



Set for Summer?

June 29, 2023

National Security and Investment Act 2021, Part 3 – Sanctions for Non-Compliance

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 explore the sanctions under the NSI Act for non-compliance.

To recap, in last month's edition we discussed the notification and intervention provisions contained within the NSA Act. In particular, the NSI Act establishes a hybrid regime falling into two parts:

- a "mandatory regime," which 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 before completing their acquisition; and
- a "voluntary regime," which allows parties to submit transactions for approval, and also allows deals to be called-in retrospectively, even if not voluntarily notified.

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. As such, real estate investors should take note of the far-reaching sanctions and enforcement provisions contained in the NSA Act designed to ensure compliance.

What Are the Sanctions for Non-Compliance?

Call-In Power

As discussed last month, the UK's Secretary of State for Business, Energy and Industrial Strategy (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 of the transaction).

As a result of this risk, prior to an acquisition an investor may wish to make a voluntary notification to the Investment Security Unit of the Department for Business, Energy and Industrial Strategy. As noted above, this could include the acquisition of real estate assets.

Enforcement

Further, the Secretary of State has the power under the NSI Act to impose remedies to address any national security concerns or risks.

The NSI Act provides for:

- a transaction requiring mandatory notification to be void if completed without approval;

- the imposition of civil fines of up to the higher of £10 million or 5% of worldwide turnover for non-compliance, including competing a notifiable transaction without approval. This can include a “daily rate” fine (of up to £200,000 or 0.1% of turnover per day) to incentivise rapid compliance;
- civil enforcement, including injunctions to enforce compliance; and
- criminal sanctions for non-compliance (including completion of a notifiable transaction without approval, non-compliance with an order, or non-compliance with a requirement to provide information), with penalties including fines, imprisonment and disqualification as a director.

The statutory basis for offences under NSI Act can be found in [Part 3, Section 32-36 of the NSI Act](#). Individual officers of a company may be guilty of an offence, as well as the corporate body itself.

Criminal Proceedings

The Secretary of State has the discretion to refer suspected offences under the NSI Act to the police for possible criminal investigation. This will usually be considered only in the most serious matters. Once a matter is referred to the police, all decisions in respect of investigation, charging and prosecution rest with the police and the Crown Prosecution Service.

Overview of Orders Published To Date

The UK Government has published [Guidance](#) on how to comply with the NSI Act and what can be expected if an individual or firm is subject to orders and notices.

Since the NSI Act came into force in January 2022, the UK Government has reviewed more than 800 transactions for possible national security concerns. The Secretary of State has [prohibited five transactions](#), four of which involve Chinese investors and one involves Russian investment. At least two of the prohibitions (the acquisition of Newport Wafer Fab by Nexperia BV and the acquisition of Upp Corporation Ltd by L1T FM Holdings UK Ltd.) are reportedly under appeal.

Closing Thoughts

Whilst the vast majority of transactions reviewed under the new NSI Act regime are expected to be cleared without needing remedies, the new regime is far-reaching with serious consequences for non-compliance. Parties to transactions should keep this in mind and take note that a much wider national security review would be required than under the Enterprise Act regime.

In our next month's edition of *REF News and Views* we will discuss the NSI Act's impact on the real estate finance market.