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National Security and Investment Act 2021, Part 2 – Notification and Intervention Provisions

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In this month's edition of *REF News and Views* we are going to continue our series on the National Security and Investment Act 2021 (the "NSI Act") and discuss its notification and intervention provisions.

To recap, in **last month's edition** of *REF News and Views* we provided some background on the NSI Act and introduced some of its key features. In particular, the NSI Act establishes a mandatory notification requirement where a change of control occurs in relation to an entity with "specified activities" within any of the 17 designated sectors (which include Artificial Intelligence, Defence and Energy) (the "sensitive sectors").

Background

The NSI Act established a hybrid regime falling into two parts:

- a "mandatory regime": requires a person that acquires a specified level of control over a certain type of entity (a "qualifying entity") that undertakes particular activities in the UK in one of the sensitive sectors to notify, and obtain approval from, before completing their acquisition; and
- a "voluntary regime": allows parties to submit transactions for approval – and also allows deals to be called-in retrospectively even if not voluntarily notified.

Notifications are made to the Investment Security Unit (the "ISU"), which sits within the Department for Business, Energy and Industrial Strategy (the "BEIS"). The ISU operates the NSI Act regime (although this is performed in the name of the Secretary of State for Business, Energy and Industrial Strategy (the "Secretary of State")).

Real estate transactions or transactions involving real estate could fall within either the mandatory regime or the voluntary regime, depending on the specific circumstances of the transaction. If there is a trigger event in relation to a property SPV qualifying entity and that SPV carries on a particular activity in one of sensitive sectors in the UK, this will fall within the mandatory regime and require notification. We will explore this in further detail later in the series.

Notification and intervention framework

Mandatory notification

The test for a mandatory notification is broadly in two parts: (a) there needs to be a trigger event; and (b) the transaction needs to involve a qualifying entity.

The trigger events for mandatory notification are where a person gains control in a qualifying entity whereby:

- the percentage of the persons shareholding or voting rights held increases:

- from 25% or less to more than 25%;
- from 50% or less to 50% or more; or
- from less than 75% to 75% or more; or

- the person acquires voting rights in a qualifying entity and, as a result, is able to secure or prevent the passage of any class of resolution governing the affairs of the qualifying entity.

Voluntary notification

Whether or not a transaction involves a target entity in a sensitive sector, there are trigger events which apply under the voluntary regime (which do not require mandatory notification).

Such events are as follows:

- the acquisition of material influence over a qualifying entity's policy; or
- the acquisition of a right or interest in, or in relation to, an asset of a certain type (a "qualifying asset") providing the ability to use or control the asset (either entirely or to a greater extent). A qualifying asset can include any tangible property, land, or intellectual property. Foreign entities and assets can be caught by the NSI Act regime if they have a connection with activities carried out in the UK, or the supply of goods or services to persons in the UK.

In these cases, parties need to consider whether a voluntary notification is advisable.

Connection with the UK

To fall within the NSI Act regime, a target entity or asset must be from, in or have a sufficient connection with the UK:

- a qualifying entity must carry on activities in the UK or supply goods or services to people in the UK; and
- a qualifying asset must be used in connection with activities carried on in the UK or the supply of goods or services to people in the UK.

The BEIS has published specific **guidance** on when target entities and assets outside the UK are within the scope of the NSI Act regime. It should be noted that the BEIS takes a relatively broad approach when determining this scope (assessments will also be fact-specific and may not be straightforward).

Call-in power

The Secretary of State has the power to produce what is known as a "call-in" notice if:

- it reasonably suspects that a trigger event has taken place in relation to a qualifying entity or qualifying asset; or
- if there are arrangements in contemplation, which, if affirmed, will result in a trigger event taking place in relation to a qualifying entity or qualifying asset.

If a call-in notice is served by the Secretary of State then an initial 30 working days' assessment period is triggered during which the Secretary of State will investigate the transaction.

A transaction can be called in up to six months after the Secretary of State becomes aware of it (and up to five years after completion).

Prior to an acquisition or investment, an investor can therefore elect to make a voluntary notification to the ISU.

Closing thoughts

It is worth noting that, for real estate deals, the most important issue is whether the property is "in proximity to a sensitive site" (such as critical national infrastructure sites or government buildings or because of the intended use of the land). Assets may be subject to the regime where they are closely linked to the activities of the sensitive sectors or in other areas that are closely linked to those sectors. If so, a transaction can fall within the voluntary regime, but there is little guidance as to what comprises a sensitive site. Despite this, government guidance suggests that it rarely expects to intervene in asset transactions.

To the extent that any transaction involves a qualified entity or qualifying asset, parties and their counsel should factor in the impact of the notification requirements under the NSI Act on the deal timeline and transaction execution.

In next month's edition of *REF News and Views* we will explore the sanctions under the NSI Act for non-compliance.