

EXPLANATORY MEMORANDUM TO
THE NATIONAL SECURITY AND INVESTMENT ACT 2021 (NOTIFIABLE ACQUISITION) (SPECIFICATION OF QUALIFYING ENTITIES) REGULATIONS

2021 No. 1264

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument is made using the power under section 6 of the National Security and Investment Act 2021 (“the Act”) to specify the description of a qualifying entity, the acquisition of which will constitute a notifiable acquisition.

2.2 Section 6 enables notifiable acquisition regulations to be made setting out what qualifying acquisitions must be notified to the Secretary of State. Section 6(2) provides that a notifiable acquisition takes place when a person gains control of a qualifying entity of a specified description, by one or more of the means set out in subsection (2), (5) or (6) of section 8. This instrument specifies descriptions of qualifying entities in 17 areas of the economy in which national security risks are more likely to arise than in the wider economy. These 17 areas are Advanced Materials, Advanced Robotics, Artificial Intelligence, Civil Nuclear, Communications, Computing Hardware, Critical Suppliers to Government, Cryptographic Authentication, Data Infrastructure, Defence, Energy, Military and Dual-Use, Quantum Technologies, Satellite and Space Technologies, Suppliers to the Emergency Services, Synthetic Biology and Transport.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England, Wales, Scotland and Northern Ireland.

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5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy, Lord Callanan, has made the following statement regarding Human Rights:

“In my view the provisions of the National Security and Investment Act 2021 (Notifiable Acquisition) Regulations are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument is being made using the power under section 6(1), (2) and (4) of the Act to specify descriptions of a qualifying entity, the acquisition of which constitutes a notifiable acquisition and to specify the activities carried out by the qualifying entity.
- 6.2 Section 6(2) of the Act provides that a notifiable acquisition takes place when a person acquires control of a qualifying entity of a specified description in the circumstances set out in subsections (2), (5) or (6) of section 8 of the Act.
- 6.3 This instrument meets the requirement of section 6(4), that the descriptions of the qualifying entity must include provision that the entity carries on activities in the United Kingdom which are of a specified description (whether or not it also carries on other activities), by specifying the description of the activities.
- 6.4 This is one of two Statutory Instruments laid on 6 September 2021 as part of the implementation of the Act. The other is the National Security and Investment Act 2021 (Monetary Penalties) (Turnover of a Business) Regulations 2021.
- 6.5 This instrument will come into force on 4 January 2022.

7. Policy background

What is being done and why?

- 7.1 The UK economy thrives as a result of foreign direct investment. Over the last 10 years, over 665,000 new jobs have been created as a result of over 18,000 foreign direct investment projects. An open approach to investment must also include appropriate safeguards to protect our national security and the safety of our citizens. The UK and its allies face continued and broad-ranging hostile activity from foreign intelligence agencies and others, who seek to compromise our national security.
- 7.2 Until the National Security and Investment Act 2021, our powers in this area largely dated from 2002. Technological, economic and geopolitical changes mean that reforms to the powers to scrutinise investment on national security grounds are required.
- 7.3 The Government announced its intention to update the investment screening powers in 2016 and consulted in a Green paper in 2017. Further proposals were put forward in the 2018 White Paper.
- 7.4 The National Security and Investment Act 2021 provides the Government with updated powers to scrutinise and intervene in investment to protect national security, as well as to provide businesses and investors with the certainty and transparency they need to do business in the UK.
- 7.5 In addition to a non sector-specific voluntary notification option and a power to scrutinise qualifying acquisitions that have not been notified to the Secretary of State, the Act makes provision for a mandatory notification and pre-approval requirement for those sectors of the economy where it is considered that national security risks are more likely to arise than in the wider economy. These regulations specify the sectors and activities within those sectors which will be in scope of the mandatory notification regime.
- 7.6 The new powers will require the Secretary of State to be notified in advance of certain acquisitions described in the 17 sectors provided for in this instrument. This will mean

that the Secretary of State is informed of proposed acquisitions in these areas and will be able to take action to investigate and, if necessary, address any national security risks.

- 7.7 Acquisitions subject to mandatory notification in these sectors will not be allowed to proceed without Government approval, and any acquisition that is not notified to the Secretary of State and cleared to proceed will be void.
- 7.8 To ensure that the mandatory notification regime works proportionately, and that the regime is future-proofed, the Government will keep under review the list of acquisitions in scope of the mandatory regime under review and will seek to make amendments in future to reflect changing national security risks and technological changes.

The statutory instrument

- 7.9 As outlined above this instrument provides the descriptions of certain qualifying entities within 17 areas of the UK economy that will require mandatory notification in certain conditions specified in section 6 of the Act. These 17 areas are Advanced Materials, Advanced Robotics, Artificial Intelligence, Civil Nuclear, Communications, Computing Hardware, Critical Suppliers to Government, Cryptographic Authentication, Data Infrastructure, Defence, Energy, Military and Dual-Use, Quantum Technologies, Satellite and Space Technologies, Suppliers to the Emergency Services, Synthetic Biology and Transport.
- 7.10 These 17 areas of the UK economy have been identified as ones where the mandatory notification should apply to particular acquisitions as national security risks are more likely to arise in these areas than in the wider economy. These 17 areas include advanced technologies and some Critical National Infrastructure (CNI).
- 7.11 A full explanation of the rationale for the specified activities in each of the 17 areas has been provided within the public consultation documents, as referenced in section 10 of this explanatory memorandum.
- 7.12 The specific activities of this instrument are the result of extensive work across Government and public consultation (as referenced in section 10 of this explanatory memorandum). Following the responses received to the consultation, the Government narrowed the scope of the specified activities provided for in this instrument. This policy development has ensured that the descriptions in this instrument are as targeted and proportionate as possible.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 No consolidation required.

10. Consultation outcome

- 10.1 The Government consulted on proposed descriptions of activities of qualifying entities within the 17 areas of the economy that would be captured under the mandatory regime set as proposed in Clause 6 of the National Security and Investment Bill, now Section 6 of the National Security and Investment Act 2021.

- 10.2 A public consultation was held between 11 November 2020 and 6 January 2021. Ministers and officials engaged with stakeholders through webinars, roundtables and direct meetings and 94 formal responses were received in response to the consultation. As national security is a reserved matter in Scotland and Wales and an excepted matter in Northern Ireland, the public consultation extended to the whole of the UK.
- 10.3 Responses to the consultation suggested that many of the sector definitions were broad in scope and would require further refining to enable acquirers to identify whether they would be in scope of mandatory notification.
- 10.4 The Government published its response to the public consultation on 2 March 2021 in advance of House of Lords Grand Committee during the Bill's passage. This response set out how responses from the public consultation have been used to refine the definitions to provide further clarity ahead of making this Statutory Instrument.

11. Guidance

- 11.1 The Government will be issuing guidance alongside this Order, and this will be placed on Gov.uk.
- 11.2 The guidance explains what descriptions of activities of qualifying entities will require notification under this Statutory Instrument. Comprehensive public guidance to help businesses, investors and advisors to understand and meet the requirements of the National Security and Investment regime will also be provided.
- 11.3 The guidance will be subject to review and will be updated to ensure it remains relevant and useful.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies is that there is an estimated reduction in businesses impacted from this legislation, compared to those already analysed within the National Security and Investment Act's published Impact Assessment. There is no impact on charities or voluntary bodies.
- 12.2 The impact on the public sector is estimated to be marginally lower than previous estimates presented through the National Security and Investment Act's Impact Assessment.
- 12.3 An Impact Assessment has not been prepared for this instrument. When compared to the initial NSI Act's Impact Assessment estimates, the expected in notifiable acquisitions from those estimates is marginal. These marginal impacts have been analysed to fall beneath the de minimis threshold where it is not appropriate to produce a separate Impact Assessment.
- 12.4 The impact of the introduction of the National Security and Investment Act was assessed through the National Security and Investment Act's Impact Assessment. This included an initial estimate of the mandatory notification impact for the 17 areas of the economy as they were envisaged at the introduction of the Bill. Given the refinements made to the specified activities of qualifying entities in these 17 areas since the introduction of the Bill, the analysis has been refined. As discussed in the National Security and Investment Act's Impact Assessment, the analysis relied on analysing previous transactions. Transactions in these 17 areas were extracted using Standard Industrial Classification (SIC) codes. Following the refinement of the

specified activities, 66 SIC codes have been used to identify the transactions that fall within the 17 areas.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 To minimise the impact of the requirements on small businesses employing up to 50 people, the approach taken is to publish comprehensive guidance to assist small businesses as outlined in section 11. The Government actively encourages small businesses to contact the Investment Security Unit through the contact address in section 15.1, which is also available on Gov.uk.
- 13.3 In considering what action to take to help small businesses, the Government has concluded that the proposed measures are proportionate given the national security risks. To provide clarity and minimise impact, the Government will issue guidance as outlined in section 11 of this explanatory memorandum.

14. Monitoring & review

- 14.1 The instrument will be subject to ongoing internal monitoring to ensure that the regime is effective in protecting our national security and reflects technological changes.
- 14.2 A statutory review clause is contained within this instrument in line with the requirements of the Small Business, Enterprise and Employment Act 2015.

15. Contact

- 15.1 Katja Stein at the Department for Business, Energy and Industrial Strategy, email: investment.screening@beis.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Jacqui Ward, Director for National Security and International, at the Department for Business, Energy and Industrial Strategy can confirm that this explanatory memorandum meets the required standard.
- 15.3 Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy, Lord Callanan, can confirm that this explanatory memorandum meets the required standard.