

What is the National Security and Investment Act 2021, and will it affect you?

The National Security and Investment Act 2021 (the "NSI Act") allows the UK government to scrutinise and intervene in a broad range of transactions on the grounds of national security. Such intervention could include imposing certain conditions or even blocking an acquisition completely (although this is expected to be rare).

The NSI Act contains a hybrid of mandatory and voluntary notification requirements which will come into force on 4 January 2022. However, it has some retrospective effect and could be relevant to transactions that completed at any time since 12 November 2020.

There are three initial questions to ask when establishing whether a mandatory notification is required:

1. Does the transaction relate to the acquisition of an "entity" or an "asset"?

Both are broadly defined but a mandatory notification will only be triggered on an acquisition of or investment into a UK entity or a foreign entity carrying on activities in the UK or providing supplies or services to persons in the UK.

2. Does the transaction lead to the purchaser gaining control of the entity by having more than 25%, more than 50% or 75% or more of voting rights or shares, or having the ability to pass or block resolutions governing the entity's affairs?

Note that it can be triggered on an initial investment or by an increase in a shareholding. The regime applies whether the purchaser is inside or outside of the UK.

3. Is the entity's business in one of the 17 specified sectors of the economy? (see the glossary of terms at the end of the document)

The sectors are: (1) advanced materials, (2) advanced robotics, (3) artificial intelligence, (4) civil nuclear, (5) communications, (6) computing hardware, (7) critical suppliers to government, (8) cryptographic authentication, (9) data infrastructure, (10) defence, (11) energy, (12) military and dual-use, (13) quantum technologies, (14) satellite and space technologies, (15) suppliers to the emergency services, (16) synthetic biology and (17) transport.

From 4 January 2022, if mandatory notification applies the purchaser will be required to notify the UK government and obtain pre-closing approval before completing the transaction. Failure to notify will result in the transaction being void. The purchaser will also be exposed to significant financial penalties (up to 5% of an organisation's global turnover or £10million, whichever is greater) as well as a potential prison sentence for individuals. Understanding whether a transaction will be caught under the mandatory notification provisions is important!

Just because a transaction relates to acquisition of an asset (and not an entity), does not reach the trigger thresholds, or falls outside the 17 specified sectors, that does not mean it is outside the scope of the NSI Act. The parties may still need to consider submitting a voluntary notification and, given the wide reaching powers, the transaction could (whether a notification is made or not) still be "called-in" by the UK government if it reasonably suspects there could be a risk to national security. (see the flow chart below)

Any such call-in must be no later than 6 months from when the UK government became aware of the transaction or, if aware before 4 January 2022, 6 months from 4 January 2022.

Impact for ports

This is important for port operators because the new regime gives the UK government powers to scrutinise and intervene when it comes to investment in ports by overseas investors or from within the UK. Port operators of all descriptions should be aware of this development for two main reasons:

1. Transport is one of the 17 sectors of the economy within the mandatory notification regime under the NSI Act. This means there is a higher risk that mandatory notification will be required. This in turn means that if the entity owning or controlling a port is the subject of a qualifying transaction then that transaction will be caught by the notification requirements.
2. The NSI Act applies widely; for example, it covers entities carrying on activities within a seaport. In our view it would be prudent for operators to have in their mind the regulatory and legal framework that will apply to any such transaction and recognise the increased level of government intervention on the horizon.

We consider the NSI Act's scope in more detail below:

Ports and Harbours

Activities carried out by a qualifying entity here consist of:

- (a) Owning or operating a port or harbour in the United Kingdom that handled 1 million tonnes or more of cargo as recorded in the Port Freight Annual Statistics in the year preceding the year in which the acquisition is due to be completed; OR
- (b) Owning and operating terminals, wharves or other infrastructure situated in a port or harbour described above.

The above definition would include the 51 major ports within the UK.

In our view the key point here is that the mandatory notification regime in the NSI Act applies to an entity which owns or operates – "operating" is defined in the draft statutory instrument as "controlling the functioning of the port, harbour, terminal, wharf or other infrastructure". Infrastructure means "infrastructure, facilities and equipment within a port or harbour directly related to the movement of freight, passengers or seafarers".

So, the scope for intervention is wider than only the entity which owns the port. The UK government will pay close attention to investment being made into your port in a qualifying transaction and could potentially veto such investment altogether on national security grounds.

Airports

Activities in relation to airports are included in the draft statutory instrument as part of the transport sector. The question here is whether the qualifying entity's activities consist of or include:

- (a) Owning or operating an airport in the UK that handled at least 6 million passenger movements or 100,000 tonnes of freight in 2018;
- (b) Providing en route air traffic control services in the UK; and
- (c) Owning a provider of en route air traffic control services in the United Kingdom.

Looking at pre-pandemic passenger data, this would affect 10 UK airports and would, of course affect national air traffic services.

Space Ports

Activity in this rapidly developing sector is also subject to the mandatory regime of the NSI Act.

Here the question is whether the qualifying entity carries on activities that include operating, developing, producing creating or using facilities including:

- Management of debris in outer space;
- 'In orbit' servicing or maintenance or manoeuvring of satellites;
- Provision of satellite communication links;
- Operating or maintaining the capability of secure infrastructure related to space or sub orbital activity;
- Manufacture or testing of space craft, launch vehicles or satellites including ground support equipment;
- Operation or control of infrastructure.

Operators will appreciate the relatively wide definition of the activities in this sector. This demonstrates how important the UK government is going to be taking this issue in the months and years ahead.

How can Foot Anstey help?

Foot Anstey's lawyers have experience of working with ports of all shapes and sizes.

We know how important it is for ports to work together to understand issues that affect the transport infrastructure sector overall. These ports are many and varied, and of great importance given that they are a gateway into the UK and of critical commercial and economic importance.

This recent legislative development is likely to require significant attention when it comes to investing in ports in the UK and there is no doubt that the NSI Act has the potential to give far greater powers to the UK government to affect investment decisions into your port, to the extent that they consider such investment to impact national security.

What should you be doing?

If you have been involved in a transaction which completed since 12 November 2020 that could potentially be caught by this new legislation and "called-in" for national security assessment, then it is possible to make the UK government aware of the deal (by email) before 4 January 2022, to reduce the risk of a call-in by shortening the period that the UK government has to call in the transaction to 6 months from 4 January 2022.

If you have a live transaction, then you should discuss with the other parties to establish if a mandatory notification is necessary or whether a voluntary notification should be made. This is likely to impact the legal documentation, due diligence exercise and proposed timescales.

If you have any doubt regarding any completed or live transactions, then please contact our specialist teams who will be able to guide you through the new regime.

Contact us for more information



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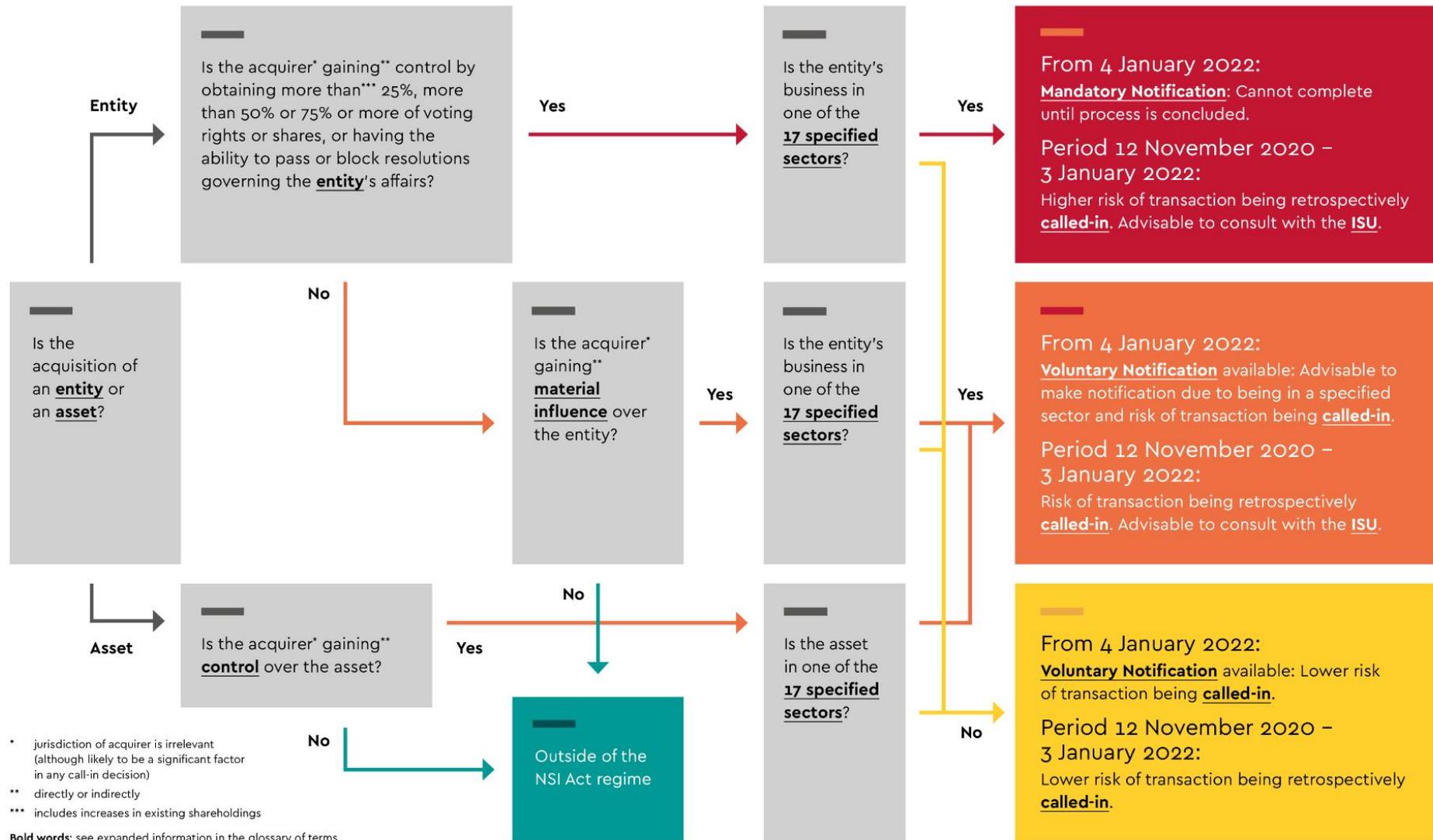


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Please note that the above position and anything stated may change if the draft Regulations are not passed as currently proposed by the government. This communication is a general guidance note only and does not constitute opinion or legal advice. Should you want legal advice please get in touch with one of our experts.

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Glossary of terms

- **“entity”** means “qualifying asset” being any entity, whether or not a legal person, that is not an individual, and includes a company, a limited liability partnership, any other body corporate, a partnership, an unincorporated association and a trust. An entity which is formed or recognised under the law of a country or territory outside the UK is a “qualifying entity” if it (a) carries on activities in the UK, or (b) supplies goods or services to persons in the UK. [Section 7(2) & (3) of the NSI Act]
- **“asset”** means “qualifying asset” being an asset of any of the following types: (a) land, (b) tangible moveable property, (c) ideas, information or techniques which have industrial, commercial or other economic value (including trade secrets, databases, source code, algorithms, formulae, designs, plans, drawings and specifications, software. Land or moveable property situated outside the UK or the territorial sea, or any asset within subsection (c), is a “qualifying asset” if it is used in connection with (a) activities carried on in the UK, or the supply of goods or services to persons in the UK. [Section 7(4), (5) & (6) of the NSI Act]
- **“material influence”** is as determined under UK merger control. There is no single factor used when assessing material influence and so it will need to be carried out on a case-by-case basis understanding the overall relationship between the acquirer and the target. This is therefore lower than the threshold of legal or de facto control in the UK and is generally recognised as requiring a shareholding of at least 15%. [Refer to the Competition and Markets Authority’s guidance on its assessment of material influence when operating the merger control regime under the Enterprise Act 2002 ‘Mergers: Guidance on the CMA’s jurisdiction and procedure (2020 revised)']
- **“control”** means gaining control of a qualifying asset by acquiring a right or interest in, or in relation to, the asset and as a result the acquirer is able (a) to use the asset, or use it to a greater extent than prior to the acquisition, or (b) to direct or control how the asset is used, or direct or control how it is used to a greater extent than prior to the acquisition. [Section 9(1) of the NSI Act]
- **“17 specified sectors”** means (1) advanced materials, (2) advanced robotics, (3) artificial intelligence, (4) civil nuclear, (5) communications, (6) computing hardware, (7) critical suppliers to government, (8) cryptographic authentication, (9) data infrastructure, (10) defence, (11) energy, (12) military and dual-use, (13) quantum technologies, (14) satellite and space technologies, (15) suppliers to the emergency services, (16) synthetic biology and (17) transport [Set out in the draft The National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021]
- **“Mandatory Notification”** a mandatory notice must be submitted to the Secretary of State before completion of the transaction. The Secretary of State must decide whether to reject (e.g. because of a lack of details being given) or accept the mandatory notice. If the mandatory notice is accepted then the Secretary of State has 30 working days to either: (i) issue a call-in notice; or (ii) issue a clearance notice. If a call-in notice is issued an “assessment period” is initiated. The Secretary of State then has an initial period of 30 working days to carry out a full assessment. This period may be extended by the Secretary of State for a further 45 working days or for any other longer period as agreed with the acquirer. [Sections 14 & 23 of the NSI Act]
- **“Voluntary Notification”** a seller, acquirer or the qualifying entity concerned may give a notice to the Secretary of State. The Secretary of State must decide whether to reject (e.g. because of a lack of details being given) or accept the voluntary notice. The review period is the same as for a Mandatory Notification. [Section 18 of the NSI Act]
- **“call-in”** a call-in notice may be issued by the Secretary of State if it reasonably suspect there could be a risk to national security (this includes where no notification has been submitted to the Secretary State). A call-in notice may not be given (a) after the end of the period of 6 months beginning with the day on which the Secretary of State became aware of the “trigger event” (or, if aware before 4 January 2022, 6 months from 4 January 2022); and (b) after the end of the period of 5 years beginning with the day on which the trigger event took place (other than in the event that a Mandatory Notification was required (i.e. from 4 January 2022) in which case there is no long-stop date). [Section 2 of the NSI Act]
- **“ISU”** the ‘Investment Security Unit’, a unit within the Department for Business Energy and Industrial Strategy that will operate the notifications online portal. It is possible to contact ISU regarding the transaction now (shortening the call-in period to six months from 4 January 2022) and for informal advice on the regime (investment.screening@beis.gov.uk)