

THE NATIONAL SECURITY INVESTMENT ACT 2021 AND ITS IMPLICATIONS FOR DISTRESSED INVESTMENTS AND RESTRUCTURING

The NSI Regime came into force on 4 January 2022. At its heart, the NSI Regime is a requirement to notify the UK government's Investment Security Unit ("ISU") where a party acquires 'control' of a Qualifying Entity operating in key sectors. The UK government also has the power to 'call-in' acquisitions for review. Acquiring parties must then wait for clearance before taking further action in relation to the relevant transaction.

What is a Notifiable Acquisition?

A **Notifiable Acquisition** is an acquisition where person gains control of a **Qualifying Entity** active in one of the **17 Key Sectors** by virtue of a **Notifiable Acquisition Trigger Event**.

What is an Other In-Scope Acquisition?

An **Other In-Scope Acquisition** is an acquisition where a person gains control of a **Qualifying Entity** or **Qualifying Asset** by virtue of an **In-Scope Acquisition Trigger Event**.

Qualifying Entity:

is an entity formed or incorporated in the UK, or any foreign entity which either: (i) carries on activities in the UK; or (ii) supplies goods or services to the UK.

Qualifying Assets are:

- 1 Land or tangible moveable property located in the UK; or
- 2 The following types of assets, where they are used in connection with activities carried on in the UK or in the supply of goods or services to the UK:
 - Land or tangible moveable property located outside the UK; or
 - Ideas, information or techniques which have commercial or other economic value

The 17 Key Sectors:



ADVANCED
MATERIALS



ADVANCED
ROBOTICS



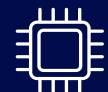
ARTIFICIAL
INTELLIGENCE



CIVIL
NUCLEAR



COMMUNICATIONS



COMPUTING
HARDWARE



CRITICAL SUPPLIERS
TO THE GOVERNMENT



CRYPTOGRAPHIC
AUTHENTICATION



ENERGY



DEFENCE



DATA
INFRASTRUCTURE



MILITARY AND
DUAL-USE



QUANTUM
TECHNOLOGIES



SATELLITE AND
SPACE TECHNOLOGY



SYNTHETIC
BIOLOGY



SUPPLIERS TO THE
EMERGENCY SERVICES



TRANSPORT

Trigger Events

Notifiable Acquisition Trigger Events

(i.e., trigger events in relation to Qualifying Entities in one of the 17 Key Sectors)

- 1 Party acquires more than 25%, 50% or 75% of the shares of a Qualifying Entity;
- 2 Party acquires more than 25%, 50% or 75% of the voting rights of a Qualifying Entity; or
- 3 Party acquires voting rights (alone or with others) that enable it to secure or prevent the passage of any class of resolution governing the affairs of the Qualifying Entity.

In-Scope Acquisition Trigger Events

(i.e., trigger events in relation to Qualifying Entities not in one of the 17 Key Sectors or Qualifying Assets)

- 1 Party acquires more than 25%, 50% or 75% of the shares of a Qualifying Entity;
- 2 Party acquires more than 25%, 50% or 75% of the voting rights of a Qualifying Entity;
- 3 Party acquires voting rights (alone or with others) that enable it to secure or prevent the passage of any class of resolution governing the affairs of the Qualifying Entity;
- 4 Party acquires the ability to materially influence the policy of the Qualifying Entity; or
- 5 Party acquires a right or interest enabling it to use or control (or use or control to a greater extent) a Qualifying Asset.

When is a Mandatory Notification to the ISU required?

Before the **Notifiable Acquisition** takes place, Mandatory Notification by the buyer is required.

Failure to notify:

- Transaction is automatically void; and
- Possible criminal and civil penalties – fines of up to 5% of global turnover or £10 million (whichever is higher) and/or 5 years imprisonment.

When may a Voluntary Notification to the ISU be recommended?

Before or after the occurrence of **Other In-Scope Acquisitions**, Voluntary Notification by the buyer or seller is required.

Where the ISU approves a voluntarily notified transaction, there is no further risk of the transaction being called-in for review.



To what acquisitions does the UK government's call-in power apply?

- Applicable to **Notifiable Acquisitions** and **Other In-Scope Acquisitions**.
- It is exercisable for up to 5 years after a Trigger Event or for 6 months after the UK Government has become aware of a **Notifiable Acquisition** or an **Other In-Scope Acquisition**.
- Acquisitions completed on or after 12 November 2020 may be called-in.



What is the timing for review?

- Preliminary screening of a transaction may take 30 working days from acceptance of the notification. The ISU will decide whether to approve the transaction or call it in for further investigation.
- After a call-in notice (following Mandatory or Voluntary Notification or *ex officio*) investigations may take 30 working days (which may be extended by up to 45 working days if the Secretary of State reasonably requires the time, or longer with the agreement of the party entering into the transaction).



What are the possible outcomes from the ISU?

- During its investigation, the ISU may issue an interim order to prevent further dealing with the Qualifying Entity or Asset.
- After its investigation, the ISU will issue either a no further action notice or a final order requiring remedies to address national security concerns.



For Lenders, Security Agents, and Insolvency Practitioners Lenders and Security Agents

- Where notification is required, lenders and security agents should seek to obtain approval from the ISU before taking enforcement action under terms of any security.
- A Mandatory Notification for a **Notifiable Acquisition** may be required where a borrower has granted security over shares of a Qualifying Entity, which operates in one of the 17 Key Sectors and the security becomes enforceable.
- A Voluntary Notification may be required where a borrower has granted security over a Qualifying Asset and the enforcement of security would entail the transfer of a right to use or control (or to use or control to a greater extent) of the Qualifying Asset.
- A voluntary notification may be required where a borrower has granted security over shares of a Qualifying Entity that does not operate in one of the 17 Key Sectors and the security becomes enforceable.



Insolvency Practitioners

- Appointment of an administrator: will not trigger the application of the NSI Regime, as there is an express carve-out in the Act.
- Appointment of liquidator or receiver: may trigger the application of the NSI Regime, as there is no express carve-out in the Act.
- The Act does not contain a carve-out for the sale of a business or asset in an insolvency process. Insolvency officeholder must comply with the notification requirements.
- A Mandatory Notification would likely be required where there is a:
 - i. share sale of a Qualifying Entity operating in one of the 17 Key Sectors; or
 - ii. debt-for-equity swap in relation to a Qualifying Entity operating in one of the 17 Key Sectors, depending on the percentage of shares or voting rights that are issued.
- An asset sale (*i.e.*, the sale of a Qualifying Asset) will not trigger a Mandatory Notification but the applicability of a Voluntary Notification should be considered if the officeholder or receiver is seeking to sell Qualifying Assets.