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D-day announced – UK's new National Security and Investment Act regime to begin on 4 January 2022

Almost three months after the National Security and Investment Act 2021 ("**NSIA**") was formally passed into law, the Department for Business, Energy & Industrial Strategy ("**BEIS**") announced on 20 July 2021 that the new screening regime under the NSIA would officially begin on 4 January 2022 ("**Commencement Date**").[1] Whilst it has been clear from the outset that the NSIA will have retrospective application to any deals which closed after 12 November 2020 – which has meant that parties have already begun to factor in the NSIA to their deal-planning since that date – the confirmation of the Commencement Date will mean that still further steps will need to be taken to ensure that all necessary analysis under the NSIA is factored into ongoing and contemplated transactions.

Along with the Commencement Date announcement, BEIS has also published a raft of accompanying guidance documents which are intended to clarify lingering ambiguities relating to the scope of the NSIA and how the regime will operate. Similarly, a new consultation document has also been published regarding the use of BEIS' discretionary "call-in" power ("**Consultation**") and draft legislation has been published pertaining to the key sectors that will comprise the mandatory notification regime.[2]

This briefing will explore these new developments and set out the key takeaways from each one.

Consultation on the "call-in" power

As we have previously reported, the NSIA regime will consist of a hybrid mandatory and voluntary notification system. Relevant to both regimes is BEIS' discretionary power to "call-in" deals for review. This discretionary power operates slightly differently for each regime:

- If the mandatory regime applies to a deal, parties are of course required to make a filing to BEIS. The issue of the "call-in" power in this context is whether, upon receipt of such filing, BEIS will decide that the deal merits further review (i.e. it cannot be cleared upfront) and "calls the transaction in" for a more detailed assessment.

- If the voluntary regime applies, parties can either choose to make a filing of their own volition – (in which case, once such filing is received, the "call-in" power works on the same basis as the mandatory regime) – or, alternatively, if the parties decide not to make a filing (as is their prerogative in these instances) the issue then becomes a question as to whether BEIS will, upon learning that such a deal has taken place through other means,[3] decide that it may raise national security concerns and issue a "call-in" notice which will require the parties to whom it is addressed to make a filing.

It is likely that this latter scenario will be of most interest to parties. That is, the question as to how likely it is that BEIS will "call-in" a deal for review if the voluntary regime applies and the parties decide not to make a filing.

BEIS has attempted to answer this question at the general level through the publication of a revised statement which sets out the factors it will consider in the exercise of its discretionary "call-in" power ("**Statement**").[4] A previous version of the Statement

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[1] The announcement can be viewed at: New and improved National Security and Investment Act set to be up and running - GOV.UK (www.gov.uk)

[2] Department for Business, Energy & Industrial Strategy. *National Security and Investment Act 2021: consultation on the statement for the purposes of section 3.* 20 July 2021. Available at: National Security and Investment Act 2021: consultation on the statement for the purposes of section 3 (publishing.service.gov.uk)

[3] For instance, it is likely that BEIS will, like the Competition & Markets Authority ("**CMA**"), have a market intelligence team who will monitor deal announcements in the press to ensure no deals slip through the net that might be of interest under the NSIA. BEIS is also likely to liaise with other regulators (like the CMA) to gather relevant information.

[4] Department for Business, Energy & Industrial Strategy. *National Security and Investment Act 2021: Draft statement for the purposes of section 3.* 20 July 2021. Available at: National Security and Investment Act 2021: Draft statement for the purposes of section 3 (publishing.service.gov.uk)

was published on 12 November 2020[5] and, in the main, it has not been much adapted since. For instance, details are still lacking in the revised Statement as to what specific national security concerns might compel BEIS to issue a "call-in" notice. This is on account of the "longstanding Government policy" to avoid disclosing any explicit national security concerns – refraining from doing so allows BEIS to both avoid revealing to potential hostile actors what its chief concerns are and ensure it has the flexibility to adapt its approach to national security assessments to reflect evolving and shifting threats. However, the Statement does provide a broad overview of the main risk factors which BEIS will consider, which essentially form a 3-stage test:

1. Target risk

Firstly, BEIS will consider the area of the economy in which the target company operates. If the target is active in one of the 17 key sectors, the mandatory regime will likely apply (provided the requisite thresholds are met) and, in such situations, a "call-in" notice is "more likely". However, even if the key sectors are not affected and the voluntary regime applies, this does not necessarily mean that the nature of the target's activities will not bear any risk. For instance, the Statement notes – in a change from the previous version – that other sectors which are "closely linked" to the 17 key sectors "could be of interest" to BEIS. As such, BEIS will assess the specific activities undertaken by the target, what the target's business could be used for and whether any of its assets bear an inherent national security concern (e.g. any land it may own in close proximity to a sensitive location, such as a military base or research facility).

2. Acquirer risk

The second step will be to assess the level of risk the acquirer itself poses from a national security perspective. BEIS has noted that it will consider (*inter alia*):

a) The nature of acquirer's business: If the acquirer is involved in a sensitive sector itself, this could pose a national security concern even if the actual target does not operate in, or appear to have any relevance to, any such sensitive sector. For instance, the target may have complementary technological expertise or products that can be adapted for different purposes relevant to the acquirer's field of activity.

b) The acquirer's pre-existing holdings: BEIS will determine whether the acquirer owns or holds interests in other companies which may be deemed to be a threat to the UK's national security.

c) The nature of the acquirer itself: If the acquirer: (i) is owned or controlled by entities / actors which are known (or perceived) to be hostile vis-à-vis the UK; (ii) has links to such entities / actors; or (iii) has been known to engage in, or is thought likely to be involved with, illicit activities such as terrorism or money laundering, all of these are factors which may raise red flags in a national security assessment.

This exposition of the acquirer risk assessment is very similar to the previous Statement of Policy Intent. However, one notable change is BEIS' list of areas which, if the acquirer is believed to threaten any of them, would constitute a likely national security concern. These are: (i) the integrity of the UK's democracy; (ii) the UK's public safety; (iii) the UK's military advantage; (iv) the UK's reputation; and (v) the UK's economic prosperity.

3. Control risk[6]

Finally, BEIS will consider the level of control being acquired in light of any risks identified in steps 1 and 2 above. In short, if certain risks have been identified in relation to the target's activities and/or the nature of the acquirer, such risks may be sufficiently mitigated by the fact that the acquirer is (e.g.) taking a low shareholding in the target which would limit its ability to control the latter and direct its policy. Conversely, a 100% acquisition of the target's shares would clearly give the acquirer full control and also afford it the potential to influence the wider market as a whole, meaning that any risks

[5] It was previously titled 'Statement of Policy Intent' and is available at: Statement of policy intent - GOV.UK (www.gov.uk)

[6] This was previously termed the "trigger event risk" under the former Statement of Policy Intent.

identified in steps 1 and 2 will need to be given still greater consideration.

The Statement also provides specific examples of how this risk assessment may work in practice. Two original examples, which replicate the same methodology of approach set out in the examples contained in the Statement, are set out below:

Example 1

Company A provides advanced engineering services to the UK's armed forces. Company B is a U.S. investment firm with a diverse portfolio; it has no ownership structure that would raise national security concerns and no links to, or history of, any illicit activities. Company B is acquiring a 5% stake in Company A.

The target risk is high in light of Company A's supply arrangements with the UK defence sector and the harm that might be suffered by the latter if these arrangements were compromised or discontinued.

The control risk is low as the acquisition is only for a 5% stake, which would afford insufficient voting rights to meaningfully affect Company A's conduct in the UK.

The acquirer risk is low as Company B has no inherent qualities or features that raise national security concerns.

As such, the risk that BEIS would issue a "call-in" notice in relation to this transaction is **low**.

Example 2

Company C is a UK-based provider of cyber security services to a wide variety of businesses and entities, including certain Government departments. Company D is acquiring 20% of Company C's existing shares. Company D is reasonably considered to have ties to other entities that have been responsible for hacking key institutions in other European countries.

The target risk is high as cyber security falls under the key sector of 'Artificial Intelligence'. Moreover, Company C's supply arrangements with Government departments could mean the latter's cyber security is susceptible to interference if the former was acquired by another entity.

The control risk is low to medium as an acquisition of 20% may (depending on Company C's articles of association) still allow Company D to enable or prevent the passing of resolutions in Company C.

The acquirer risk is high as Company D has perceived ties to entities which have conducted illicit activities in the past.

As such, the risk that the BEIS would issue a "call-in" notice in relation to this transaction is **high**.

Other important points to note on the Statement and changes from the previous version are:

- Whilst the previous Statement of Policy Intent included a reassurance that BEIS did not expect to intervene in respect of loans, conditional acquisitions, futures and options regularly, this reassurance has been removed from the new Statement. Loans, in particular, seem susceptible to reviews under the NSIA – see our previous briefing here.

- Importantly, BEIS has stressed that the aforementioned risk assessment it will conduct when deciding to use its "call-in" power will be done in respect of facts which exist ***at the time BEIS decides to do so*** and not through a historical lens by considering what the facts were at the time the deal was *actually* completed. This is highly significant. It does not impact mandatory filings – as the time BEIS considers the facts and the time the transaction is completed will be the same[7] in these instances – but it will have a huge bearing on cases under the voluntary regime which are not notified. This is because there is an inherent risk in such cases that, even if parties determine the risk of a "call-in" to be low at the time of completion, the situation can change and, as such, parties will need to conduct a degree of ongoing monitoring to be alive to this risk. As BEIS has an ultimate limitation period of five years in which to issue a "call-in" notice (reduced to six months once BEIS has been "made aware" that a transaction took place), parties may consequentially need to monitor such completed deals for a long period of time.

The Consultation will close on 30 August 2021. After it is subsequently presented to, and approved by, Parliament, BEIS has noted that the Statement will be reviewed at least every five years to ensure it is kept updated and fit-for-purpose.

Draft legislation on the key sectors subject to mandatory notification

One of the cornerstones of the new NSIA regime will be the list of key sectors of the UK economy and definitions of the same which form the basis of the mandatory notification regime. After the

[7] Albeit, since the mandatory regime is suspensory the transaction cannot close until after BEIS has given its approval. However, in this particular context the timing of the two can be treated as being concurrent for all intents and purposes.

Commencement Date, any parties undertaking a transaction which involves one or more of these sectors (and which meets certain prescribed thresholds) will be required to make a mandatory filing to BEIS.[8]

A provisional list of the key sectors and their definitions were published alongside the draft version of the National Security and Investment Bill (as it then was) on 12 November 2020 and opened up to a public consultation.[9] The results of this consultation were published on 2 March 2021, which (broadly) found that: (i) on the one hand, the 17 sectors originally identified did indeed constitute the most sensitive areas of the UK economy and raised the most potent national security concerns, which meant that the list itself was left unchanged bar one small amendment;[10] and (ii) on the other hand, the proposed definitions of each sector were too broad and all-encompassing to provide parties with sufficient clarity as to when particular transactions would be brought within the scope of the mandatory regime.[11] As such, BEIS published significant amendments to the definitions of the 17 key sectors at that time – see our previous update here.

BEIS has now published a draft version of the Statutory Instrument ("**SI**") which will pass these definitions into law. The final version of the SI will be presented to Parliament later this year.[12] Though the definitions of the 17 key sectors in the draft SI have been further amended following more engagement between BEIS and stakeholders, these amendments are minor and much less extensive than the ones introduced in March. That said, future changes are still possible whilst the SI remains in draft form and before Parliament has had a chance to debate it.

After the Commencement Date (by which time the SI will have been formally passed into law), the Secretary of State will be required to carry out a review of the sector definitions every three years and publish a report detailing his/her findings.[13] The first of these reports must be published before 4 January 2025.

The extra territorial impact of the NSIA

Counterintuitively – and controversially – BEIS has made clear that the NSIA will have an extremely broad scope and will be capable (in some circumstances) of applying extra-territorially to companies, persons and/or assets located outside the UK. Indeed, it is conceivable that a transaction involving a target and acquirer which are both domiciled / headquartered outside the UK could be reviewed by BEIS under the NSIA. Still more extraordinary is that even *intra*-group deals and re-structurings (even ones involving two overseas companies) may be within the scope of the NSIA if the company group in question has a sufficient UK nexus.

BEIS has now published guidance to provide more clarity on this issue.[14] The types of overseas companies and assets that might be caught by the NSIA are set out below.

[8] Specifically, to the Investment Security Unit ("**ISU**"), a new department sitting within BEIS which will oversee the NSIA regime.

[9] Department for Business, Energy & Industrial Strategy. *National Security and Investment: Sectors in Scope of the Mandatory Regime – Consultation on secondary legislation to define the sectors subject to mandatory notification in the National Security and Investment Bill 2020*. 12 November 2020. Available at: National Security and Investment: Sectors in Scope of the Mandatory Regime (publishing.service.gov.uk)

[10] The sector originally termed 'Engineering Biology' was re-named 'Synthetic Biology'.

[11] Department for Business, Energy & Industrial Strategy. *National Security and Investment: Sectors in Scope of the Mandatory Regime –Government Response to the consultation on mandatory notification in specific sectors under the National Security and Investment Bill*. 2 March 2021. Available at: National Security and Investment: Sectors in Scope of the Mandatory Regime - government response (publishing.service.gov.uk)

[12] The National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021 (the "**Regulations**"). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003506/Draft_National_Security_and_Investment_Act_2021__Notifiable_Acquisition_Specification_of_Entities__Regulations_2021.pdf

[13] Section 4(1) of the Regulations.

[14] See: How the National Security and Investment Act could affect people or acquisitions outside the UK - GOV.UK (www.gov.uk)

Companies

Here, BEIS has reiterated the statutory wording in the NSIA by stating that any company or person located outside the UK which either:

a) carries on activities in the UK; or

b) supplies goods or services to companies or people in the UK,[15]

will be within the jurisdiction of the NSIA ("**Qualifying Entity**"). Helpfully, BEIS then provides a non-exhaustive list of examples of the types of arrangements that would fall under categories a) or b) above.

An overseas company will likely be a Qualifying Entity if it…	**An overseas company will unlikely be a Qualifying Entity if it…**
Conducts business from a regional office in the UK	Has staff who live in the UK but work remotely for a non-UK office
Has an R&D facility in the UK	Has owners or investors who are based in the UK
Produces goods for exporting to a company in the UK	Buys goods or services from UK-based suppliers
Is responsible for distributing goods to a UK company	Has a parent company which has other subsidiaries who carry out activities in the UK
Oversees the activities of a subsidiary company which is based in the UK[16]	Solely conducts market research concerning the UK
Supplies goods to a UK hub which, in turn and after modification, sends the goods onto other countries	Operates a sales team from a base in the UK whose sole function is to seek new clients
Has staff which undertake activities which are similar, or akin to, working in a regional office in the UK (e.g. by performing services for a UK-based client on a regular basis)	Lists securities on a regulated or an exchange-regulated market in the UK

[15] Section 7(3) of the NSIA.
[16] Unless the subsidiary operates entirely independently of the parent company.

Assets

Moreover, the guidance also re-affirms that land or tangible moveable property which is located outside the UK (or its territorial sea) and which is either:

a) used in connection with activities carried on in the UK; or

b) used in connection with the supply of goods or services to people in the UK,[17]

will be within the scope of the NSIA ("**Qualifying Asset**").

As with companies, the guidance provides examples of Qualifying Assets, which include:

- Machinery which is used to produce equipment or goods that are used in the UK; and
- Energy facilities which supply electricity to companies or consumers in the UK.

The relationship between the NSIA and other regulatory regimes

BEIS has provided further clarifications as to how the NSIA will operate vis-à-vis other regulatory regimes, three of the most significant of which concern:

- The public interest regime under the Enterprise Act 2002: Importantly, BEIS has again confirmed that the previous means for the UK Government to review mergers on national security grounds under the Enterprise Act 2002 ("**EA02**") will be replaced by the NSIA (though the other public interest considerations under the former will continue).[18] Moreover, BEIS has also confirmed that any mergers that have previously been reviewed on national security grounds under the EA02 cannot be looked at again under the NSIA, including any such cases which are presently ongoing.[19] There is no risk of double jeopardy for these transactions.
- Merger control investigations: A number of valid concerns have been voiced by stakeholders regarding the future interaction between the UK's merger control regime (which will remain under the jurisdiction of the CMA) and national security assessments conducted by BEIS under the NSIA. If future deals need to be reviewed by both authorities, how will this impact the timetables for these deals? How will the CMA and BEIS ensure that any remedies they respectively impose will be aligned?

  BEIS has taken the first steps to answering these questions. Whilst still withholding details, BEIS has confirmed that it will "work closely" with the CMA with regard to any deal that has warranted reviews from both regulators in order to manage the timetable of such cases. With regard to any remedies that may be necessary, BEIS has, interestingly, stated that any remedy that might be imposed on national security grounds will, effectively and if necessary, override anything that the CMA might be considering on merger control grounds in the event of a conflict. In this regard, BEIS has cited the UK Government's power under Part 3 of the EA02 to direct the CMA to take, or not to take, any action deemed necessary and proportionate to address a national security consideration. In other words, the way it appears that BEIS will ensure that no action under the NSIA will conflict with one taken by the CMA is ensure that the former takes precedence over the latter.
- The Takeover Code: Since the NSIA regime was first proposed, stakeholders have raised concerns as to how this new regime will impact the acquisition of shares in publically-traded companies in the UK. The Takeover Code ("**Code**") governs, and sets out the procedures for, the acquisition of shares in listed entities in the UK. Of particular relevance – insofar as the NSIA is concerned – are the strict rules on offer timetables, which stakeholders noted could be impacted by any reviews under the NSIA. Saliently, BEIS has noted that the Takeover Panel (which oversees the Code) has no current plans to amend the same in light of the NSIA. This follows from a recent document published by the Takeover Panel in response to a consultation on the proposed new Code rules it launched on 27 October 2020. In this response document, the Takeover Panel states that one of the proposed new provisions (which has since been cemented in a new version of the Code)[20] allows for the offer timetable to be suspended if a "material official authorisation or regulatory clearance" is pending.[21] It is currently felt that this is sufficient

[17] Section 7(6) of the NSIA.
[18] The other public interest considerations include the ability to combat public health emergencies, media plurality and the stability of the UK financial system.
[19] It is worth noting that some cases, such as Nvidia's acquisition of Arm, are presently being considered on national security grounds under the EA 02 – see our report on this here.

[20] The Takeover Code – Thirteenth Edition. Available at: https://www.thetakeoverpanel.org.uk/wp-content/uploads/2021/08/567845_005_The-Take-Over_Bookmarked_02.08.21.pdf?v=28Jun2021
[21] Specifically, the new Rule 31.4 (*Suspension of offer timetable if an official authorisation or regulatory clearance remains*

to address the implications a separate NSIA review may have on the timetable of (e.g.) public tender offers that trigger such a review.

The impact of the NSIA on the higher education and research sectors

BEIS has published specific guidance on the NSIA for universities and sectors involving new and cutting-edge research activities.[22] BEIS notes that universities' and other organisations' research projects are often financed by investments from private companies, governments and other entities through a number of different means.[23] Given these investments often relate to the establishment of specialised research companies or are tied to specific assets such as intellectual property, they risk falling within the scope of the NSIA. It is clear that BEIS sees the need to ensure that any proprietary technologies developed in the UK by domestic universities or organisations to be one of fundamental importance.

On this basis, BEIS has set out four typical scenarios which might trigger the NSIA in this context:

1. Financing university research in which the investor gains control over university property (which may consist of both tangible moveable and intellectual property);

2. Developing or establishing research institutions in which the ownership of company shares or assets is obtained by outside investors;
3. Acquiring control over the shares and/or assets of a university or research organisation spin-out company; and
4. Funding employees or students in university programs, such as PhDs, in which the funder(s) obtain the rights to any and all intellectual property developed in the course of such study.

The purpose behind this guidance is, therefore, for universities and research institutions to be aware of the sorts of situations in which their research projects might fall under one of the categories listed above and, if such situations arise, to be able to conduct a self-assessment as to whether or not to make a notification to BEIS under the NSIA.

Other points to note – bracing for impact

It is important to reiterate the fact that the NSIA will have retrospective application to any deals entered into after 12 November 2020 and which will complete before 4 January 2022 ("**Interim Period**"). To clarify, what this means is that, after the Commencement Date, BEIS will be able to exercise its "call-in" power in respect of any deals which closed in the Interim Period should it have national security concerns vis-à-vis the same. It does not mean that the mandatory notification regime will be applicable during the Interim Period – as this only takes effect after the Commencement Date – but rather that any deals that complete within this time are not exempt from retroactive scrutiny. Now that the Commencement Date has been announced, it is imperative that parties conduct all necessary due diligence and steps in relation to any transactions which are planned or contemplated during the Interim Period, especially if they technically fulfil the criteria for mandatory notification. In light of this, it is advisable that, if parties suspect a deal will be of interest to BEIS after the Commencement Date, to engage with BEIS informally during the Interim Period. Whilst BEIS will neither provide a formal clearance nor prohibit a deal until the NSIA regime is up and running, they can nonetheless indicate whether a transaction is likely to raise any concerns.

Equally important, too, is the need for parties to brace themselves for the start of the mandatory regime after the Commencement Date. It is essential that parties to deals which will enter into or complete deals after this date conduct rigorous analysis to determine if the deal will be subject to mandatory notification. Not only will closing the deal which requires notification to BEIS render it null and void, but BEIS can also impose heavy sanctions to parties in such situations (namely, fines of

outstanding) provides that, should any regulatory review period not have ceased by Day 37 of a contractual offer period,

[22] Department for Business, Energy & Industrial Strategy. *National Security and Investment Act: guidance for the higher education and research-intensive sectors*. 20 July 2021. Available at: National Security and Investment Act: guidance for the higher education and research-intensive sectors - GOV.UK (www.gov.uk)

[23] For instance, university research projects might be financed via: (i) contract or sponsored research; (ii) the sponsorship of a research position (e.g. a chair position); or (iii) the sponsorship a research theme.

up to 5% of a company's global turnover or £10 million (whichever is the higher) and individual criminal sanctions).

Once the NSIA regime is up and running, parties will need to factor in the review timetables into their deal-planning and address this with relevant clauses in their transaction documents. Details on the review process – which remains unchanged – can be found in one of our earlier briefings here.

Final comments

The publication of the new Consultation and guidance documents is an important step towards the implementation of the NSIA regime and collectively they provide some welcome clarifications to stakeholders, businesses and investors. However, BEIS has only just begun the process of publishing all the secondary legislation and guidance required to put the necessary flesh on the bones of the new regime. For instance, details of the notification and review procedure and the nature of final orders are still to come, both of which will be very important to give parties a clear understanding as to how the NSIA regime will work in practice once it is up and running. It is expected that BEIS will publish these outstanding items over the course of the next few months.

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