

UK National Security and Investment Act 2021 creates a screening regime for foreign investment

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The National Security and Investment Act 2021 (the **Act**), which was enacted on 29 April 2021, creates an extensive new regime for screening foreign investment in the UK.

The Act introduces a **mandatory notification regime** for transactions in specific sectors and a voluntary notification regime for all other sectors. It allows the Secretary of State to "**call in**" investments for review (in any sector), and to assess and address any national security risks they involve, including imposing conditions on and potentially blocking transactions considered to pose an unacceptable risk to national security. When exercising the "call-in" power, the Secretary of State must consider the:

- **target risk** – the nature and activities of the target;
- **trigger event risk** – the type and level of control being acquired and how it could be used; and
- **acquirer risk** – the extent to which the acquirer raises national security concerns.

Why has the government introduced this?

Because it considered that existing legislation did not provide adequate protection against the acquisition of UK businesses, assets and technology by foreign purchasers who could pose a threat to the national security of the UK. The core areas of risk for national security are seen as national infrastructure sectors, advanced technology, military and dual-use technologies, and direct suppliers to government and the emergency services. The government explains in its March 2021 policy paper "Global Britain in a Competitive Age" that the Act promotes inward investment, while minimising the potential risk to the UK's national security, and has been introduced to strengthen the UK's defence and security.

Who will this affect?

Purchasers and sellers of businesses, companies or other entities carrying on activities in the UK, or supplying goods or services to customers in the UK, in particular where the target is active in any of **17 key sectors**, whatever the turnover or share of supply of the target. The 17 key sectors are: advanced materials; advanced robotics; artificial intelligence; civil nuclear; communications; computing hardware; critical suppliers to government; critical suppliers to the emergency services; cryptographic authentication; data infrastructure; defence; energy; military or dual-use technologies; quantum technologies; satellite and space technologies; synthetic biology; and transport.

What transactions will have to be notified?

Notification for review and approval by the Secretary of State will be mandatory for notifiable acquisitions in the 17 key sectors listed above. It will be unlawful to complete a notifiable acquisition unless and until it is approved. Regulations will define specific activities within those sectors where notification by the acquirer will be mandatory. The current

definitions remain in draft form, although they have been revised (and narrowed) in response to third party comments (see: <https://www.gov.uk/government/consultations/national-security-and-investment-mandatory-notification-sectors>). The government is continuing to engage with relevant sectors to further refine the definitions.

When might parties consider making a voluntary notification?

Transactions (other than notifiable acquisitions) may be notified on a voluntary basis to obtain approval, rather than risk being "called in" for review. Purchasers, sellers and target entities are encouraged to make formal **voluntary notifications** to the new Investment Security Unit of trigger events involving them which they consider could give rise to a national security risk.

Asset acquisitions will not be subject to mandatory notification, but may be "called in". This includes acquisitions of control over land, tangible movable property (such as machinery used to make defence components), or ideas, information or techniques which have industrial, commercial or other economic value (such as designs, source code or software). Only assets which are within the UK, or used in connection with activities carried on in the UK, or the supply of goods or services to persons in the UK, will be relevant. Interventions for asset transactions are expected to be very rare, unless they are integral to an entity's relevant activities in a key sector, or the land is in a sensitive location (for example, close to a military base). Gaining rights or interests over an asset which enable the acquirer to use the asset, or direct or control how it is used, will count as a "trigger event". However, loans, conditional acquisitions, futures and options are expected to be reviewed only if and when an actual acquisition of control occurs.

What are the relevant thresholds?

The new regime will apply to:

Direct or indirect acquisitions of:	Mandatory notification	Voluntary notification
more than 25%, more than 50%, or 75% or more of the shares or voting rights in a qualifying entity (i.e. acquiring shares or rights taking the purchaser above the relevant percentage);	✓	✓
voting rights that enable or prevent the passage of any class of resolution governing the affairs of a qualifying entity;	✓	✓
material influence over the policy of a qualifying entity; or		✓
a right or interest in a qualifying asset , or to direct or control how it is used.		✓

Who will make the decisions?

The Secretary of State for Business, Energy and Industrial Strategy (BEIS).

Will there be any penalties for failing to notify?

Yes, there will be civil and criminal penalties for completing a notifiable acquisition without approval, including **imprisonment** for up to five years, **finances** of up to £10 million (or, if higher, 5% of worldwide turnover) and **disqualification as a director** for up to 15 years. **Notifiable acquisitions which are completed without approval will be legally void.**

What time limits will apply?

The Secretary of State may "call in" a trigger event up to **six months** after becoming aware of it, if that is within **five years** of the trigger event occurring – but if the transaction was subject to mandatory notification, **no time limit** will apply.

Which acquirers are at risk?

This will be assessed on a case-by-case basis, but a key factor will be the acquiring entity's affiliations to "hostile parties", rather than the existence of a relationship with foreign states, or nationality. The government says that it recognises that state-owned entities and sovereign wealth funds may have "full operational independence in pursuing long-term investment strategies with the object of economic return, raising no national security risks".

The Act applies to both foreign and UK purchasers (although the Act clearly focuses on foreign investment).

When will this start to apply?

The Act is expected to come into force later this year, but the Secretary of State will have power to "call in" transactions occurring from 12 November 2020, but will not "call in" transactions before the new regime has come into force. **This means that relevant transactions completed on or after 12 November 2020, or transactions that are currently being negotiated (or are agreed but not yet completed), could be subject to the new regime, once it comes into force.** If parties consider that a transaction could give rise to a national security risk, by contacting BEIS now, they can ensure that the "call-in" period would end six months after the regime enters into force.

There is no obligation to notify transactions before the Act comes into force.

What will be the process for notifying transactions?

Notifications will need to be made via a new digital portal (currently being developed) to the new Investment Security Unit, at BEIS. Whilst the full Unit is currently being set up in preparation for the launch of the new regime, the government encourages parties to contact the Unit (by email) about transactions that may fall within the scope of the new regime. In our experience, the Unit is open to constructive dialogue and, if possible, will provide an initial view on a transaction.

Once the regime is in force, individual government departments will be involved in the screening process, depending on the sector affected by the transaction.

How long will these reviews take?

Notified transactions must either be cleared or "called in" within **30 working days** after the notification has been accepted. If "called in", the Secretary of State will have a **further 30 working days** – extendable in certain circumstances by a **further 45 working days** – to assess the transaction fully. A further voluntary extension can be agreed with the parties in certain circumstances. The Secretary of State will "stop the clock" on each of these periods while requested information or attendance is awaited.

What remedies could be imposed?

The Secretary of State will have power to impose any such remedies as are considered necessary to protect national security. This could include blocking or imposing conditions on transactions. **Interim orders** can also be imposed to prevent or reverse pre-emptive action.

What should you do about this now?

The government's intention is for the new screening regime to come into force by the end of 2021, although there is as yet no formal commencement date for the Act.

Businesses should consider, with their advisers, whether their transactions could be subject to review. If you are in one or more of the **17 key sectors**, review the revised draft definitions of sectors (and relevant activities) to check

whether they are appropriate. As mentioned above, businesses should also consider contacting BEIS about a particular transaction, where there is a risk of "call in", or it is not clear whether the transaction falls within the scope of the regime.

Next steps

Before the regime comes into force, the government must publish various regulations, including:

- a statement of policy intent setting out how the Secretary of State will use the "call-in" power – this statement will be finalised following public consultation;
- notifiable acquisition regulations specifying the sectors subject to mandatory notification – these regulations will be finalised following further engagement with the affected sectors; and
- regulations specifying the form and content of mandatory and voluntary notifications – the notification forms are currently available in draft form and will be finalised following engagement with interested parties.

For further information or assistance, please contact one of our team.

For bilingual version (English - Chinese) please click [here](#).

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