

## National Security and Investment Act 2021 (NSIA): implications for real estate investors



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 real estate investors 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.

### **Mandatory notification of a notifiable acquisition**

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- Failure to notify in advance a ‘notifiable acquisition’ will result in the acquisition being void and could also result in criminal and civil penalties. Retrospective validation is possible though creates legal uncertainties regarding intervening transactions.

### **Government’s right to call in a transaction**

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- The Government can call in notifiable acquisitions and other in-scope acquisitions before or after the 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 and applies up for a period of up to five years after the transaction has taken place. 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, for example, 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 requiring, for example, 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 result in civil and criminal penalties.
- It is possible to notify the Government voluntarily 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:**

- **Real estate investors are potentially at risk** of civil and criminal penalties (of up to £10 million and 5 years imprisonment, respectively) and transactions being void.
- 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 real estate 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
<b>AND</b>	
Specified description:	– the entity carries on a particular activity in one of seventeen sensitive sectors in the UK (see over)
<b>AND</b>	
trigger event (relating to the qualifying entity):	– increase of shares <b>OR</b> increase in percentage of voting rights held, in each case over a threshold (>25%/>50%/≥75%) <b>OR</b> – 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
<b>AND</b>	
trigger event (relating to the qualifying asset):	– as above <b>OR</b> the acquisition enables the person to materially influence the policy of the entity
<b>OR</b>	
qualifying asset:	– land or tangible moveable property in the UK <b>OR</b> – land or tangible property located overseas or ideas, information or techniques which have industrial, commercial or other economic value <b>IF</b> used in connection with activities carried on in the UK or the supply of goods or services to the UK
<b>AND</b>	
trigger event (relating to the qualifying asset):	– 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)

## Will the sale of a property SPV be a notifiable acquisition?

If there is a **trigger event** in relation to a property SPV **qualifying entity** and that SPV carries on a particular **activity** in one of **seventeen sensitive sectors** in the UK, this will be a notifiable acquisition. We expect this to apply relatively rarely to property SPV sales and set out the key risk areas using a colour coded traffic light system in the table below.

Sensitive Sector		Relevance to a qualifying entity property owning SPV
Advanced materials		Unlikely to be relevant to a property owning SPV.
Advanced robotics		Unlikely to be relevant to a property owning SPV.
Artificial intelligence		Unlikely to be relevant to a property owning SPV.
Civil nuclear		May apply rarely to a property owning SPV landlord where the land is used or to be used as part of the civil nuclear sector (for example as a nuclear power station).
Communications		Likely to apply where the property owning SPV owns a building and the main purpose of that building is to host active telecommunications equipment and the equipment is used by a public electronic communications network or service with a UK turnover of at least £50 million.  May also apply (but less likely in an SPV context) where the property owning SPV owns land on which a qualifying associated facility is located (active, passive or support infrastructure) and the landowner is also carrying out other activities that are in scope of the regulations, such as owning/operating the telecommunications infrastructure on the land.
Computing hardware		Unlikely to be relevant to a property owning SPV.
Critical suppliers to the government		May be relevant if the property owning SPV has let a building to a government contracting authority and the lease contains features relating to the storage or processing of classified information or requirements for the parties to have list X accreditation or for employees to be vetted at or above Security Check level.
Cryptographic authentication		Unlikely to be relevant to a property owning SPV.
Data infrastructure		May be relevant if the property owning SPV also owns relevant data infrastructure (and not just the land on which the data infrastructure is located).
Defence		May be relevant to a property owning SPV if granting a lease amounts to the “creation or application of goods or services” and the property is used or provided for defence or national security purposes. The property owning SPV must also either be a government contractor (or any subcontractor in a chain of sub-contractors which begins with a government contractor which provides such goods or services) or have been notified by the government that they hold, or may come into possession of, classified material.
Energy		May be relevant if the property owning SPV owns certain assets used in the energy sector – specifically upstream oil and gas, downstream gas and electricity.
Military and dual use		Unlikely to be relevant to a property owning SPV.
Quantum technologies		Unlikely to be relevant to a property owning SPV.
Satellite and space technology		Unlikely to be relevant to a property owning SPV.
Suppliers to emergency services		May be relevant if the property owning SPV supplies directly (e.g. as part of its leasing arrangements) to the Border Force, British Transport Police Force, Civil Nuclear Constabulary, a fire and rescue authority, the Ministry of Defence Police or the National Crime Agency services to control systems relating to access and security of buildings.
Synthetic biology		Unlikely to be relevant to a property owning SPV.
Transport		May be relevant if the SPV owns – a qualifying port, harbour; or – a terminal, wharf or other infrastructure situated in a qualifying port or harbour; or – a qualifying airport.



### Will the sale of a property SPV be subject to the government's call in power?

Sales of property SPVs could amount to **notifiable acquisitions** (see over) or **other in scope transactions**. However, the government can only call in transactions that it **reasonably suspects give rise to or may give rise to a risk to national security**.

The government has published guidance on how it expects to use its call-in power. In relation to entity transactions, the following transactions are more likely to be called in:

- acquisitions subject to mandatory notification;
- acquisitions of control through material influence over qualifying entities in the **seventeen sensitive sectors**; and
- acquisitions of entities which carry out activities closely linked to the activities in the **seventeen sensitive sectors**.

### Will the sale of a property asset be subject to the government's call in power?

Asset sales of properties could amount to **other in scope transactions**. However, the government can only call in other in scope transactions that it **reasonably suspects give rise to or may give rise to a risk to national security**.

The government has published guidance on how it expects to use its call-in power. In relation to asset transactions, the following are more likely to be called in:

- acquisitions of assets that are, or could be, used in connection with the activities in the **seventeen sensitive sectors**, or closely linked activities; and
- acquisitions of land which is, or is proximate to, a sensitive site (eg critical national infrastructure sites or government buildings), potentially taking into account the intended use of the land.

The government expects that it will be rare to call in acquisitions of assets which do not fall into the above categories. Overall, the government expects that call in of asset acquisitions will be rare compared to call in of acquisitions of entities.

### How will the government exercise its call in power?

When deciding whether to call in a particular acquisition, the government will consider risk factors to assess the likelihood of the acquisition giving rise to a risk to national security. It will consider the use of the target, the characteristics of the acquirer and the amount of control the acquirer will gain over the target's activities or strategy.

The government does not regard state-owned entities, sovereign wealth funds or other entities affiliated with foreign states as being inherently more likely to pose a national security risk. It will not make judgements based solely on the acquirer's country of origin, although an acquirer's ties or allegiance to a state or organisation hostile to the UK will be considered.

### Should a voluntary notification be made?

Parties to **other in scope transactions** (of entities or assets) may choose to submit a voluntary notification.

The main benefit of submitting a voluntary notification is legal certainty as to whether or not the government will call in the acquisition. This must be balanced against the time and cost of making a notification and waiting for approval (and how this may impact the transaction timetable).

There are risks to deciding not to voluntarily notify an acquisition that potentially raises national security concerns. The government could call in the transaction (and issue orders, including imposing conditions and even unwinding the transaction) up to five years after the transaction has taken place. Parties should consider the likelihood of third-party complaints as part of their assessment of whether to voluntarily notify.

It is possible to complete a transaction before submitting a voluntary notification.