

The National Security and Investments Act 2021 – the impact for lenders

Here we look at the potential concerns the legislation could have for lenders and the impact it may have on documenting secured funding agreements.

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It will take several months for a clear picture to emerge as to how the behaviours and practices of participants in the M&A market have changed in the wake of the National Security and Investment Act 2021 coming into force on 4 January 2022. Here we look at the potential concerns the legislation could have for lenders and the impact it may have on documenting secured funding agreements.

The NSIA enables the UK Government to scrutinise ‘acquisitions’ of certain entities or assets. If the Government deems a transaction gives rise to a national security risk, it has the power to unwind and declare the transaction void, impose sanctions (civil and/ or criminal) including fines of up to 5% global turnover/£10m (whichever is greater) and imprison relevant individuals for up to 5 years. The powers to imprison can even be extended to lenders and agents. It is worth noting that all powers are retrospective and capture relevant transactions since 12 November 2020.

If a transaction is caught by the legislation, a notification should be made to the Government who will then issue clearance permitting the transaction to proceed (or not, depending on the nature of the case). If a notifiable transaction has not received such clearance, the Government can then exercise the powers discussed above.

The NSIA sets out the sectors within which relevant businesses operate within and what constitutes a ‘trigger event’ (i.e. a transaction that requires a notification). This helps to determine whether a transaction should be subject to scrutiny.

What are ‘trigger events’?

‘Trigger events’ include: (i) an increase of holding of votes/shares in an entity to more than 25%, 50% or 75% or more; (ii) acquiring a “material influence” over policy of an entity; (iii) acquiring a level of shareholding that allows the holder to influence the passage of resolutions governing the affairs of an entity; and (iv) an acquisition which enables an entity greater use/ control of an asset than that prior to the acquisition. The legislation is not limited to shares and catches other transfers including acquisitions of land or tangible moving property in the UK and even overseas land/IP if used in connection with activities in or, supply of goods/services to, UK.

For lenders, entering into loan agreements on their own seems unlikely to create concerns. The granting of security interests on the other hand poses more nuanced questions.

Granting of security interests: four key questions raised

- Has a security interest been granted over shares or other assets whereby legal ownership has been transferred or assigned?
- Has a security interest been granted that automatically transfers ownership or voting rights following an event of default?
- Does the security interest automatically catch all further shares owned by an entity (such as in standard English debentures)?
- Could these technicalities constitute a ‘trigger event’ under the NSIA? It is arguable that they could.

The NSIA does not include a blanket exemption for beneficiaries of security. The questions posed above could present concerns to lenders in an enforcement scenario as:

- determinations of whether a notification is – or could arguably be – required (and the making of any such notification) could add delay and uncertainty to the enforcement process; and
- the pool of purchasers may be reduced,

thus potentially acting as an unexpected restraint on enforcement and inhibitor on the value of such security. While instinctively the focus may be drawn to funding in the context of a 'pure' acquisition, lenders advancing funds on a general 'corporate' basis would have similar enforcement concerns. Especially, those who are relying on collateral provided in respect of entities or assets within the scope of the NSIA.

Further if a required notification is not made to the Government and the transaction is found to be in breach of the NSIA and declared void, lenders would have no secured rights over charged assets. This would result in difficulties in reobtaining advanced funds and enforcing rights of turnover.

We may, start to see changes to standardised loan and security documentation including:

- increased focus on the nature of the security granted or the operation of provisions in respect of security interests over relevant assets;
- extension of availability periods to cover a notification (potentially giving rise to discussions in respect of ticking/commitment fees);
- additional conditionality to permitted acquisition regimes;
- representations confirming no undertaking of NSIA notifiable transactions since 12 November 2020 (unless cleared);
- additional undertakings and events of default linked specifically to breaches of, or the government exercising rights under, the NSIA;
- further conditions precedent including (i) clearance from the Government; (ii) provision evidence/confirmation of compliance with the requirements of the NSIA; and (iii) details of any notifiable transactions since 12 November 2020.

If you would like to discuss any of the issues raised here, please contact the Browne Jacobson banking team.

This article was first published by [Global Risk Regulator](#).

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