MAYER | BROWN

7 January, 2022

Legal Update

Quick Reference Guide: UK National Security and Investment Act 2021

Key takeaways

The UK National Security and Investment Act 2021 (the "Act") entered into force on **4 January 2022**:

- The Act enables the UK Government to screen, block and potentially unwind transactions giving rise to national security concerns in the United Kingdom through a new authority: the Investment Security Unit ("ISU"). These powers are distinct from merger control.
- Acquisitions of both **entities** and **assets** may fall within the scope of the Act. Additionally, acquisitions of control of **entities** operating within any of 17 specified sensitive sectors will be subject to **mandatory notification** and will be **void** unless approved. The Act may apply outside the customary scope of M&A.
- Acquisitions may be retrospectively called-in for review for up to five years after the acquisition trigger event (and for an unlimited period for a non-notified transaction within the sensitive sectors). Parties may voluntarily notify transactions and/or consult with the ISU for greater certainty.
- The mandatory notification regime is suspensory: severe penalties are applicable for non-compliance with the notification obligation. Parties may face criminal sanctions (up to five years' imprisonment) and civil penalties (up to 5% of worldwide turnover or £10 million – whichever is greater) for completing acquisitions without approval.

Qualifying entities and assets

The scope of the Act is broad (and largely reflects earlier legislative proposals; see our previous legal update for further detailed analysis, here).

The Act applies to acquisitions of control of any **qualifying entity or asset** which carries on activities in the United Kingdom or supplies goods/services to persons in the United Kingdom (or which is used in connection with such activities or goods/services).

- **Qualifying entities:**
  - Any entity (legal or non-legal person) that is not an individual, including a company, a limited liability partnership, any other "body corporate", a partnership, an unincorporated association and a trust.
  - An entity formed or recognised **outside the United Kingdom** if it carries on activities in the United Kingdom or supplies goods or services to persons in the United Kingdom.

- **Qualifying assets:**
  - » Land.
  - » Tangible moveable property.
  - » Ideas, information or techniques which have industrial, commercial or other economic value.
  - » Assets situated **outside the United Kingdom** if they are **used in connection with** activities carried on in the United Kingdom or the supply of goods or services to persons in the United Kingdom.

Trigger events

The Act sets out the following tests to determine whether control over a qualifying entity or asset has been (or will be) acquired – a **"trigger event"**.

Entities		Assets
1. Increase shareholdings	≤25% to >25% ≤50% to >50% <75% to ≥75%	1. Ability to use the asset (or use it to a greater extent) than prior to the acquisition
2. Increase voting rights		
3. Voting rights (including negative control)	Enables the person to **secure** or **prevent** the passage of **any class of resolution** governing the affairs of the entity	2. Ability to direct/control how the asset is used, or direct or control how it is used to a greater extent than prior to the acquisition
4. Material influence	Enables the person materially to influence the policy of the entity	

The transaction will potentially be subject to mandatory notification or liable to call-in for review (see below) following the occurrence of a trigger event. However, the Act also provides that "arrangements" that are in progress or contemplation which, if carried into effect, will result in a trigger event taking place will also be caught by the Act. For example, this might capture arrangements between parties whereby the joint exercise of certain rights is pre-determined.

Sensitive sectors

Acquisitions of control (as defined above, but excluding material influence) of entities operating in the following sensitive sectors may be subject to mandatory notification:

Sensitive sectors	
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
17. Transport	

Regulations set out detailed definitions of activities falling within each sector. The Regulations were adopted in the light of a public consultation by the Government following publication of the National Security and Investment Bill. The consultation resulted in certain of the descriptions being narrowed and rendered more precise (for example in relation to the concept of a Critical Supplier to Government). Nevertheless, the Regulations and sources to which they refer are extremely granular (for example in relation to military and dual use goods, and advanced materials) and may require very close scrutiny in an individual case.

An acquisition falling within any of these sectors, which is subject to mandatory notification and is completed prior to approval by the Secretary of State, **will be automatically void** (subject to the possibility of **retrospective validation**).

The Government has stated that qualifying acquisitions of entities which undertake activities closely linked to the activities in these 17 areas of the economy (for example, they are related to transport but are not within the definition of transport in the Regulations) are more likely to be called-in than those that are not closely linked. It has also stated that, while not subject to mandatory notification, acquisitions of control through material influence over target entities operating in the sensitive sectors are also more likely to be called-in.

Timing – "Call-in" of non-notified transactions

Although the Act entered into force fully on 4 January, it applies retrospectively to trigger events which occurred from **12 November 2020**. The long-stop date for call-in depends on when the trigger event occurred, and whether the Secretary of State was aware of the trigger event (or is deemed aware of it, for example through a press release).

When did the trigger event occur?	Secretary of State aware of the trigger event?	Review period
Before 4 January 2022	Yes – **Before** 4 January 2022	Call-in power applicable for six months from 4 January 2022
	Yes – **On/after** 4 January 2022	Call-in power applicable for six months from date of awareness
	No	**Long-stop** date for call-in power of five years **from 4 January 2022**
On/after 4 January 2022	Yes – **On/after** 4 January 2022	Call-in power applicable for six months from date of awareness
	No	**Long-stop** date for call-in power of five years **from trigger event date**

Timing – Review

The acquirer is responsible for making the notification to the ISU:

- The ISU will have **30 working days** (the "review period") to complete its screening of the transaction once a notification is accepted. However, there is no set period within which it must decide whether a notification is complete (though this is normally expected to occur within days) and the ISU may reject a notification where it considers that the parties have not provided sufficient information.
- The Government has said that it will confirm acceptance (or not) of the notification as soon as reasonably practicable (from when the review period will start to run). It has also indicated that it expects a considerable number of notifications, so in practice (particularly early on in implementation when the process is new and COVID-related absences are affecting all organisations) this may take some time.

- Within the initial 30 day review period, the ISU must either clear the transaction or call it in for detailed assessment.

If the transaction is called-in, a formal assessment period begins in which the ISU has a **further**:

- **30 working days** to conduct an initial assessment (the "assessment period"), which is extended if the ISU requires further information or the attendance of individuals; *plus*
- **45 working days** for additional review (at the ISU's discretion); *plus a*
- **Voluntary period** that may be agreed with the acquirer in order to complete the assessment.

The Government may issue an interim order at any time during the assessment period, to prevent steps that might undermine any conditions that the Secretary of State may seek to put in place at the end of the assessment period.

Parties will also need to consider the interaction between review procedure under the Act and the UK merger investigation procedure where the transaction is also subject to notification/investigation under the UK merger control rules, as different timetables apply.

Before the full entry into force of the Act on 4 January, the CMA was competent to review transactions on grounds of national security at the request of the Secretary of State pursuant to the public interest intervention procedure under the UK merger control rules. National security has now been removed as a public interest consideration and the ISU alone is competent to assess acquisitions on grounds of national security.[1]

Pending enactment and implementation of the Act, a lower turnover threshold of £1m was introduced into the merger control rules in respect of mergers in specified sectors. That threshold was removed by the Act.

The CMA has also updated its merger control guidance, which notes in that the CMA may share confidential information with the ISU/Secretary of State and coordinate its review accordingly. However, there is no one-stop-shop: the procedures under the merger control rules and the Act remain distinct and, as a result, transactions may be subject to parallel investigations. Parties are therefore encouraged to inform the CMA at an early stage if a transaction might give rise to national security concerns.

Application beyond M&A

Although the Act is likely to apply primarily to changes of control in connection with M&A transactions, other types of transaction might fall within its scope. These may include:

- **Land sales** – for example, where the land is adjacent to a sensitive site and national security concerns might arise (for example, having regard to the intended use of the land).
- **Financing arrangements** – for example, where a lender acquires a veto right over strategic decisions of a borrower; or sponsors/investors acquire material influence or joint control over a project company.
- **Security and restructuring** – control might arise upon taking enforcement action (for example, where the secured party becomes the registered shareholder); however, the creation of security and security becoming enforceable could also potentially be caught. The Act contains an exception for rights that are exercisable by administrators or by creditors while an entity is involved in relevant insolvency proceedings; such rights are not regarded as held by the administrator or creditors even while the entity is in those proceedings. However, this exception does not extend to lenders or security agents or to purchasers from liquidators or administrators.
- **Equity underwriting** – it may be necessary to consider whether, and if so at what point in a transaction, an underwriter might acquire an interest/right in the shares or voting rights of a relevant entity.

1. Under the merger control rules, public interest considerations concern media plurality and the quality/availability of broadcasting services; the stability of the UK financial system; and combating/mitigating the effects of public health emergencies. Additional grounds can be added by Statutory Instrument.

- **Structured equity transactions** – as regards entities falling outside the security exception, but where rights are exercisable only in certain circumstances, it will be necessary to determine when such circumstances will arise and when they will be in the control of the relevant person.
- **Custodian business** – an interest held by a person as nominee for another is treated by the Act as being held by other; and rights are treated by a person who controls their exercise.
- **Long-term agreements** – a trigger event might arise if a supply contract creates a relationship of dependence/influence.

Practical considerations

- Parties will need to establish whether, and if so when, a **trigger event** is likely to occur in relation to proposed transactions; which parties will gain control over the relevant entities/assets; which party will bear the burden of notification or risk of investigation (if relevant); and the implications for the transaction timetable and any necessary interim funding needed.
- The Act contains broad concepts of **connected persons** and **indirect holdings** which will need to be considered in determining whether the relevant control thresholds are satisfied. Holdings by different group members and/or arising from different lines of business/capacities may have to be **aggregated** for the purpose of determining whether a trigger event arises.
- It will be necessary to consider whether there is any **joint interest**, **joint arrangement** or **common purpose** which could give rise to **aggregation** of holdings for the purpose of determining whether a trigger event exists.
- Outside the mandatory notification regime, **voluntary notification** can be used to eliminate or shorten the period of uncertainty caused by the risk of call-in; and in all cases **contractual allocation of risks** may be appropriate (for example in relation to remedies and previous non-notified transactions).
- This analysis will need to take place alongside the consideration of merger control requirements and other foreign investment rules. **Early consultation** with the ISU may facilitate this.

Although the public interest intervention procedure has historically been used relatively sparingly, investment in sensitive sectors has attracted closer scrutiny by the UK authorities in recent years. With the new regime now fully in force, it remains to be seen how in practice the Government will seek to balance the perceived need to safeguard entities and assets that are deemed to affect national security against the desire to show that the United Kingdom remains "open for business".

In the meantime, where transactions might fall within the scope of the Act, early consideration will need to be given to its potential application.

If you have any questions about the issues raised in this legal update, please get in touch with your usual Mayer Brown contact or:

David Harrison
Partner, London
E: dharrison@mayerbrown.com
T: +44 20 3130 3050

Jason Hungerford
Partner, London
E: jhungerford@mayerbrown.com
T: +44 20 3130 3084

Trevor Borthwick
Partner, London
E: tborthwick@mayerbrown.com
T: +44 20 3130 3556

Angela Lai
Counsel, London
E: alai@mayerbrown.com
T: +44 20 3130 3452

James Harrison
Associate, Brussels
E: jharrison@mayerbrown.com
T: +32 2 551 5951

Mayer Brown is a distinctively global law firm, uniquely positioned to advise the world's leading companies and financial institutions on their most complex deals and disputes. With extensive reach across four continents, we are the only integrated law firm in the world with approximately 200 lawyers in each of the world's three largest financial centers—New York, London and Hong Kong—the backbone of the global economy. We have deep experience in high-stakes litigation and complex transactions across industry sectors, including our signature strength, the global financial services industry. Our diverse teams of lawyers are recognized by our clients as strategic partners with deep commercial instincts and a commitment to creatively anticipating their needs and delivering excellence in everything we do. Our "one-firm" culture—seamless and integrated across all practices and regions—ensures that our clients receive the best of our knowledge and experience.

Please visit mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

0644con