mandatory notification, voluntary notification, and retrospective validation (for notifiable transactions completed without approval), consistent with [Regulations](#) passed on 16 November 2021, together with guidance for submitting notifications on an online portal.

The ISU, which sits within the Department for Business, will provide informal advice as to whether transactions are likely to fall within the scope of the new mandatory regime or be called in for review on national security grounds, as it has done over the past few months since the Act was passed. The Government has also published guidance on the new rules [here](#), updated most recently on 15 November 2021, with additional

[guidance](#) specifically for “higher education and research-intensive sectors.”

Interaction with other UK regulatory requirements and review in other jurisdictions. The new regime will operate in parallel to other UK regulatory requirements, including the Takeover Code, export control, and merger control under the Enterprise Act 2002. As explained in this [guidance](#), if there are grounds for a transaction to be considered for both competition and national security reasons, the ISU will work closely with the Competition and Markets Authority to manage the case. Ultimately, though, any decision on national security grounds will take precedence over the CMA’s competition assessment.

As with merger control, investments in companies with international activities will frequently be subject to parallel review under foreign investment rules in several jurisdictions. The Act includes the possibility for the Secretary of State to share information with non-UK public authorities for certain specified purposes, including for the exercise of functions under the Act or corresponding functions under non-UK rules.

II. Implications

The new regime is consistent with heightened scrutiny of foreign investment around the world, with many other jurisdictions introducing new rules or strengthening existing regimes in recent years. The new UK regime will be among the most wide-ranging and onerous in the world, adding a new layer of mandatory review and imposing non-trivial costs on investments in any company with UK activity.

There are numerous elements of the new regime that remain unclear and will need to be clarified by the ISU either in further guidance or in its practice over the initial months of the new regime. More importantly, it remains to be seen how frequently the Government will intervene in transactions and whether enforcement will be

limited to transactions with clear national security issues.

The Act leaves the notion of “national security” undefined, raising the prospect that the grounds for intervention could be expanded over time to encompass political, industrial, or economic considerations. The decision not to appoint an independent decision-making and instead empower a Government minister to vet investments may heighten this risk, particularly given the perception that certain of the recent interventions made under the existing regime were motivated by political considerations.

A number of other issues and implications are already apparent, including the following.

- Given the broad definition of investments subject to mandatory notification, the absence of any *de minimis* threshold, and the sanctions for non-notification of reportable investments, the Act may lead investors (at least initially) to apply a “safety first” approach and make “failsafe” notifications for transactions that seem unlikely to raise national security issues.
- The Act sets short timeframes for review, which will in turn require the Government to dedicate sufficient administrative resources to deal with the volume of expected notifications to avoid adversely impacting transaction timing.
- In providing that any failure to comply with a mandatory notification requirement would automatically render a transaction void (irrespective of whether that transaction raised national security concerns or the failure to notify was deliberate), the Act may generate legal uncertainty and, in the worst case, have significant consequences in causing transactions to be unwound.

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