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# The UK's new national security screening regime

## A step-change in the UK Government's powers to intervene in acquisitions and investments

**The UK Government has published its long-awaited National Security and Investment (NS&I) Bill which will establish a new screening regime for investments in a wide range of sensitive and strategic sectors, with – for the first time - mandatory filing and pre-approval requirements for deals involving specified sectors and significant civil and criminal penalties for non-compliance.**

The Bill started its legislative process through the UK's parliament on 11 November 2020, so is not expected to become law until Q1-Q2 2021 at the earliest, depending on parliamentary time. However, once the regime is in force, the Government will be able retrospectively to call-in certain deals which had not completed by 12 November but which potentially give rise to national security concerns. This power is expected to be used rarely, but given the wide-scope of the regime and the Government's powers, investors currently involved in deals that would fall under the mandatory regime or may otherwise give rise to national security issues should consider engaging with the Government early and should ensure appropriate protection in deal documents.

Deals which have not completed by the time the new regime comes into force, and which trigger the mandatory notification requirement, will need to be notified and cleared before closing.

Acquisitions and investments falling within scope of the new regime will be notified to a new Investment Security Unit within the Department for Business, Energy and Industrial Strategy (BEIS).

The Government will also be able to call-in certain deals (before or after completion) which it considers fall within scope and raise potential concerns.

The Business Secretary, currently Alok Sharma, will be the decision-maker, acting independently to assess the risk of the investment to national security and whether any remedies are necessary and proportionate to prevent or mitigate that risk. All such decisions will be subject to judicial oversight.

The new regime aims to address growing concerns around mergers, acquisitions and other types of deals that could threaten national security. The Government has been considering reform to the existing public interest regime for some time, but its approach has moved significantly since the 2018 White Paper was published, reflecting changed attitudes to perceived threats and stricter regimes brought in by other countries, including the US, Australia, Japan and many in Europe (notably, Germany, France, Italy and Spain).

## Key features of the new regime are:

1. **Mandatory and suspensory notification for investments in designated sectors:** acquisitions of certain shareholdings in businesses active in one of 17 designated sectors will be subject to a new mandatory notification system with statutory review time-lines. These sectors include:

   - critical national infrastructure (e.g. civil nuclear, communications, data infrastructure, defence, energy and transport);
   - advanced technologies (e.g. artificial intelligence, autonomous robotics, computing hardware, cryptographic authentication, advanced materials, quantum technologies and engineering biology);
   - critical suppliers to Government and emergency services;
   - military or dual-use technologies; and
   - satellite and space technologies.

   Transactions falling within the scope of the mandatory notification requirements will not be permitted to complete until clearance is given by the Government. Transactions that complete before receiving Government clearance will be legally void.

   In order to tightly define the sectors which will require mandatory notification, the Government is currently consulting on proposed sector definitions which will remain under review and subject to change. The consultation runs for 8 weeks up to 6 January 2021.

2. **Voluntary notification and call-in powers apply to a broader range of deals:** certain deals that are not caught by the mandatory regime, but which may give rise to national security concerns, may be called-in for a national security review by the Government up to 6 months after the Secretary of State 'becomes aware' of the deal, provided this is done within 5 years of the acquisition taking place. Parties are therefore encouraged to voluntarily notify deals which could lead to national security risks to start the 30 working day period in which the Government must decide to carry out a full assessment or take no further action, reducing the window for possible Government intervention.

3. **Timing:** following notification (mandatory or voluntary), the Government conducts an initial screening process of up to 30 working days before deciding whether to issue a call-in notice. Where a call-in notice is issued, the Government will have a further 30 working days to decide whether to clear a transaction or whether to impose remedies. This 30 working day period may be extended by an additional 45 working days or longer by agreement with the acquirer. The clock will, however, stop following a request for information up until the time when that request has been complied with. The fixed statutory timelines will offer more predictability and certainty to investors than the existing Enterprise Act 2002 regime where timelines are set by the Government on a case-by-case basis, largely at the discretion of the relevant Secretary of State, and which can take many months to receive clearance.

4. **The regime will apply to investors from any country,** including domestic UK investors. While there is no doubt that Chinese investments in sensitive sectors will come under close scrutiny under the new regime, it is important to bear in mind that only 4 of the 12 national security interventions under the existing regime have involved Chinese investors. The UK Government has intervened in 8 transactions involving investors from countries that have historically been allies, including the US, Canada, Italy and Germany and has extracted undertakings from those investors to protect UK national security interests. A consistent theme in those interventions, in addition to the usual concerns about access to sensitive data, has been the Government's interest in ensuring continuity of supply of critical services to Government and maintenance of strategic capabilities. Such concerns are effectively nationality agnostic because they go to ensuring that critical capabilities, skills and manufacturing are maintained in the UK and not transferred abroad. As a result, it is likely that in particularly sensitive sectors we will see the Government calling in transactions involving investors from so-called 'friendly' countries and imposing remedies under the new regime. The Government can, via regulations, exempt certain acquirers from notification requirements, but no investors or classes of investors are currently exempt.

5. **Minority acquisitions are in scope:** acquisitions of stakes from 15% or acquisitions of further stakes (e.g. 25-50%, 50-74%, 75-100%) may be notifiable or called-in, although the Government will need to conclude that any acquisitions below 25% enable the acquirer materially to influence the policy of the target (an established test under the UK's merger control regime where the shareholding is examined alongside other interests, including board representation and industry expertise).

6. **Asset acquisitions are in scope:** acquisitions of a right or interest in an asset (including land, physical property and intellectual property) which gives the acquirer the ability to use that asset are in scope for potential call-in and voluntary notification (but do not fall within the mandatory notification regime). Assets bought by consumers (e.g. personal computer software, mobile phones, GPS) are not in scope.

7. **No financial or share of supply thresholds** will apply.

8. **Investments likely to attract detailed scrutiny:** in exercising its powers to undertake a national security assessment, the Government must have a reasonable suspicion that the deal gives rise to a national security risk in light of:
   - **target risk:** if the target is active in one of the sectors which the Government has identified as areas where national security risks are more likely to arise (e.g. critical infrastructure, advanced technology, military and dual-use technologies and suppliers to Government), and exceptionally in the wider economy;
   - **trigger event risk:** the type and level of control being acquired and the potential for such acquisition to undermine national security; and
   - **acquirer risk:** the extent to which the Government considers that a particular acquirer raises national security concerns, for example, due to affiliations with hostile states or organisations.

9. **Acquisitions taking place from 12 November but prior to the regime coming into force:** once the regime comes into force ('commencement'), the Government will be able to call-in certain deals that completed after the Bill was introduced in parliament but before commencement, provided the Government has not used its current powers to intervene on public interest grounds under the Enterprise Act 2002. Such deals will not be subject to mandatory notification but could be subject to remedies if national security concerns arise. Deals that have not completed before commencement, and satisfy the requirements for mandatory notification, will need to be notified. Parties involved in these deals should therefore ensure that deal documents contain appropriate conditionality and should consider engaging with Government early in order to mitigate the length of a review period and reduce the formal notification requirements, to the extent possible.

10. **Wide-ranging powers to impose conditions on (or block) deals:** the Government will be able to either clear, impose conditions on or block deals where there is an unacceptable risk to national security. Typical conditions are expected to involve:
    - restricting the amount of shares acquired;
    - ring-fencing sensitive information and/or technology;
    - requirements to maintain strategic capabilities/security of supply in the UK; or
    - commitments to maintain a UK headquarters or presence and to protect employees and local R&D capabilities.

11. **Information requests:** the Government will have wide-ranging powers to request information from parties to inform its decision-making at every stage of the process, including powers to require individuals to provide evidence in person.

12. **Sanctions** for non-compliance include fines of up to 5% of worldwide turnover or £10 million (whichever is greater) and imprisonment of up to 5 years.

13. **Appeals:** a new appeals mechanism will be introduced, with the Government's decisions subject to either judicial review or a bespoke appeal procedure.

14. **Current merger control and public interest regime:** when the new regime comes into force, the national security provisions in the current public interest regime will be removed. However, the other public interest considerations (media plurality, public health and financial stability) will continue to be part of the current regime, and will operate alongside the new national security regime, together with the Competition and Markets Authority's review of deals on competition grounds. The Government will, however, be able to intervene where competition remedies run contrary to national security interests if this is considered necessary and proportionate.

## Impact on investors: start preparing today

Under the new regime, the Government expects a dramatic increase in notifications signalling the significant gear change in the UK's approach. The Government forecasts 1,000 – 1,830 notifications, 70-95 national security assessments and around 10 cases requiring remedies per year. Although the new regime will not be in place for several months, any party considering investing in a business which falls within the scope of the regime should consider:

- **Engaging in the debate on the regime's scope:** any investors or businesses active in the relevant sectors should review the Government's stated intentions and draft definitions of sectors that will be subject to mandatory notification to ensure the scope of the regime is sufficiently clearly defined, predictable and transparent. Going forward, the scope of these sectors will need to be kept under constant review.
- **In-flight cases - assess the risk of the deal being 'called-in' after the regime comes into force:**
  - acquisitions which close between 12 November and commencement of the new regime may be called-in for a period of up to 6 months from commencement (if the Secretary of State was aware of the deal before commencement) or 6 months from when the Secretary of State became aware (if he/she became aware after commencement) where the transaction raises national security concerns and the Government has not exercised its powers to intervene under the Enterprise Act 2002 regime;
  - acquisitions which have signed but not closed by commencement but which fall within the scope of the mandatory notification regime will trigger a mandatory notification requirement and will be prohibited from closing until clearance has been received.

In each of these cases, parties should assess the risk of the acquisition falling within scope and, if appropriate, contact the new Investment Security Unit for informal advice. Early engagement with the Government has a number of advantages in terms of timing and predictability, particularly in the early stages of the regime.

- **Risk of mandatory filing obligation or call-in:** once the regime comes into force, investors will need to assess early on whether deals fall within scope for mandatory filing obligations or are at risk of call-in and should be notified voluntarily, alongside other foreign investment review and merger control requirements.
- **Deal documents:** investors negotiating deals should ensure that they include appropriate conditionality, risk allocation measures and long-stop dates for a potential notification and review period. Similar considerations apply to investors seeking to sell stakes in businesses which may now involve suspension obligations and intervention risk driven, to some extent, by the identify of the new acquirer.
- **Identify possible remedies to secure clearance:** for any deals that may raise national security issues, parties are recommended to engage with the Government early on potential solutions to resolve national security concerns. Although no deal has yet been blocked on public interest concerns, a number have been abandoned following an intervention and, for those which proceed, strict conditions are frequently imposed. Early engagement on potential remedies is key to reaching an acceptable outcome.

The new regime will have a significant impact on deal certainty and timing for any investments involving a sensitive or strategic sector.

As the Bill progresses through parliament, now is a crucial time to engage with discussions and understand the scope of the final regime in order to anticipate the likely impact on any live transactions and your forward-looking M&A strategies.

**Please get in touch with a member of our antitrust, competition and trade team for more information.**



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