

The UK National Security and Investment Act – Guidance Notes

September 14, 2022

On 4 January 2022, the UK National Security and Investment Act 2021 (NSI Act) came into full force. As we [previously noted](#), the NSI Act grants the UK government wide new powers to scrutinise and intervene in acquisitions and investments on grounds of national security and made it necessary to notify related transactions in 17 key sectors.

Since its introduction, the UK government on 16 June produced an annual report which provided insights into the regime and operational takeaways. Not long after on 19 July, the UK government produced [market guidance notes](#) (Guidance) highlighting feedback received from the implementation of the NSI Act, particularly focusing on mandatory notifications along with real-life scenarios faced. This details further implications and impact of the introductions of the NSI Act. The Guidance was published in addition to the new guidance on the applicability of the NSI Act to new-build downstream gas and electricity assets.

Notifications

As a general point, clear language and specific references to the activities of the qualifying entity or asset should be made, particularly in relation to sector definitions in the [notifiable acquisition regulations](#).

Structure charts highlighting the ultimate beneficial ownership of both the qualifying entity and the acquirer should be included in order for the government to decide whether to use the call-in power. Information covering periods before and after the acquisition being completed should be included.

Temporary Acquisitions of Control

The appointment of liquidators and receivers may qualify as an acquisition under the NSI Act, and in some circumstances where notifiable acquisition criteria are met, mandatory notification may be required.

The Guidance provides examples of two scenarios:

- 1) Shares of a solvent entity are owned by the liquidated entity. The liquidator or receiver has voting rights over these shares during the insolvency proceeding and before these shares are sold. This is a control acquisition that may necessitate mandatory notice if certain conditions are met, such as whether the solvent company engages in the activities listed in the notifiable acquisition requirements.
 - 2) Shares held by a bankrupt director in a solvent entity which are transferred to a trustee during an insolvency process. This is an acquisition of control that may require mandatory acquisition requirements if certain conditions are met, such as whether the solvent company engages in the activities listed in the notifiable acquisition requirements.
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Security Over Shares

The granting of certain share security types, in which title to the shares is not transferred to the secured lender (or its nominee), is not a notifiable acquisition requiring mandatory notification due to the fact that no acquisition of control is being acquired. This is the case even if it involves an entity engaging in activities covered by the Notifiable Acquisition Regulations. However, where security taken over shares involves the legal transfer of ownership, such as a Scottish share pledge, this could give rise to a notifiable trigger event.

Unless the security entails ongoing control by the pledgee over the secured shares, the issuance of security over shares is not a notifiable occurrence. However, in certain situations, enforcing such a security where the secured shares are in a qualifying firm engaged in a mandated sector may result in a mandatory notice.

Indirect Acquisitions of Control

The Guidance further sets out examples where there is an indirect acquisition of control of qualifying entities by investors and other stakeholders, including where there is an unbroken chain of majority stakes or where there is an entity of interest which would require notification.

Internal Corporate Reorganisations

The guideline reiterates that an internal corporate reorganisation might nonetheless be a qualifying transaction even if the entity's ultimate beneficial owner stays the same. Although the scenario is unlikely, the Guidance further warns that such reorganisations could pose threats to national security, for instance by giving an adversarial actor the ability to undertake malicious acts against the entity.

Different Types of Voting Rights and Mandatory Notification

Under the NSI Act, any acquisition of voting rights that would allow someone to secure or prevent the passage of any class of resolution of the target entity must be notified. This requirement applies to the 17 specified sectors. According to the Guidance, the concept of voting rights in the NSI Act does not apply to contractual rights that have a similar effect (such as those taken by minority investors when providing early-stage investment). Notification in relation to the acquisition of such rights is not required. However, the acquirer may decide to voluntarily notify the transaction if the acquisitions enable them to have material influence, either alone or together with other interests or rights. Although notification is not mandatory in this scenario, the Secretary of State still has the authority to call it in. Thus, voluntary notification may be worthwhile.

Published Information

According to the notes, the government may decide to publish information about call-in notices or final notifications but will not disclose information on the receipt and acceptance or rejection of individual notifications. The government is, however, required to publish notice of any final orders when they are made.

When the government decides to announce proactively (rather than in response to an earlier disclosure made by one or more parties), it will strive to try to give advance notices to the parties and again after the relevant markets have closed.

Recently, the government announced that it had prohibited the acquisition of intellectual property owned by the University of Manchester by a Chinese company. The intellectual property in question was found to have dual-use application with the potential for it to be exploited in a military context. This marks the first time a transaction has been blocked under the new legislation; however, it is evidence that the government is willing and able to take an interventionist approach under the NSI Act.

Our Thoughts

It remains to be seen whether the present economic conditions will give rise to more potential acquisitions of businesses in prescribed sectors. From our experience, we can say that the technology sector is being looked at closely – particularly

businesses in the semiconductor space or whose technology may have dual-use applications. Furthermore, Chinese buyers appear to be experiencing additional scrutiny.

Any clients considering an acquisition in one of the prescribed sectors or other potentially sensitive sectors will need to consider the NSI Act as part of their due diligence at the outset of a transaction to determine whether a notification should be made. Clients will need to factor in the additional time-frames to closing should a mandatory or voluntary notification be made,

Please do not hesitate to contact us to discuss the NSI Act and the impact it may have on your current or future investment plans. Katten has been at the forefront of the developments of this new regime since its inception and has already advised several clients through the notification and government call-in process. We are well placed to guide you through the detail of the new regime.

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