

# Clients & Friends Memo

## The UK's National Security & Investment Act

12 May 2021

The UK's newly enacted [National Security and Investment Act 2021](#) (the "**Act**") introduces a broad regime enabling the Government to intervene in M&A transactions on the grounds of national security. The Act will come into force at a date towards the end of 2021 after specific details are fleshed out through statutory instrument. Once in force, it will apply to transactions concluded on or after 12 November 2020.

### 1. Mandatory Notification

Acquisitions of "control" (meaning 25%, 50% or 75% of an entity's shares or votes) of entities operating within any of 17 sensitive sectors will be subject to mandatory notification. These sensitive sectors will be further defined through a statutory instrument and include advanced materials or robotics, AI, computing hardware, cryptographic authentication, energy and transport. Transactions within this group that close without approval from the Secretary of State are void.

The Act provides a process for retrospective validation of transactions that are void for failure to comply with this procedure. This will be of interest to those acquirers that have completed acquisitions between 12 November 2020 and the date the Act becomes effective.

### 2. Call-In Power and Voluntary Notification

Outside of the transactions subject to mandatory notification, the Secretary of State will also have the ability to review any transaction before or after closing on a reasonable suspicion that it "may give rise to a risk to national security" and provided it involves the acquisition of "control" over a "qualifying" entity or asset, with both terms very broadly defined.

This "call in" power is exercisable at any time within 6 months of the Secretary becoming aware of the transaction, provided it is within 5 years of the acquisition.

To forestall this, or at least set the 6 month clock running, parties may voluntarily make a notification.

### 3. Review Timetable

The Act lays out the procedure for notification and review, with each stage requiring notice from the Secretary of State before the next stage will commence. The Act has the potential to significantly lengthen the deal timeline for transactions falling within the sensitive sectors:

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- Once a mandatory or voluntary notification is accepted as complete, the Secretary will have 30 working days to either give a call-in notice for the transaction (triggering an assessment period) or confirm that there will be no further action in respect of that transaction.
- If the Secretary gives a call-in notice (either on its own initiative or following its initial review of a notification), an assessment period commences. The assessment period is initially 30 working days, which can be extended first by the Secretary of State (alone) for an additional 45 working day period and then further by agreement between the Secretary of State and the acquirer. Each of these periods is extended automatically for each day on which an attendance or information notice has been given but not yet complied with to the Secretary's satisfaction.
- At the end of the assessment period, the Secretary is required to either (i) give a final notification that no further action will be taken or (ii) make a final order as to the remedy it expects.

#### **4. Territorial Scope**

The Act applies to acquisitions of interests in entities formed in the UK and assets situated here, but also those formed or situated outside the UK if they carry on (or are used in connection with the carrying on of) activities in the UK or supply goods or services to persons in the UK. Nor is its application limited to acquisitions by foreigners – as drafted, the Act covers acquisitions by any acquirer, without reference to their nationality. While the Act provides for exemptions for certain types of acquirers to be created by statutory instrument, the initial set of statutory instruments is not expected to provide any acquirer-specific exemptions, although the draft policy statement issued by the Government indicates “acquirer risk” will take into account the entity's affiliations to hostile parties, rather than the existence of a relationship with foreign states in principle, or their nationality.

#### **5. Remedies**

An automatic consequence of failing to gain approval for a mandatorily notifiable transaction is that the transaction will be void. In addition, the Secretary of State will have broad powers to make orders, both on an interim basis and on conclusion of any call-in review, specifying actions the persons must take or not take in connection with the transaction. Breaches of the mandatory notification provisions, or the Secretary of States' order, can result in up to 5 years imprisonment and fines up to the higher of £10 million and 5% of the total value of the worldwide turnover of the infringing business, including any business they own or control.

#### **6. Conclusion**

This Act represents a significant new consideration to be factored into the timing and completion risk analysis of current and new investments in any sensitive business with a UK nexus. A good deal of detail still remains to be provided through statutory instrument before this Act becomes effective towards the end of the year, including the form and content required for mandatory and voluntary notifications, as well as for applications for retrospective validations of deals already closed. In the meantime, parties to the transactions potentially affected by the new rules may seek informal discussions with the Government, which has (perhaps optimistically) indicated it does not expect “many” transactions to be affected by its new national security call-in power.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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