ALLEN & OVERY

National Security and Investment Act 2021:
Implications for lenders and security agents

The NSIA gives the Government powers to scrutinise and intervene in transactions where control over certain entities or assets has been or will be 'acquired' and this gives rise to a national security risk in the UK. The powers are broad and could affect lenders and security agents on both existing deals (for trigger events occurring on or after 12 November 2020) and new deals. There are two main areas of concern when structuring transactions, entering into loans and security documents, and restructuring or enforcing debt (including through the appointment of certain insolvency officeholders).

Mandatory notification of a notifiable acquisition

– Failure to notify in advance a 'notifiable acquisition' will result in the acquisition being void and could also result in criminal and civil penalties for lenders and security agents. Retrospective validation is possible though creates legal uncertainties regarding intervening transactions.

Government's right to call in a transaction

– The Government can call in notifiable acquisitions and other in-scope acquisitions before or after that acquisition takes place if it gives rise, or may give rise, to a risk to national security. This is a retrospective power applicable to acquisitions from 12 November 2020. The initial assessment period following call-in is 30 working days but the overall assessment timetable could extend to 75 working days or longer from call-in.

– While the Government investigates an acquisition, it may issue an interim order eg to stop further dealing with the asset/entity. Once the Government has finished its investigations, it will issue either a no further action notice or a final order eg requiring any remedies deemed necessary to address national security concerns (which may extend to an order for the acquirer to sell the qualifying asset or entity). Failure to comply with an interim or final order could also result in civil and criminal penalties.

– It is possible to voluntarily notify the Government either before or after the occurrence of other in-scope acquisitions. If the acquisition is approved by the Government, there is no further risk of call in in relation to that trigger event.

Notes:

– Lenders and security agents are potentially at risk of civil and criminal proceedings (with penalties of up to 5% total global turnover or GBP10 million (whichever is higher) and five years imprisonment).

– It is not always clear on the wording of the NSIA when a trigger for a mandatory notification will occur. We are seeking further clarification from the Government. See over for examples of where notifiable and other in-scope acquisitions might occur on a lending transaction.

Notifiable acquisition

qualifying entity:
– any entity (eg a company, LLP, partnership, trust etc) formed or incorporated in the UK, or any overseas entity which either carries on activities in the UK or supplies goods or services to the UK

AND

specified description:
– the entity carries on a particular activity in one of seventeen specified sectors in the UK (see over)

AND

trigger event (relating to the qualifying entity):
– increase of shares **OR** increase in percentage of voting rights held, in each case over a threshold (>25%/>50%/≥75%) **OR**
– acquisition of voting rights enabling the holder to pass or block any class of resolution governing the affairs of the relevant company

Other in-scope acquisitions

qualifying entity:
– as above

AND

trigger event (relating to the qualifying entity):
– as above **OR** the acquisition enables the person to materially influence the policy of the entity

OR

qualifying asset:
– land or tangible moveable property in the UK **OR**
– land or tangible property located overseas or ideas, information or techniques which have industrial, commercial or other economic value **IF** used in connection with activities carried on in the UK or the supply of goods or services to the UK

AND

trigger event (relating to the qualifying entity):
– acquisition of a right or interest which enables the acquirer to direct or control how the asset is used (eg taking security over the asset)

Which elements of a general lending transaction could be trigger events?

NOTIFIABLE ACQUISITIONS

Event of default (transactions with share security)

– Typically when an event of default occurs, any voting rights attached to the secured shares are transferred to the security agent. As security is commonly taken over all of the shares in a company, if the company operates in one of the specified sectors, this may result in a notifiable acquisition for the purposes of the NSIA unless certain exceptions apply.

– The security agent and lenders would be required to make a mandatory notification prior to the event of default (ie when the notifiable acquisition takes place) unless certain exceptions apply. However, they may have no prior notice of the event of default and therefore will not be able to comply. This potentially opens the security agent and lenders up to civil and criminal penalties and the "acquisition" being void. This is particularly an issue for share security entered into before the NSIA came into force on 4/1/2022.

Entering into new share security and subsequent lender transfers

– Entering into an equitable mortgage or charge over the shares in a company which is active in one of the specified sectors should not result in a notifiable acquisition (because the legal title to the shares does not pass to the lenders or security agent). Where legal ownership of the shares in such a company is transferred upon creation of the security, notification would have to be given before entering into the security (in this scenario, it is not clear whether a subsequent transfer of a lender's participation (and the accompanying security) will be considered to be a new acquisition).

Enforcing share security

– Enforcing existing security (ie security entered into before the NSIA came into force on 4/1/2022) or new security over the shares in a company which is active in one of the specified sectors is likely to result in a notifiable acquisition. Notification would have to be given prior to taking enforcement action.

NB: Similar issues may apply where share or other security is granted by a major (direct or indirect) shareholder of a company active in a specified sector

OTHER IN-SCOPE ACQUISITIONS

Entering into asset security and subsequent lender transfers

– It is possible that entering into security over qualifying assets will be an acquisition which could be called in. If the assets are used in a specified sector then it may be worth voluntarily notifying the Government and seeking approval to remove the risk of future call-in. However, it is not clear whether a transfer of a lender's participation will be seen as a new acquisition.

Enforcing existing asset security

– Enforcing existing security (ie security entered into before the NSIA came into force on 4/1/2022) over qualifying assets may be an acquisition that could be called in. If the assets are used in a specified sector, it may be worth voluntarily notifying the Government and seeking approval to remove the risk of future call-in.

Entering into the credit agreement

– In particular circumstances, a lender or group of lenders may be viewed as having a material influence over the policy of a qualifying entity, eg where the entity has no other option but to borrow from that lender or group of lenders in a distressed scenario. If this is the case, this could be an acquisition of control that could be called in. If the entity operates in a specified sector, it may be worth voluntarily notifying the Government and seeking approval.

Appointing a liquidator, receiver or administrative receiver

– Although there is an exclusion for the appointment of an administrator (and also for certain foreign insolvency proceedings), the same exclusion does not apply for liquidators, receivers or administrative receivers. Therefore, the appointment of a liquidator, receiver or administrative receiver could arguably be a notifiable event.

NB: Similar issues may apply to a major (direct or indirect) shareholder of a company active in a specified sector

Specified sectors

1. Advanced materials
2. Advanced robotics
3. Artificial intelligence
4. Civil nuclear
5. Communications
6. Computing hardware
7. Critical suppliers to government
8. Cryptographic authentication
9. Data infrastructure
10. Defence
11. Energy
12. Military and dual-use
13. Quantum technologies
14. Satellite and space technology
15. Suppliers to the emergency services
16. Synthetic biology
17. Transport

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