

Cooley

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On July 19, 2022, the UK government published its long-awaited [Market Guidance Notes](#) on the National Security and Investment (NSI) Act, based on an analysis of notifications received to date and feedback from stakeholders. The notes focus on whether commonly raised scenarios require mandatory notification, which has tended to be the area of most interest. In particular, the notes provide welcome guidance on submitting notifications, acquisitions of control and the publication of information relating to the NSI Act.

Summary of main points addressed in the notes

Notifications

For voluntary and mandatory notifications, the government has clarified that notifiers should provide as much detail as possible about the activities of the entity or asset in scope, make specific reference to the relevant sector definitions in the [Notifiable Acquisition Regulations](#), and avoid the use of technical language.

Structure charts are an important part of the notification form, and are needed for the government to fully understand the ownership structure of the entities and assets before and after the acquisition has been completed. In particular, the notes clarify that it is important to include the ultimate controller of the acquirer to assist the government in deciding whether to make use of its 'call-in' power.

Temporary acquisitions of control

The notes helpfully illustrate two scenarios in which the appointment of liquidators and receivers may constitute an acquisition which may require potential mandatory notification:

1. If a liquidated entity has shares in a solvent entity, and the liquidator or receiver gains voting rights over those shares during the insolvency process and prior to the shares being sold, this constitutes an acquisition of control that may be notifiable if the other relevant tests are met.
2. If a director is declared bankrupt, and its shares in a solvent entity are transferred over to a trustee in bankruptcy during the insolvency process, this also is regarded as an acquisition of control that may be notifiable if the other relevant tests are met.

Granting security over shares

The notes clarify that the granting of share security is not a notifiable acquisition requiring mandatory notification, even if it involves an entity carrying on activities covered under the mandatory notification sectors. This is because there is no acquisition of control being acquired. This clarification is consistent with the response previously provided by the government in responding to a [query raised by the City of London Law Society](#). However, and notwithstanding this clarification, the notes point out that, where legal title is transferred or control passes in some other way and the shares fall within the mandatory sectors, then a notifiable acquisition has taken place and must be notified.

Indirect acquisitions of control

As set out under the NSI Act, it is possible for investors and other parties to acquire control indirectly over entities carrying on activities in one of the 17 specified sectors, and to fall in scope of the mandatory regime, where there is an unbroken chain of majority stakes all the way through to that entity of interest. The notes provide some helpful examples of how this may happen in practice.

Internal reorganisations

The notes confirm that internal reorganisations also are in scope where they result in an acquisition of control over an entity, even if the ultimate beneficial owner remains the same. Although that is a rare scenario, the notes explain that such reorganisations may raise national security risks, for example, by enabling a hostile actor to pursue malign actions over the entity.

Voting rights and mandatory notification

The NSI Act captures the acquisition of voting rights that enable a person to secure or prevent the passage of any class of resolution governing the affairs of the target entity. The notes confirm that contractual rights are not voting rights and will therefore not trigger a mandatory notification, provided such contractual rights do not amount to control of such voting rights and do not enable the acquirer to secure or prevent the passage of all resolutions of a particular class. It may be the case that contractual rights – either alone or together with other interests or rights – enable an acquirer to materially influence the policy of a company. Such rights would fall outside the mandatory regime, but may be subject to ‘call in’ by the UK government.

Publication of Information

The notes explain that the government will not publish information regarding the receipt and acceptance or rejection of individual notifications, but it may choose to publish information regarding ‘call-in’ notices or final notifications. Where the government makes a proactive announcement, it will aim to provide advance notice to the parties. Where a final order has been made, the government is required to publish notice of the order. A recent example of this is the government’s publication of its first [final order prohibiting the licensing of vision-sensing technology](#) by the University of Manchester to the Beijing Infinite Vision Technology Company.

‘White list’ of investors

The notes clarify that the government is monitoring closely whether it would be appropriate to make exemptions from mandatory notification requirements based on the ‘characteristics’ of the acquirer (i.e., a ‘white list’ of investors), but there are currently no plans to exempt certain businesses and investors from the mandatory notification regime.

Other updates

On July 20, 2022, the government published new [guidance on the applicability of the NSI Act to new build downstream gas and electricity assets](#). The guidance is intended to assist developers of new build downstream gas and electricity infrastructure to understand what types of assets and acquisitions in the sector are within the scope of the NSI Act, and when to submit a voluntary notification. The guidance also provides specific examples of acquisitions in the sector that would be in scope of the NSI Act. In addition, the government has updated its [guidance on the Notifiable Acquisitions Regulations](#) to clarify when an acquisition in the downstream oil sector will be subject to a mandatory notification under the NSI Act.

Outlook

This is the first set of notes to be published by the government since the NSI regime came into force on January 4, 2022. The notes and the additional guidance outlined above are welcome updates which provide more clarity, insight and certainty for businesses on the UK government's approach to NSI notifications – and the overall operation of the NSI regime. A further set of guidance is expected in early 2023.

Cooley trainee solicitor [Victoria Barlow](#) also contributed to this alert.

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