

THE UK NATIONAL SECURITY AND INVESTMENT ACT: MARK THE DATE

The UK Government [announced](#) on 20 July 2021 that the substantive provisions of the National Security and Investment Act (**Act**) will commence fully on 4 January 2022. The Government's announcement was accompanied by draft secondary legislation defining the sectors that will be subject to mandatory filing, a revised Statement of Policy Intent explaining which transactions are most at risk of scrutiny and various additional guidance for businesses.

BACKGROUND

The UK Government, like many others around the world, has been focusing on the perceived threat of hostile investors owning or controlling critical businesses or infrastructure and, as a result, enacted the Act in May 2021. Whilst the UK has had a public interest regime in force for nearly 20 years, the Government could only intervene on national security grounds in deals that fell within the scope of the UK's merger control regime (and under the jurisdiction of the UK Competition and Markets Authority (**CMA**)) and investments in the defence sector.

The Act instead gives the Government powers to "call-in" and review a wide range of "qualifying acquisitions" – including investments in both entities and stand-alone assets (such as land, machinery and intellectual property) – on national security grounds and to impose remedies to address any concerns that are identified. A sub-set of those transactions are subject to mandatory notification and standstill obligations (with criminal penalties for failure to comply), namely those involving a target entity with specified activities in one of 17 sensitive sectors (see the box on the next page). Our [May 2021 briefing](#) provides an overview of the impact of the new Act on a variety of investments and financing transactions.

The Government has now announced that the Act will commence fully on 4 January 2022. This means that the Government's call-in powers will become effective (including for transactions which completed on or after 12 November 2020, the date of the Act's introduction in Parliament) and that mandatory notification requirements will apply to transactions that meet the relevant criteria and complete on or after 4 January 2022. Along with the announcement of the commencement date, the Government has also released a number of pieces of guidance and draft secondary legislation.

Key issues

- When will mandatory filing obligations and the Government's call-in powers become applicable?
- How does the Government's Statement of Policy Intent differ from previous versions?
- How do the revised definitions of the 17 sensitive sectors that trigger mandatory filing and/or a higher risk of a call-in differ from previous versions?
- What does the new guidance say about the extra-territorial transactions that are caught by the Act?

STATEMENT OF POLICY INTENT

As required by the Act, the Government has published for consultation a [revised version](#) of its "Statement of Policy Intent" (the **Statement**), which sets out how the Government expects to use its call-in powers.

The risk factors identified in the revised Statement remain broadly similar to those identified in prior iterations. In particular, they focus on: (i) whether the target entity or assets could be used in a way that poses a risk to national security ("target risk"); (ii) whether the acquirer has characteristics that suggest there may be a risk to national security as a result of the transaction ("acquirer risk"); and (iii) whether the acquirer will obtain a level of control that could allow it to pose a risk to national security ("control risk"). However, there are some significant differences between the revised Statement and previous versions.

First, the revised Statement appears to indicate a more expansive approach to assessing national security risks, with the UK's economic prosperity and reputation now ranked alongside military advantage and public safety as factors in determining the risk associated with particular acquirers or entities with which they may have links.

Second, the Statement makes it clear that the assessment of the target risk will focus on the 17 sensitive sectors, as well as real estate that is proximate to sensitive sites. Prior iterations of the Statement referred to certain infrastructure (such as that for water, food, chemicals, health and finance) falling outside the sensitive sectors, but these references have been removed. However, the revised Statement now states that areas of the economy that are "closely linked" to the sensitive sectors are at higher risk of a call-in. It gives the example of activities that are "related to transport but are not strictly within scope of the definition of transport given in the regulations" (the transport definition covers only certain activities relating to ports and airports). It remains unclear, however, whether activities falling entirely outside one of the 17 sensitive sectors (e.g. activities that are not within the transport sector at all) might nevertheless be considered "closely linked" to a sensitive sector.

Third, a number of helpful statements in previous versions of the Statement have been removed. It no longer states that the Government "does not regard state-owned entities, sovereign wealth funds – or other entities affiliated with foreign states – as being inherently more likely to pose a national security risk", or that it "recognises that pension funds may be long-term investors in entities that operate in the UK's national infrastructure, but will not often seek to interfere in their processes even if they have the capability to do so."

Finally, the revised Statement includes a number of new illustrative examples. One that will be of interest to real estate investors explains that an acquisition of residential property next to a military site would only be considered to be a "medium" target risk, "given other security protections in place at the military site" and therefore would be unlikely to be called in if the acquirer has no links to hostile activities and intends to use the asset for residential purposes.

As the consultation is open until 30 August 2021, further changes to the Statement may be made later this year.

The 17 Sensitive Sectors

- 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
- Transport

Only certain activities within these sectors are considered sensitive.

DEFINITIONS OF THE 17 SENSITIVE SECTORS

The Government has also published a draft statutory instrument (SI) which sets out the proposed definitions of the 17 sensitive sectors. As noted above, these determine not only which transactions are notifiable, but also those non-notifiable transactions that are most at risk of being called in.

The definitions are broadly the same as those contained in previous drafts published by the Government (see our [March 2021 briefing](#) for details), but some are more detailed (e.g. energy) and there are minor adjustments to the scope of others that could affect the notifiability of some transactions. For instance, the communications definition no longer includes goods or services "used to directly make possible or directly support" a public communications network, whereas the data infrastructure definition has been expanded to include the activities of certain sub-contractors. Whilst the draft SI remains subject to change, the Government expects to lay the final SI later this year.

EXTRA-TERRITORIAL TRANSACTIONS

Another [piece of guidance](#) issued by the Government explains the types of extra-territorial transactions that are caught by the Act. For multinational companies, points of particular interest include the following:

- The acquisition of a foreign company will be subject to mandatory filing if it either carries out activities in the UK in a sensitive sector itself (e.g. through an office, or through staff that regularly travel to the UK to perform services for a UK client), or if it "oversees" a subsidiary that carries out such activities.
- While not notifiable, an acquisition of a foreign company could be called in for a national security review even if the target has no business activities in the UK, provided it exports goods or services to customers in the UK.
- Similarly, a non-notifiable acquisition of an overseas asset can be called in if the asset is used "in connection with" the supply of goods or services to UK customers, or activities carried on in the UK, even if it is not the seller of the asset that makes those supplies or carries out those activities.

While not covered in this Guidance, multinational businesses should also be aware that the Act catches intra-group restructurings, such that filing obligations (and criminal penalties for failure to comply) may apply to intra-group transfers of the shares of an entity that carries out activities in a sensitive sector in the UK, or that is a direct or indirect parent company of such an entity.

OTHER GUIDANCE FOR BUSINESS

The Government has also published:

- An [overview](#) of the Act, with guidance on how to prepare for the new rules;
- [Guidance](#) on how the new regime will interact with the UK merger control regime, takeover rules, export controls and financial services regulation; and
- [Guidance](#) for the Higher Education and Research-Intensive sectors.

Further guidance is expected to be published later this year.

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