

UK's New National Security Review Regime To Come Into Force in January 2022

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

John Adebiyi

Partner / London
44.20.7519.7022
john.adebiyi@skadden.com

Max Edwards

Associate / London
44.20.7519.7178
max.edwards@skadden.com

Jason Hewitt

Associate / London
44.20.7519.7142
jason.hewitt@skadden.com

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One Manhattan West
New York, NY 10001
212.735.3000

40 Bank Street, Canary Wharf
London, E14 5DS
44.20.7519.7000

Following our prior client alerts regarding the U.K.'s new investment screening regime under the National Security and Investment Act 2021 (the Act)¹, the U.K. government has announced that the Act will come into force on 4 January 2022.

This announcement provides welcome certainty for the market and will allow parties to better plan their transactions taking into account the requirements of the new regime. Under the Act, the U.K. government has the power to review and intervene in business transactions (including asset acquisitions) that could give rise to risks to the U.K.'s national security. The Act also empowers the government to impose conditions on transactions and, under some circumstances, to block and unwind transactions. Acquisitions involving businesses in 17 sectors of the economy that are perceived to be particularly sensitive from a national security perspective will require prior government approval, and failure to obtain the necessary approvals will render a transaction void and may result in the imposition of criminal and civil penalties. Additionally, the government may call in for review deals outside the designated sensitive sectors, including on a retrospective basis for transactions that close on or after 12 November 2020. The Act also provides for a timeline for the government to review transactions that have been called in or voluntarily notified to it.

In addition to announcing the commencement date for the Act, the U.K. government published materials relevant to the operation of the new regime, including a draft statutory instrument setting out the proposed acquisitions of qualifying entities in the 17 sectors of the economy that will be subject to the mandatory notification requirements of the Act. The proposed descriptions of the mandatory notification sectors in the draft statutory instrument include some helpful refinements to the specifications published earlier in the year (see our 9 March 2021 client alert "[UK Government Provides Greater Clarity on New National Security Screening Rules](#)"), and will hopefully provide market participants with further clarity regarding whether or not a particular transaction is likely to be subject to mandatory notification. The draft statutory instrument is subject to change and the government expects to lay the final version before the U.K. Parliament later this year.

The U.K. government also launched a consultation on an updated statement that sets out how the power to review transactions that do not meet the mandatory filing threshold will be exercised. The draft statement provides that transactions in the 17 sensitive sectors of the economy (but that do not fall within the specific definitions requiring mandatory notification) may still be called in for review, as they are considered to be areas in which risks to national security are more likely to arise. This includes acquisitions of assets closely linked to the activities of the 17 sensitive areas of the economy. For example, a transaction related to transport that is not within the scope of the definition of the transport sector in the mandatory notification regulations could nevertheless potentially be called in for review, as the transport sector is perceived to be of greater sensitivity from a national security perspective than other areas of the economy are.

The draft statement also sets out three primary risk factors the government expects to consider in assessing the likelihood that a transaction may pose a risk to national security: the target risk (is the target of the acquisition being used, or could it be used, in a way that poses a risk to national security?); the acquirer risk (does the acquirer have characteristics suggesting a potential risk to national security by controlling the target?); and the control risk (does the degree of control that will be acquired pose a risk to national

¹ See "[UK Government Introduces New Regime for Screening Foreign Direct Investment](#)" (11 November 2020), "[UK Government Provides Greater Clarity on New National Security Screening Rules](#)" (9 March 2021) and "[UK's National Security and Investment Bill Becomes Law](#)" (30 April 2021).

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security?). The draft statement notes that the U.K. government will not make assumptions based on an acquirer's country of origin. However, authorities will obviously take into account ties or allegiance to a state or organization that is hostile to the U.K. Conversely, acquirers with a history of passive or long-term investments that have not raised any national security concerns are likely to be viewed as low-risk. Notably, the government expects to call in for review acquisitions of assets significantly less frequently than acquisitions of entities. Responses to the consultation on the draft statement are requested by 30 August 2021.

The U.K. government also published helpful guidance on various aspects of the new regime, including how the Act could affect people or acquisitions outside the U.K. The potentially wide extra-territorial scope of the Act — it applies to transactions affecting entities formed under the laws of territories outside the U.K. that carry on activities in the U.K. or supply goods or services to people in the U.K., and to assets (including land) situated outside the U.K. that is used in connection with activities carried on in the U.K. or with the supply of goods or services to people in the U.K. — has been of particular concern to commentators, so the

clarifications provided by this guidance will be welcome. The guidance specifies that an overseas entity that carries out research and development in the U.K. or has an office in the U.K. from which it carries on activities would likely be within the scope of the new rules. Conversely, an entity whose sole nexus with the U.K. is that it has owners or investors who are based in the U.K., buys goods or services from U.K.-based suppliers, or has a parent company that has other subsidiaries that carry on activities in the U.K. would likely not be within the Act's scope.

As we have previously noted, the Act provides for a significant change in the U.K.'s approach towards the screening of inward investments. The greater certainty provided by the announcement of the new regime's commencement date and the more specific definitions of the 17 mandatory notification sectors, as well as the government's guidance on other aspects of the rules, will hopefully allow investors to prepare for the implementation of the new regime with confidence.