UK

FOREIGN DIRECT INVESTMENT

National Security and Investment Act 2021—new national security regime—mandatory notification—specified activities—voluntary notification—meaning of "change of control"—impact on deal timetables—remedies and penalties—relevant assessment risk criteria—relationship of NSIA to Enterprise Act 2002

Foreign investment; Merger control; Merger notices; National security; Takeovers

Implementation of the National Security and Investment Act 2021

The National Security and Investment Act came into force on 4 January 2022. The Act gives the United Kingdom (UK) Government the power to screen transactions where there is a change of control of entities or assets, even when these are based overseas. Distinct from the UK's voluntary merger control regime, the Act establishes a mandatory notification requirement where a change of control occurs in relation to an entity with "specified activities" within any of 17 designated sectors, ranging from transport and advanced robotics to cryptographic authentication and synthetic biology.[1]

The Act also gives the Government powers to "call in" and review a wide range of transactions involving changes of control of entities or assets that are not subject to mandatory filing.[2] Parties to such transactions have the option of notifying the Government to obtain clearance before implementing them, which is why the regime for reviewing such transactions is often referred to as the "voluntary" regime. The Government has said that transactions are unlikely to be called in for review unless they concern an entity which carries on activities in, or is closely linked to, one of the 17 designated sectors, an asset which is used in connection with such activities, or land that is, or is proximate to, a sensitive real estate site (such as Government buildings).[3]

It should be noted firstly that the concept of a "change of control" for the purposes of the Act is strikingly broad; where an *entity* is the subject of the transaction, a change of control exists where the percentage of shares or voting rights passes 25%, 50% or 75%, or where the voting rights acquired are sufficient to secure or prevent any class of shareholder resolution governing the affairs of the entity.[4] Under the voluntary regime (only), transactions can also be reviewed if they involve an acquisition of material influence over an entity.[5] For acquisitions of control over *assets* (which also fall under the voluntary regime only), a change of control is constituted by acquisition of a right or interest in the asset which enables use of the asset or the ability to direct or control its use, or do so to a greater extent.[6] What is more, companies based overseas can be caught within the Act's jurisdiction; under the voluntary regime the Government can review a change of control of foreign companies that have UK activities or supply UK customers, or where the target asset is used in connection with such activities or supplies.[7] In contrast, under the mandatory filing regime a filing is required only if the target entity carries out the specified activities within the UK—exports to UK customers from abroad cannot on their own trigger a mandatory filing.

Since the Act only recently came into force, it is too early to have a complete picture of how the UK's new national security regime operates in practice. This may remain the case for some time; in response to concerns raised at the Act's consultation stage surrounding the "commercial and reputational implications of the publication of the Government's decision to

[1] National Security and Investment Act 2021 (the Act) s.14(1).
[2] The Act s.1(1).
[3] The Act s.18 and Department for Business, Energy and Industrial Strategy, *Notice—National Security and Investment Act 2021: Statement for the purposes of Section 3* (the Notice), 2 November 2021, Paragraphs 11-12 and Paragraph 36.
[4] The Act s.8.
[5] The Act s.1(1) and s.8(8).
[6] The Act s.9(1).
[7] Department for Business, Energy and Industrial Strategy, *National Security and Investment White Paper* (the White Paper), November 2020, para.136.

call in a trigger event", the Government intends to routinely publish information only at the final decision stage, and even then "only in relation to trigger events where final remedies (including blocking orders) are imposed."[8]

Transaction parties will, however, have already begun to see the effects the Act has on their deals. For example, the fact that clearance can take up to 30 days and, in cases in which second stage "call in" is initiated, a further 30–75 days, will have a knock-on effect on deal timetables.[9] Any formal information request that is sent to the transaction parties or third parties automatically suspends the second stage timetable, and it remains to be seen whether and to what extent this will create further delays. Parties will also need to take into account that the Secretary of State can impose remedies where national security risks are identified, which can include prohibition or unwinding of the transaction. There are also stringent penalties for non-compliance. In particular, closing a notifiable transaction without clearance can attract fines of up to 5% of worldwide turnover or £10 million (whichever is greater) and a prison term of up to five years for individuals.[10]

Interestingly, and perhaps controversially, the Act itself does not define national security or the considerations which will be taken into account when making a national security assessment of a transaction. This has laid the Act open to criticism that political considerations not explicitly set out in the Act may influence the decision-making over certain transactions. However, some assistance is given by the statement issued by the Government pursuant to s.3 of the Act.[11] With regards to evaluating acquisitions of entities, the statement suggests that the three risk factors to be considered are:[12]

1. Target risk, where the Secretary of State will consider questions such as what the target does, what it is used for or what it could be used for;[13]
2. Acquirer risk, where the Secretary of State will consider questions such as what the acquirer's technological capabilities are and what its links are to entities which may seek to undermine or threaten the national security of the UK;[14] and
3. Control risk, where the Secretary of State will consider the amount of control that has been gained, noting that a greater degree of control "may increase the possibility of a target being used to harm national security."[15]

Prior to the Act's coming into force, the Secretary of State was able to intervene in cases being investigated by the CMA which raised concerns around national security, financial stability, capabilities to combat a public health emergency, and media ownership and plurality.[16] Though the Act creates a national security review regime now distinct from the CMA's merger assessment, it is important to note that the previous system has not altogether disappeared; the CMA is still in fact bound to inform the Secretary of State where it is investigating a merger which it believes raises public interest concerns. It should be noted, however, that intervention on the basis of national security is now solely dealt with under the Act.[17]

Moreover, under s.31 of the Act, where a transaction pursuant to which a final order or notification has been given is also being considered by the CMA, the Secretary of State can direct the CMA to take, or refrain from taking action under the merger control regime, provided that this is necessary

[8] The White Paper para.36.
[9] The Act s.14(9), s.18(9) and s.23(3).
[10] The Act s.41 and Table 1.
[11] The Notice.
[12] The Notice para.20.
[13] The Notice paras 23–24.
[14] The Notice paras 25–29.
[15] The Notice paras 30–32.
[16] Enterprise Act 2002 s.42.
[17] Enterprise Act 2002 s.58.

and proportionate to address a risk to national security.[18] This is intended to work to ensure that the two regimes operate substantively in-step with one another.

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US

MERGERS

Merger HSR thresholds—annual adjustment—increase in 2022—fee-determining thresholds also raised—no change to HSR filing fees

Fees; Merger notices; National competition authorities; United States

Federal Trade Commission announces increased HSR thresholds for 2022

On January 24, 2022, the Federal Trade Commission (FTC) announced the annual adjustment of the thresholds that trigger premerger reporting obligations under the Hart-Scott-Rodino (HSR) Act. The new increased thresholds apply to transactions closing after February 23, 2022.

The HSR Act requires parties to notify the Federal Trade Commission (FTC) and the Department of Justice (DOJ) before acquisitions of voting securities, assets, or non-corporate interests involving United States (US) commerce where the value exceeds certain dollar-based size thresholds. If the transaction is reportable, the parties cannot close until after a mandatory waiting period (typically 30 days). The waiting period allows the agencies to review the proposed transaction and determine whether the transaction raises antitrust issues that require further investigation. While either agency can investigate, only one will do so, and the investigation may extend past the initial waiting period. The investigating agency will ultimately decide whether to challenge the transaction.

The FTC adjusts the thresholds annually based on changes in US gross national product. Last year marked an unusual decrease in the thresholds due to a decline in US economic output in 2020 caused by the COVID-19 pandemic. This year marks a return to increased thresholds, following an increase in US economic output in 2021.

Under the new thresholds, unless an exemption applies:

- Transactions resulting in holdings valued at or below $101 million are not reportable;
- Transactions resulting in holdings valued at more than $101 million but equal to or less than $403.9 million are reportable only if one party has assets or annual net sales of at least $202 million and the other party has assets or annual net sales of at least $20.2 million; and
- Transactions resulting in holdings valued at more than $403.9 million are reportable, regardless of the parties' size.

While the HSR filing fees remain the same, the fee-determining thresholds were also revised upward. The filing fees paid by the acquiring party in the transaction now are:

- $45,000 for transactions valued at more than $101 million but less than $202 million;

[18] The Act s.31(2).