

## Practice and Precedents Editor's Notes

### *A Question of National Security for Property Transactions*

The National Security and Investment Act 2021 came into force on 4 January 2022 and established a new statutory regime allowing the government to scrutinise and intervene in certain transactions, including acquisitions of interests in land, in order to protect the UK's national security. The regime will be administered by the Department of Business, Energy and Industrial Strategy. Whilst most conveyancing transactions are unlikely to give rise to national security concerns, conveyancers must still be aware of the potential application of the new regime.

Certain transactions will be subject to mandatory notification requirements and completion will not be able to take place before they have been cleared. Such transactions may include the acquisition of a shareholding or voting rights in a company that owns land. There is also a wider range of transactions that may be called in for review by the Government, either before or after completion, if there is a reasonable suspicion that national security concerns may arise. These transactions may include the purchase of land which is, or is near to, a sensitive site, as well as the acquisition of a shareholding or voting rights in a company that owns land, which does not fall within the scope of the mandatory notification requirement, but which gives rise to concerns. The Government has published guidance in the "National Security and Investment Act 2021: Statement for the purposes of section 3"<sup>1</sup> on transactions which are likely to be called in.

Where a risk of call in is identified, it may be advisable to voluntarily notify the transaction in the interests of certainty. However, there will be nothing to prevent the parties completing the transaction before clearance is given, though completion will, however, be subject to the terms of any interim order imposed by the Government if it is decided that an in-depth investigation is required.

If the transaction is reviewed and national security concerns are identified, the Government will be able to impose conditions on the transaction, for example by controlling access to certain operational sites or works. As a last resort, the Government could prohibit or unwind the transaction.

The Government's power to call in transactions for review may be exercised retroactively for potentially up to five years from when the Act came into force in relation to any qualifying transaction completed between 12 November 2020 and 4 January 2022 which gives rise to national security concerns.

The Government has set up an online service which can be used to notify it of acquisitions.<sup>2</sup> Guidance has also been published to help an applicant provide the right information.<sup>3</sup>

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<sup>1</sup> <https://www.gov.uk/government/publications/national-security-and-investment-statement-about-exercise-of-the-call-in-power> [Accessed 22 January 2022].

<sup>2</sup> <https://nsi.beis.gov.uk> [Accessed 22 January 2022].

<sup>3</sup> <https://www.gov.uk/government/publications/national-security-and-investment-notification-service-mandatory-voluntary-and-retrospective-forms/guidance-on-completing-and-registering-a-notification-form> [Accessed 22 January 2022].

## **National Security**

The term ‘national security’ is not defined in the Act. However, the National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021<sup>4</sup> identify 17 sensitive areas of the economy which are considered more likely to pose a national security risk. These are:

- Advanced Materials
- Advanced Robotics
- Artificial Intelligence
- Civil Nuclear
- Communications
- Computing Hardware
- Critical Suppliers to Government
- Cryptographic Authentication
- Data Infrastructure
- Defence
- Energy
- Military and Dual-Use
- Quantum Technologies<sup>5</sup>
- Satellite and Space Technologies
- Suppliers to the Emergency Services
- Synthetic Biology<sup>6</sup>
- Transport

Guidance on notifiable acquisitions has been published.<sup>7</sup>

### **Acquisition of control over an entity which owns land**

Where a buyer acquires shares or voting rights in an entity which owns land, consideration will need to be given as to whether the mandatory notification requirements may be triggered. These requirements will be triggered if:

- the entity carries on activities in the UK of a specified description in one or more of the 17 sensitive areas of the economy identified in the National Security and Investment

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<sup>4</sup> National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021 (2021/1264).

<sup>5</sup> For example, quantum secure communication systems.

<sup>6</sup> This is a multidisciplinary area of research that seeks to create new biological parts, devices, and systems, or to redesign systems that are already found in nature.

<sup>7</sup> <https://www.gov.uk/government/publications/national-security-and-investment-act-guidance-on-notifiable-acquisitions/national-security-and-investment-act-guidance-on-notifiable-acquisitions> [Accessed 22 January 2022].

Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021<sup>8</sup>; and

- the buyer will gain control of the entity as a result of either:
  - the percentage of shares or voting rights that the buyer holds in the entity increasing from 25% or less to more than 25%, from 50% or less to more than 50% or from less than 75% to 50% or 75% thresholds; or
  - the acquisition of voting rights in the entity that (whether alone or together with other voting rights held by the buyer) enable the buyer to secure or prevent the passage of any class of resolution governing the affairs of the entity.<sup>9</sup>

In relation to the “Communications” mandatory notification category, the Government has stated in its Guidance<sup>10</sup> that:

“Entities which own or make available buildings that host telecommunications equipment, including on the roof of the building, are excluded from mandatory notification. The only exception to this is if the main purpose of that building is to host active telecommunications equipment, and where that active equipment is used by a PECN/S<sup>11</sup> with a UK turnover of at least £50 million. In addition, owners of residential properties or unrelated commercial properties which have active telecommunications equipment on their roofs, such as 5G small cells, are not in scope of mandatory notification, as the main purpose of those buildings is not to host active telecommunications equipment.”

Owners of land upon which a qualifying associated facility is located (whether that is active, passive or support infrastructure) are also not in scope of mandatory notification.

However, owners of land upon which a qualifying associated facility is located (whether that is active, passive or support infrastructure) will not be in scope of mandatory notification, as the specific purpose of these buildings is to host active telecommunications equipment. Exceptions to this include where the landowner is also carrying out other activities which are in scope of the regulations, such as owning or operating the telecommunications infrastructure on its land, which would mean it would be making available an associated facility or if they were also providing a PECN/S within the turnover threshold.

Where an acquisition of shares or voting rights in an entity which owns land falls outside the mandatory notification requirements, the buyer still should assess the risk of the transaction being called in for review by the Government and consider whether a voluntary notification should be made. The Government has the power to call in a transaction for review at any time up to 5 years after the transaction has completed. So, a voluntary notification would avoid the risk of a transaction later being challenged or unwound.

To what extent a transaction is likely to be called in, and therefore whether it is advisable to make a voluntary notification, is subject to the discretion of the Government. The “National

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<sup>8</sup> National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021 (2021/1264).

<sup>9</sup> National Security and Investment Act 2021, s.8.

<sup>10</sup> <https://www.gov.uk/government/publications/national-security-and-investment-act-guidance-on-notifiable-acquisitions/national-security-and-investment-act-guidance-on-notifiable-acquisitions> [Accessed 22 January 2022].

<sup>11</sup> A public electronic communications network or service.

Security and Investment Act 2021: Statement for the purposes of section 3”<sup>12</sup> identifies the following risk factors which the Government will take into account when considering whether or not to call in a transaction:

- Target risk – whether the target of the qualifying acquisition (the entity or asset being acquired) is being used, or could be used, in a way that raises a risk to national security;
- Acquirer risk - whether the acquirer has characteristics that suggest there is, or may be, a risk to national security from the acquirer having control of the target; and
- Control risk – whether the acquirer has characteristics that suggest there is, or may be, a risk to national security from the acquirer having control of the target.

The statement considers each of these risks in turn, and states that acquisitions in areas of the economy which are closely linked to the 17 sectors specified as requiring mandatory notification, but which are not subject to mandatory notification, could be more likely to be called in than those in other areas of the economy. Qualifying acquisitions which occur outside these areas of the economy are unlikely to be called in as national security risks are expected to occur less frequently in these areas.

### **Purchases of land**

Where land is being purchased as an asset, the mandatory notification requirement will not be triggered, irrespective of the sector in which the asset is being used. However, the Government’s call in power will still apply to the acquisition of control over land. The requisite degree of control over land will be acquired where the buyer gains the ability to use or direct the use of the land to a greater extent than before. This means that a buyer of land should consider the risk of the transaction being called in for review, and whether or not it should submit a voluntary notification.

The “National Security and Investment Act 2021: Statement for the purposes of section 3”<sup>13</sup> provides that

“Land is mainly expected to be an asset of national security interest where it is, or is proximate to, a sensitive site. Examples of such sensitive sites include critical national infrastructure sites or government buildings. However, the Secretary of State may also take into account the intended use of the land”<sup>14</sup>.

The statement also includes the following example:

“Company A has bought Building B located in the UK for residential use. Building B is a house adjacent to a sensitive military site. Company A is an overseas pharmaceutical company that is known to the UK Government with no evidence of ties to hostile activity in the UK.

The target risk is medium as there is a proximity risk as the target to a sensitive site. However, it is unlikely that owning the adjacent property for residential use could pose a risk to national security, given other security protections in place at the military site.

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<sup>12</sup> <https://www.gov.uk/government/publications/national-security-and-investment-statement-about-exercise-of-the-call-in-power> [Accessed 22 January 2022].

<sup>13</sup> <https://www.gov.uk/government/publications/national-security-and-investment-statement-about-exercise-of-the-call-in-power> [Accessed 22 January 2022].

<sup>14</sup> *Ibid* para 36.

The acquirer risk is low as there is no evidence to suggest that the acquirer, Company A, is linked to hostile activity, so the possibility of the target being used to threaten the UK's national security is low. Company A has also demonstrated that it intends to use the asset as a place of residence, which does not pose a national security risk.

As Company A has purchased the asset outright, enabling Company A to use or to control or direct Building B's use, this represents a higher level of control risk.

Nonetheless, this acquisition is unlikely to be called in because of the levels of target and acquirer risk.”

While this example gives some comfort, it still leaves it open to a risk of a call in in the case of, for example, the acquisition of buildings located near to the London headquarters of the UK's security services (MI5 or MI6), or next to military bases, depending on the assessment of the potential national security risk posed by the purchaser. It will therefore be important for a buyer to establish as part of its due diligence whether the land and buildings it is buying might be deemed to be proximate to sensitive sites, and if they are proximate, what kind of access or control they might give to or over such sites.

Unhelpfully the Government has not defined what is meant by “proximate”, nor has it published a list of sensitive sites. The searches which a buyer would usually carry out as part of its due diligence may not reveal whether the land and buildings are proximate to a sensitive site. A buyer may, therefore, have to consider whether to extend its due diligence to address this issue. By way of contrast, in the USA, the Committee on Foreign Investment in the United States<sup>15</sup> defines “close proximity” as “within one mile” of a relevant military installation or other facility of property of the US Government and offers an online tool which can be used to check whether land or buildings are proximate to a sensitive site.<sup>16</sup>

So, as part of a buyer's due diligence on the purchase of land and buildings, it is suggested that it would be prudent to make enquiries to see if the regime may potentially be engaged. This should include:

- considering the Government's likely assessment of the buyer's “acquirer risk”;
- ascertaining whether the land and buildings are proximate to a sensitive site; and
- if the land is proximate to a sensitive site, the level of access or control which the acquisition would give the buyer in respect of the sensitive site.

### **Call in timeframe**

The Government can call in for review any transaction covered by the Act (whether or not it has been notified) where there is a reasonable suspicion that it could give rise to a risk to national security. A call in notice may be issued at any time while the transaction is in progress

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<sup>15</sup> CFIUS is an interagency committee authorised to review certain transactions involving foreign investment in the United States and certain real estate transactions by foreign persons, in order to determine the effect of such transactions on the national security of the United States. See <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius> [Accessed 22 January 2022].

<sup>16</sup> Available at <https://mtgis-portal.geo.census.gov/arcgis/apps/webappviewer/index.html?id=0bb1d5751d76498181b4b531987ce263> [Accessed 22 January 2022].

or within six months of the Government becoming aware of a completed transaction, as long as this happens within five years of the transaction completing. This means that the government has the power to block acquisitions for up to 5 years after completion. The Government can impose conditions on the transaction or prohibit or unwind it.

### **Review and potential outcomes**

The Government has 30 working days after the transaction has been called in to determine whether to issue a final order imposing remedies or a final notification confirming no further action is to be taken. This period may be extended by the Government for a further 45 working days if it reasonably believes that a national security risk has arisen or would arise from the transaction, and it reasonably considers the extension is required to carry out further assessment. Extensions beyond 75 working days (the initial 30 day period plus the additional period of 45 working days) may be agreed between the buyer and the Government if the Government is satisfied that a national security risk has arisen or would arise from the transaction, and reasonably considers a further period is required to consider whether to make a final order or what it should contain.<sup>17</sup>

Before the end of the assessment period, the Government must either notify the recipient of the call in notice that no further action will be taken, or, where it is satisfied that a transaction has taken place or is in progress or contemplation, and that it has given rise to or would give rise to a national security risk, make a final order for the purpose of preventing, remedying or mitigating that risk.<sup>18</sup> A final order can only be made if the Government reasonably considers that the provisions of the order are necessary and proportionate for the permitted purposes. A final order will be in force for the period specified in or under it, or until it is revoked. If national security concerns are identified following an investigation, then the Government may decide to approve the transaction subject to conditions, for example controls on access to certain operational sites or works. As a last resort, the Government also has the power to block, and potentially unwind, the transaction.

Where an investigation is carried, an interim order may be imposed restricting what the parties can do with the relevant shareholding or voting rights or assets pending the conclusion of the investigation.<sup>19</sup> This could include preventing a buyer from using land or related assets or exercising voting rights. For transactions which have not yet completed at the time an interim order is imposed, the order may effectively prohibit completion, if this is deemed necessary to prevent “pre-emptive action” which could limit the ability of the Government to impose conditions on the transaction to address national security concerns, should these ultimately be required.

### **Sanctions for non-compliance**

There are potentially severe sanctions for non-compliance.<sup>20</sup> Where a transaction is subject to the mandatory notification obligation, completion prior to clearance will result in the transaction being deemed automatically void. In addition, non-compliance with the regime may result in fines of up to 5% of worldwide turnover or £10 million, whichever is the greater, and

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<sup>17</sup> National Security and Investment Act 2021, s.23.

<sup>18</sup> National Security and Investment Act 2021, s.26.

<sup>19</sup> National Security and Investment Act 2021, s.25.

<sup>20</sup> National Security and Investment Act 2021, ss.32-36.

imprisonment of individuals for up to five years, as well as director disqualification for up to 15 years.

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