

CLIENT ALERT

UK Parliament Adopts National Security and Investment Act

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On 29 April 2021, the UK National Security and Investment Act 2021 (**NSI Act**) received Royal Assent and entered into force. The NSI Act creates the UK's first mandatory notification regime for a wide range of investments in a number specified sectors to enable the UK Government to monitor and assess investments in sectors with national security sensitivity.

Although the provisions establishing the mandatory notification regime are not expected to be brought into force until autumn 2021, investors should already take account of the NSI regime's retroactive effect. Investments which are not notifiable may nonetheless be 'called in' if the Secretary of State considers that they give rise to a risk to national security, provided they occurred on or after 12 November 2020. This retrospective call-in right is not limited to the specified sectors under the NSI Act. Our client alert concerning the detailed mechanics of the new regime is available [here](#). In today's client alert, we identify certain amendments to the NSI Act which have been adopted since the publication of the draft bill in November 2020, as well as modest changes in the scope of the specified sectors to which the mandatory notification regime will apply.

Higher minimum threshold for mandatory pre-closing notifications

The key change between the November 2020 bill and the NSI Act is that the minimum stake which triggers a mandatory notification is 25%, rather than 15% as originally proposed by the UK Government. This threshold relates to the voting rights or shares acquired by the investor, as well as the ability of the investor to secure or prevent the passage of any class of resolution governing the affairs of the target business. (Other successive thresholds also exist at 50% and 75%.) Investments in businesses which carry on activities in the UK, or which supply goods or services to customers in the UK,

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fall within the scope of the mandatory notification regime, provided that their activities relate to one or more of the specified sectors under regulations expected to be adopted in autumn 2021.

Notification of investments in businesses which meet these criteria is mandatory, and completion of such investments needs to be suspended pending approval by the Secretary of State. A notifiable acquisition which completes without clearance is void under English law, and may lead to corporate and individual civil fines and criminal sanctions, including imprisonment.

Narrowed scope of activities which fall within mandatory regime

Alongside raising the minimum threshold in the mandatory notification regime to a 25% stake in the target business, the UK Government also appears likely to reduce the scope of the 17 specified sectors which fall within it. These sectors are not formally part of the NSI Act, but must be specified by regulations to be made under it by the Secretary of State in connection with the mandatory notification regime. For example, in relation to the tech sector, in March 2021 the UK Government proposed revised definitions of 'artificial intelligence', 'cryptographic authentication', and 'data infrastructure' which in each case reduced their scope. The proposed revisions followed the eight-week consultation process on the draft sector definitions which closed in January 2021.

Transparency measures

As regards the transparency of the new NSI regime, the UK Government also accepted amendments to the NSI Act which were proposed by the House of Lords and which relate to the information which must be included in the Secretary of State's annual report. For example, in addition to the numbers of mandatory and voluntary filings, call-in notices, and affected sectors, the Secretary of State must now also disclose the average number of working days from receipt of filings until the decision on them. These figures might prove useful in signalling to investors the range of possible timetables for the review.

Investor-friendly amendments which the UK Government rejected

However, the UK Government rejected a number of more far-reaching investor-friendly amendments which were proposed in Parliament. For example, in January 2021 the UK Government rejected an amendment proposed by the Foreign Affairs Committee to define 'national security', thereby limiting the scope of the 'call in' power – exercisable up to five years after the date of a non-notifiable investment – and reducing the risks for investors of disruptive post-closing interventions.

The UK Government also rejected an amendment proposed by the House of Lords to require the Secretary of State to publish summaries of the grounds of its decisions. Akin to the competition regime, such summaries might have offered greater legal certainty for investors. Similarly, the UK Government rejected amendments to extend oversight to

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Parliament's Intelligence and Security Committee,¹ which oversees British intelligence and security activities including MI5, MI6, and GCHQ.

Key considerations for investors

Potential transactions and investments currently under discussion or negotiation, to the extent not already assessed, will need to be considered under the new NSI regime as a priority. Adjustments to the scope of the new regime during the legislative procedure were modest, and leave intact the main features of the UK Government's original proposal. The Department for Business, Energy, and Industrial Strategy (**BEIS**) has already published a draft template for notifications under the NSI regime.² However, practical challenges stemming from the still wide scope of the specified sectors are already anticipated. BEIS has encouraged businesses to seek informal guidance.³ More formal guidance is anticipated from the UK Government before the mandatory regime enters into force later this year.

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¹ Intelligence and Security Committee of Parliament, 'How the Committee works', available [here](#).

² 'Draft Questions for a National Security and Investment Form', available [here](#).

³ See the NSI Regime: process for businesses factsheet dated 11 November 2020, available [here](#).