

# Global Rules on Foreign Direct Investment

## United Kingdom

The UK introduced a new more extensive national security regime in 2022 when the National Security and Investment Act 2021 came into force on January 4, 2022. This replaced the UK's previous national security regime under which "relevant merger situations" subject to competition review by the Competition and Markets Authority (CMA) could also be reviewed for national security concerns.

A much greater number of transactions are being reviewed for national security concerns under the new regime given this captures a broader range of types of transactions than the previous regime, and includes a new mandatory notification requirement for certain transactions. Relevant transactions that completed on or after November 12, 2020 can also be called-in for a retrospective review.

### New national security regime

Under the new regime, certain acquisitions of entities active in 17 "sensitive" sectors require mandatory notification and clearance before being implemented. Other types of transactions (including acquisitions of assets and IP) are subject to voluntary notification and can be called-in for review if not notified. The Investment Security Unit (ISU) within the Cabinet Office operates the new regime, although the Chancellor of the Duchy of Lancaster/Secretary of State in the Cabinet Office is the ultimate decision-maker as to whether a transaction raises substantive concerns.<sup>1</sup>

### Notification requirements

Mandatory notification is required for certain "trigger events" – the acquisition of more than 25 percent, more than 50 percent, or 75 percent or more of voting rights or shares in a qualifying entity active in any of 17 specified sectors, or the acquisition of voting rights enabling or preventing the passage of any class of resolution governing the affairs of such an entity. The 17 sectors include a significant focus on technology and innovation (e.g. advanced robotics and quantum technologies), as well as

obvious sectors such as defence, energy and transport.

Acquisitions of the above shareholdings or voting rights may be voluntarily notified if the qualifying entity is not active in one of the 17 sectors. Other trigger events subject to voluntary notification are the acquisition of material influence over a qualifying entity (regardless of the sector in which it is active) or the acquisition of a right or interest in, or in relation to, a qualifying asset (e.g. land, ideas, IP, algorithms) providing the ability to use or control the asset (either entirely or to a greater extent). Transactions within the voluntary notification regime can be called-in for review even if not notified, although certain time limits apply (see below). Parties may choose to voluntarily notify where they consider there is a degree of sensitivity, and to benefit from the legal certainty of an approval.

### Review procedures

Notified transactions are subject to an initial assessment lasting up to 30 working days, and then either cleared or called-in for a full national security assessment. A full assessment takes another 30 working days, extendable by a further 45 working

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<sup>1</sup> The Secretary of State is the ultimate decision-maker on any NSI review, although the ISU operates the NSI regime on a day-to-day basis. During the first year of the regime, the ISU was within the Department for Business, Energy and Industrial Strategy (BEIS) and the Business Secretary was the relevant Secretary of State. However, on 7 February

2023, it was announced that BEIS would be split into a number of different departments, with the ISU moving to the Cabinet Office and the Chancellor of the Duchy of Lancaster/Secretary of State in the Cabinet Office replacing the Business Secretary as the relevant Secretary of State for the NSI regime.

days and any additional period the parties agree. Transactions not notified but nonetheless called-in for review proceed straight to a full assessment. Problematic transactions may be subject to conditions, or blocked as a last resort. The substantive assessment focuses on three risk factors: (a) “target risk” (whether use of the target entity or asset may pose a risk to national security); (b) “acquirer risk” (whether the acquirer’s characteristics suggest a risk to national security from them having control of the target); and (c) “control risk” (whether the amount of control being acquired creates a risk to national security). There is limited guidance on how these risk factors are considered.

There are also significant sanctions for non-compliance with the new regime, including turnover-based fines and criminal liability. Transactions that require mandatory notification and are completed without approval are automatically void (although it is possible to apply for retrospective validation).

#### **Retrospective call-in**

Although the new regime began on January 4, 2022, trigger events between November 12, 2020 (the day after the Bill was published which became the National Security and Investment Act) and January 3, 2022 may be called-in for review. However, if the Secretary of State became aware of the trigger event before January 4, 2022, the deadline for call-in has now passed (as any call-in needed to be within the first six months of the regime). For other trigger events before January 4, 2022 (i.e. where the Secretary of State did not become aware before that date), any call-in must be within six months of when the Secretary of State becomes aware of the trigger event, subject to a final deadline of five years from when the new regime commenced.

For trigger events that take place after January 4, 2022 and are not notified, the deadline for call-in is six months from when the Secretary of State becomes aware of the trigger event. If the trigger event is within the voluntary notification regime, any such call-in is also subject to a final deadline of five years from when the trigger event occurred. However, the five-year deadline does not apply if a mandatory notification was required.

#### **Other public interest reviews**

The UK’s previous national security regime was set out in the Enterprise Act 2002, under which fewer than 20 transactions were reviewed or notified for review on national security grounds. Five of those reviews started in 2021, indicating the increased sensitivity in this area (as evidenced by the new regime), despite historically low levels of reviews. Although the previous national security provisions have now been removed from the Enterprise Act, reviews on other “public interest” (media plurality, financial stability or capability to combat or mitigate public health emergencies) or “special public interest” (certain transactions in the newspaper or broadcasting sectors) grounds remain possible under the UK merger control regime set out in the Enterprise Act. In public interest cases, the CMA conducts the review and is responsible for the competition assessment, but the relevant Secretary of State decides whether the public interest factors require an in-depth (Phase 2) review and/or remedies. Special public interest cases are similar but there is no competition assessment.

The ability to assess whether a transaction threatens the UK’s ability to combat or mitigate a public health emergency, and possibly remedy or even block the deal if there are serious concerns, is a relatively new public interest ground. This ground became effective from June 23, 2020 (in light of the COVID-19 pandemic), and reflects the UK Government’s concern that its ability to deal with a public health emergency may be undermined if businesses with critical capabilities become subject to foreign control. Examples included vaccine research companies, personal protective equipment manufacturers, internet service providers and food supply chain companies.

#### **Comment**

The new national security regime gives the UK Government much greater visibility over transactions raising potential concerns. BEIS predicted that around 1,000 to 1,830 transactions will be notified each year, with initial data showing that 222 notifications were submitted in the first three months of 2022. The vast majority of these have raised no concerns at all, but will have provided the UK Government with a wealth of data on transactions across industries.

That said, the new standalone regime is showing itself to be more interventionist than had been the case under the previous national security regime. Five transactions were prohibited during the first 12 months of the regime with another nine transactions cleared with remedies. As such, the new regime may deter some buyers from investing in sensitive sectors in the UK.

*For further information on the National Security and Investment Act, including a decision tree to help identify transactions falling within the new regime, see [here](#). To learn more about the first year of the regime and emerging trends, see [here](#).*

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