

Impact of National Security and Investment Act 2021 on Real Estate Transactions

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Introduction

This briefing provides a summary and examples of the impact of the National Security and Investment Act 2021 (“Act”) on real estate transactions.

The Act has established a new regime for the United Kingdom that allows the Secretary of State for Business, Energy and Industrial Strategy (“SoS”) to screen a wide variety of transactions for national security purposes.

There is a mandatory notification regime applicable to certain corporate transactions within specified sectors, which will require those transactions to be notified for approval by the SoS before completion. Failure to do so will render the transaction void.

There is also a voluntary notification regime applicable to certain corporate and asset transactions that potentially give rise to national security concerns, which permits parties to put transactions forward for approval by the SoS to pre-empt the SoS possibly calling in the transaction. The SoS can ‘call-in’ transactions that fall outside the mandatory notification regime, but are still judged by the SoS to pose a potential risk to national security.

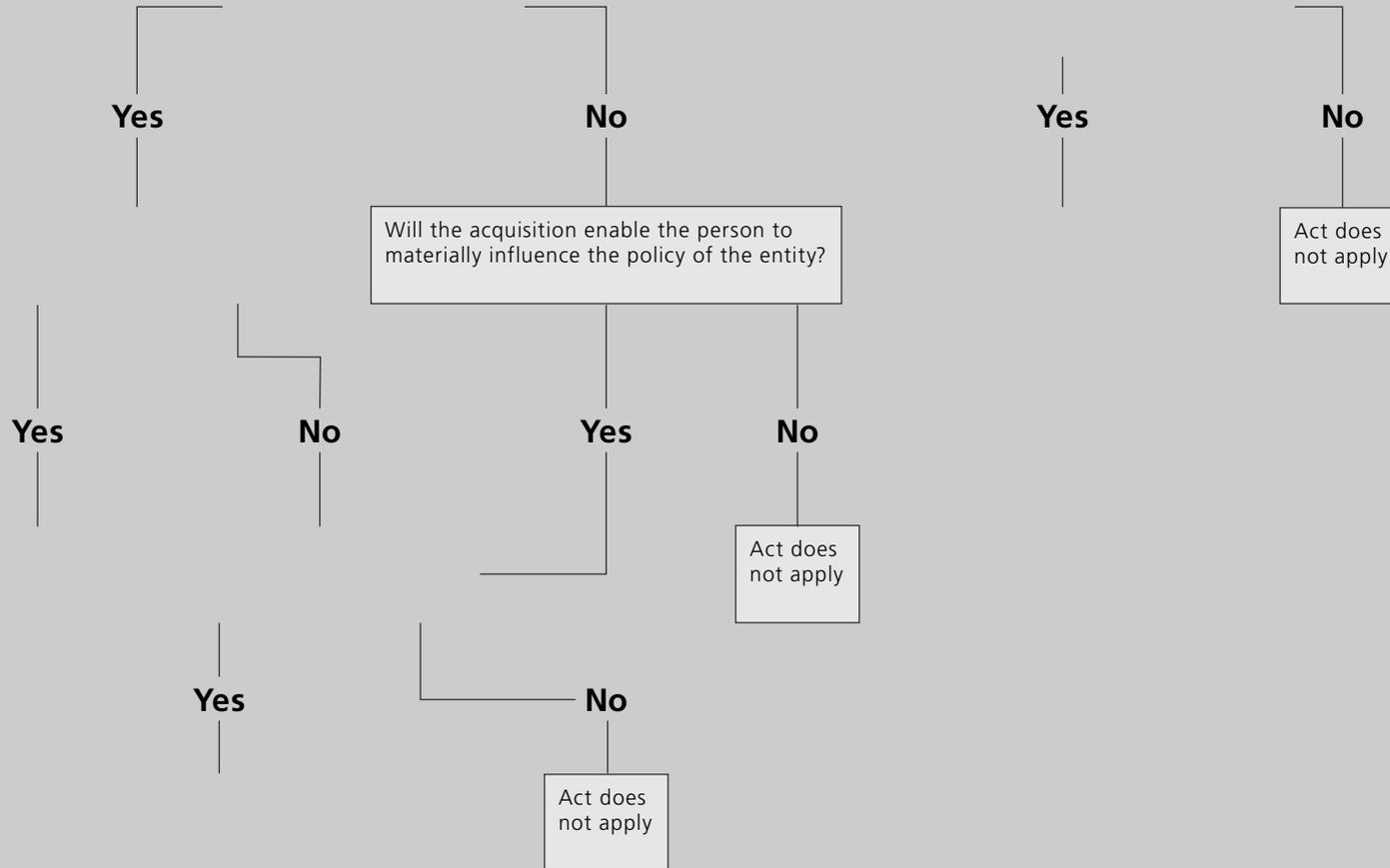
There are civil and criminal penalties for businesses and individuals failing to comply with the Act.

So transactions involving real estate assets (whether a corporate or asset deal) have the potential to trigger a mandatory or a voluntary notification, depending on the circumstances of the transaction. This may be due for example to a purchaser acquiring control above the relevant threshold of an entity which owns land and carries out activities in one of 17 sensitive sectors, or where the corporate or asset transaction presents a risk to national security.

The Act applies not only to transactions now and in the future, but also to transactions that completed on or after 12 November 2020.

This briefing provides a summary in the form of a flow diagram of the impact of the Act on corporate and asset deals. There are then a number of examples of the Act’s application with the relevant type of notification and risk profile mentioned. Application of the Act is fact specific and all transactions should be considered on a case by case basis. None of the examples should be taken as legal advice on the Act’s application to any specific transaction.

Summary of the impact of the National Security and Investment Act 2021 ("Act") on corporate and asset deals



Examples of the application of the National Security and Investment Act 2021 (“Act”)

Please note that the application of the Act is fact specific, and all transactions should be considered on a case by case basis. None of the examples below should be taken as legal advice on the application of the Act to any specific transaction. N.B. that unless the relevant scenario refers to shares, it should be assumed that it relates to an asset-only transaction.

Example	Possible mandatory/ voluntary notification?	Risk profile
<p>Purchase of shares in a business that owns an electricity distribution network</p> <p>The Energy Specified Sector includes owners and operators of UK’s Energy Distribution Networks. A mandatory notification will be required if the shares/voting rights threshold is met, i.e. where the buyer’s shareholding or percentage of voting rights in the business increases from to more than 25%, more than 50%, or 75% or more (e.g. an increase from 24% to 26% in voting rights); or the acquisition enables the buyer to secure or prevent the passage of any class of resolution.</p>	Mandatory	
<p>Purchase of shares in a business that owns an electronic communications network</p> <p>The business would fall within the Communications Specified Sector, if it is a public electronic communications network with a UK turnover of at least £50 million. If that is the case, a mandatory notification would be required if the shares/voting rights threshold is met.</p>	Mandatory	
<p>Purchase of shares in a business that owns an airport</p> <p>The business may fall within the Transport specified sector depending on the size of the airport, and so a mandatory notification could be required if the shares/voting rights threshold is met.</p>	Mandatory	
<p>Purchase of shares in a business that owns properties let to or otherwise used by Government departments</p> <p>The parties should consider whether the entity would be considered a “Critical Supplier to Government”, i.e. whether the lease includes any of the following features:</p> <ul style="list-style-type: none"> — processing and/or storing SECRET or TOP SECRET material — a requirement to have list X accreditation — a requirement for employees to be vetted at or above Security Check (SC) level <p>If the business is not a “Critical Supplier to Government”, the parties should separately consider whether to make a voluntary notification. Relevant factors include: does the business have access to information relating to the Government department that creates a national security risk e.g floorplans/knowledge around what is kept on the premises, what kind of access rights does the landlord have over the properties, what is the identity of the acquirer?</p>	Mandatory	

Examples of the application of the National Security and Investment Act 2021 (“Act”)

Example	Possible mandatory/ voluntary notification?	Risk profile
<p>Purchase of shares in a business that owns properties let as petrol stations No mandatory notification is required, unless the business undertakes other activities that fall within a Specified Sector. There is unlikely to be a national security risk necessitating a voluntary notification, unless the acquirer is connected to a hostile actor.</p>	Mandatory/Voluntary	
<p>Purchase of shares in a company that owns a property located within 100 metres of a military facility The parties should consider whether the company falls within a Specified Sector, as if so, a mandatory notification may be required. If no mandatory notification is required, the parties should separately consider whether to make a voluntary notification as the land is proximate to a potentially sensitive site. Relevant factors include the identity of the buyer and whether the purchase of the company would give the owner access to the military facility or the ability to interfere with the activities carried out there. The intended use of the land will also be a relevant factor.</p>	Mandatory/Voluntary	
<p>Purchase of land to build a nuclear power station This involves the acquisition of an asset, rather than the acquisition of an entity and so no mandatory notification is required in terms of the land acquisition. The parties should consider whether a voluntary notification should be made as the assets may be integral to the activities of a business operating in the Civil Nuclear specified sector. Consider: who is the intended owner of the land? Are they an established business in this sector? Is the owner connected to a hostile actor/country? Will they be involved with the activities on the site or are they purchasing on behalf of someone else, if so who?</p>	Voluntary	
<p>Purchase of a building let to a Government department No mandatory notification is required. The parties should consider whether to make a voluntary notification as the acquisition of the building may give rise to a national security risk. Relevant factors include: does the business have access to information relating to the Government department that creates a national security risk e.g floorplans/knowledge around what is kept on the premises, what kind of access rights does the landlord have over the properties, what is the identity of the acquirer?</p>	Voluntary	
<p>Purchase of a portfolio of nationwide electricity charging points No mandatory notification is required. The parties should consider whether to make a voluntary notification, with relevant factors including the identity of the acquirer, and the nature of the portfolio – could the portfolio be considered “critical infrastructure”?</p>	Voluntary	

Examples of the application of the National Security and Investment Act 2021 (“Act”)

Example	Possible mandatory/ voluntary notification?	Risk profile
<p>Purchase of a property located within 100 metres of a military facility No mandatory notification is required.</p> <p>The parties should consider whether to make a voluntary notification as the land is proximate to a potentially sensitive site. Relevant factors include the identity of the buyer and whether the purchase of the property would give the owner access to the military facility or the ability to interfere with the activities carried out there. The intended use of the land will also be a relevant factor.</p>	<p>Voluntary</p>	
<p>Transfer of a property that grants a right of way over an area within 100 metres of a military facility No mandatory notification is required.</p> <p>The transaction falls within the scope of the Act as the right of way provides a person with the ability to use the land or use it to a greater extent than prior to the acquisition. The parties should consider whether to make a voluntary notification as the transfer grants access to land proximate to a potentially sensitive site. Relevant factors include the identity of the buyer and whether the right of way would give the owner access to the military facility or the ability to interfere with the activities carried out there?</p>	<p>Voluntary</p>	
<p>Purchase of a datacentre where the acquirer will also be acting as its operator or will have access to the data infrastructure No mandatory notification is required.</p> <p>If the acquirer of the data centre will also be acting as its operator or will have access to the data infrastructure, the parties should consider whether a voluntary notification should be made. Relevant factors include the nature of the data centre i.e. whether the datacentre is used for storing, processing or transmitting data for public sector authorities (including on a sub-contractor basis), or whether the data centre is made available to public network and service providers. If so the assets may be considered integral to the activities of a business operating in the Data Infrastructure and/or Communications specified sectors. Consider also the identity of the buyer – are they connected to a hostile actor/country; or, alternatively are they an established market operator who is already known to the Government?</p>	<p>Voluntary</p>	

Examples of the application of the National Security and Investment Act 2021 (“Act”)

Example	Possible mandatory/ voluntary notification?	Risk profile
<p>Purchase of a datacentre where the acquirer will not be involved in its operation, and will not have access to the data centre infrastructure No mandatory notification is required.</p> <p>In general, there will be a low national security risk where the acquirer of the data centre is not involved in its operation, has no access to the data infrastructure and is not connected to a hostile actor/country. A voluntary notification will usually not be recommended for passive owners of a data centre site in these circumstances.</p>	Voluntary	
<p>Asset management agreement (“AMA”) relating to the operation of harbour facilities If the AMA provides a person with a greater ability to control or direct the use of the harbour facilities, the transaction can be ‘called-in’ under the Act. The parties should consider whether to make a voluntary notification, with relevant factors including the identity of the acquirer, the size of the harbour facilities, and what kind of rights the AMA gives over the operation of the facilities.</p> <p>In general, there is likely to be a low national security risk, unless any party to the AMA is connected to a hostile actor.</p>	Voluntary	
<p>Lease of a warehouse within 100 metres of a major dockyard No mandatory notification is required.</p> <p>There is unlikely to be a national security risk necessitating a voluntary notification, unless the acquirer is connected to a hostile actor and the lease would give the leaseholder access to the dockyard or the ability to interfere with the activities carried out there.</p>	Voluntary	
<p>Purchase of a building within 100 metres of the location of a Government department No mandatory notification is required.</p> <p>In general, this would be unlikely to give rise to a national security risk necessitating a voluntary notification unless the buyer was connected to a hostile actor and would be able to access or interfere with activities carried out at the Government site (e.g. if the building acquired was linked to the Government building by tunnel).</p>	Voluntary	

Examples of the application of the National Security and Investment Act 2021 (“Act”)

Example

Possible mandatory/ voluntary notification?

Risk profile

Purchase of a building with electronic communications installation on the rooftop that serves the surrounding area

No mandatory notification is required.

In general, this would be unlikely to give rise to a national security risk necessitating a voluntary notification, unless the installation is considered to be critical national infrastructure; or the main purpose of the building is to host active telecoms equipment which is used by a public electronic communications network or service (PECN/S).

Voluntary



Grant of a sub-station lease

The grant of a sub-station lease does not require mandatory notification and is unlikely to give rise to national security concerns necessitating a voluntary notification.

Voluntary VOLUNTARY



Grant of a wayleave

The grant of a wayleave does not require mandatory notification and is unlikely to give rise to national security concerns necessitating a voluntary notification.

Voluntary



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