



# NATIONAL SECURITY AND INVESTMENT BILL

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# NATIONAL SECURITY AND INVESTMENT BILL

ON 11 NOVEMBER 2020 THE UK GOVERNMENT PUBLISHED ITS NATIONAL SECURITY AND INVESTMENT BILL. IF THE BILL IS ENACTED AND COMES INTO FORCE IN SUBSTANTIALLY ITS CURRENT FORM (WHICH SEEMS VERY LIKELY), IT WILL PROVIDE THE GOVERNMENT WITH WIDE-RANGING POWERS TO INTERVENE IN TRANSACTIONS ON NATIONAL SECURITY GROUNDS AND, IN RELATION TO CERTAIN KEY SECTORS, WILL REQUIRE MANDATORY PRE-CLEARANCE.

The Bill reflects the Government White Paper published in July 2018 with some significant changes; in particular, the mandatory notification regime for transactions in certain sectors.

The Government's intervention powers will apply retrospectively to transactions which complete after 11 November 2020, although the mandatory notification/clearance regime will apply only after the bill comes into force (the date for which is not yet known).

## OVERVIEW

The Bill gives the Secretary of State for Business, Energy and Industrial Strategy powers to screen investments and to address any national security risks they involve.

The proposed regime will require mandatory notifications of certain transactions in certain sectors. However, transactions outside these sectors may still be subject to "call-in" by the Secretary of State on national security grounds, and therefore the Bill also allows for voluntary notifications of transactions to provide acquirers of entities and assets with some certainty.

## TRIGGER EVENTS

The Government will be able to "call in" for review any transaction (whether or not notified) which gives rise to any of the following "Trigger Events":

1. the acquisition of more than 25% of the votes or shares in a qualifying entity;
2. the acquisition of more than 50% of the votes or shares in a qualifying entity;

3. the acquisition of 75% or more of the votes or shares in a qualifying entity;

4. the acquisition of voting rights that enable or prevent the passage of any class of resolution governing the affairs of a qualifying entity;

5. the acquisition of "material influence" over a qualifying entity's policy;

6. the acquisition of a right or interest in, or in relation to, a qualifying asset providing the ability to:

- use the asset, or use it to a greater extent than prior to the acquisition; or
- direct or control how the asset is used, or direct or control how the asset is used to a greater extent than prior to the acquisition.

These Trigger Events apply only to a "qualifying entity" (any entity that is not an individual) or a "qualifying asset" (land; tangible moveable property; or ideas, information or techniques which have industrial, commercial or other economic value), in each case subject to the UK nexus test noted below.

The regime will apply to transactions involving both UK and non-UK entities and assets. However, non-UK entities or assets will be caught only where the non-UK entities carry on activities in the UK or supply goods/services in the UK, or the non-UK assets are used in connection with such activities. The Government has also indicated that mandatory notification obligations will apply only where there is a more direct nexus to the UK, although it has not yet published further details.

The new regime will not be limited to transactions involving any particular area of the economy. However, mandatory notification obligations will be limited only to transactions in certain designated key sectors, and the Secretary of State has indicated that the call-in power is likely to be used to conduct a detailed national security assessment of notified or non-notified transactions only where certain risk factors are present (see further overleaf).

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## MANDATORY NOTIFICATIONS

An acquirer must notify and receive clearance for any Trigger Event falling within paragraph 1 to 4 above in relation to an entity falling within specific “**Key Sectors**” prior to completion. In addition, the acquisition of 15% or more of the votes or shares in such an entity must be notified so that the Secretary of State can assess whether the Trigger Event listed in paragraph 5 applies.

This mandatory clearance regime will not apply until the legislation has been enacted and come into force; i.e., there will be no retrospective notification obligation on transactions where a Trigger Event has completed prior to that time. However, these transactions will still be subject to the Government’s call-in powers which apply retrospectively from 12 November 2020. Once the legislation comes into force and the mandatory notification obligations apply, if an acquirer fails to notify a transaction the Government can apply its call-in powers retrospectively without time limit.

The Key Sectors will be set out in detail in secondary legislation which has been published in draft. The following 17 sectors are specified in the draft legislation:

1. Advanced Materials
2. Advanced Robotics
3. Artificial Intelligence
4. Civil Nuclear
5. Communications
6. Computing Hardware
7. Critical Suppliers to Government
8. Critical Suppliers to the Emergency Services
9. Cryptographic Authentication
10. Data Infrastructure
11. Defence
12. Energy

13. Engineering Biology
14. Military and Dual Use
15. Quantum Technologies
16. Satellite and Space Technologies
17. Transport

The Key Sectors are further specified within the broad categories above. For example, “Transport” extends only to major ports and harbours (presently there are 51 major ports falling within the draft legislation), larger airports and air traffic control services. The Government is consulting on the definition of these key sectors – the consultation will close on 6 January 2021.

Completing a transaction which is subject to mandatory notification before clearance is given will carry both civil penalties (up to the higher of £10m and 5% of worldwide turnover) and criminal penalties (an unlimited fine and up to five years imprisonment). Any such transaction will be void.

## RISK FACTORS

Irrespective of whether a transaction is subject to mandatory notification, if a transaction gives rise to one or more of the trigger events, the Secretary of State can exercise call-in powers to conduct a national security assessment if the Secretary of State has a reasonable suspicion that the trigger event may pose a risk to national security. In the context of exercising this power, the Secretary of State must have regard to a statutory statement of policy intent (the “**Statutory Statement**”), which will set out three risk factors:

- the *target risk* – the nature of the target and whether it is in an area of the economy where the government considers risks more likely to arise;
- the *trigger event risk* – the type and level of control being acquired and how this could be used in practice; and
- the *acquirer risk* – the extent to which the acquirer raises national security concerns.

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In relation to *target risk*, the draft Statutory Statement describes those business sectors which are more likely to give rise to national security concerns, dividing the economy into three broad areas:

- core areas – the headline sectors falling within the “Key Sectors”;
- core activities – specific activities to be identified in secondary legislation where risks are most likely to arise, expected to be primarily within the core areas noted above; and
- the wider economy, where the Government expects transactions to be called in only exceptionally.

In relation to *trigger event risk*, examples are given of events which may allow the acquirer the ability to corrupt processes or systems, to have unauthorised access to sensitive information or to exploit an investment to influence the UK. Acquisitions of further control over assets may also be caught if they increase the acquirer’s practical ability to use or control an asset.

The *acquirer risk* is the most difficult risk for transaction parties to assess. The Statutory Statement states that parties are expected to do due diligence and notify the Secretary of State where they have concerns, but recognises that due diligence will not necessarily capture national security concerns, and that detailed assessments will be the responsibility of the Secretary of State. Factors that will be considered include:

- those in ultimate control of the acquiring entity;
- the track record of those people in relation to other acquisitions or holdings;
- whether the acquirer is in control of other entities within a sector or owns significant holdings within a core area, as this increases their potential leverage; and
- any relevant criminal offences or known affiliations of any parties directly involved in the transaction.

## CLEARANCE PROCESS

The proposed regime will allow transaction parties to make a voluntary clearance application, and as noted above will require pre-clearance for transactions within the Key Sectors. In the absence of such an application, the Government may nevertheless decide to call in a transaction up to six months after the Secretary of State becomes aware of the transaction, provided the trigger event took place less than five years ago. (The five-year limit does not apply where the transaction was subject to a mandatory notification obligation.)

Initially, the Government will have 30 working days following acceptance of a complete notification in which to decide whether to exercise its call-in power. If it does so, the Secretary of State will undertake a national security assessment, with an initial review period of 30 working days extendable by up to an additional 45 working days (or longer if agreed between the parties). The Government will be able to “pause the clock” while information gathering requests are fulfilled.

## REMEDIES

A wide range of remedies will be available to the Secretary of State in relation to a transaction, focusing on access to sensitive sites, access to confidential information, supply chains, intellectual property transfer, compliance, monitoring and personnel. The legislation will also provide for interim remedies and the power to block a transaction. Remedies will be imposed by an order and enforceable through sanctions; voluntary commitments will not be accepted. Any remedy will need to meet a specific legal test; in particular, the Secretary of State may only make a final order in relation to a transaction if the Secretary of State:

- is satisfied, on the balance of probabilities, that the trigger event poses, or would pose, a national security risk; and
- reasonably considers that the provisions of the order are necessary and proportionate for the purpose of preventing, remedying or mitigating the risk.

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## NEXT STEPS

The Bill has now commenced its passage through Parliament where it will receive detailed scrutiny from both Houses of Parliament. The Government has not indicated when legislation might come into force, but it seems likely to be in the first half of 2021.

The Government has set up an e-mail helpline on which businesses may contact the relevant Government team to seek advice as to what to expect with regards to a Trigger Event.

## FOR MORE INFORMATION

Our Corporate team is available to discuss any of these issues with you and answer any specific questions you may have. If you would like more information about the topics raised in this briefing, please speak to your regular contact at Weil or to any of the authors listed below:



Ian Hamilton

+44 20 7903 1534

[ian.hamilton@weil.com](mailto:ian.hamilton@weil.com)



Neil Rigby

+44 20 7903 1277

[neil.rigby@weil.com](mailto:neil.rigby@weil.com)

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