

UK Government consults on changes to the National Security & Investment Act

The regime implemented by the National Security and Investment Act 2021 (the “NSI Act” or “NSI regime”) is considered an important economic security tool to enable the UK Government (the “Government”) to scrutinise, and (if necessary) intervene, in investments and acquisitions in sensitive sectors and locations that could potentially harm the UK’s national security. For further background on the legislation, please see [here](#) for our previous article published when the NSI Act first came into force on 4 January 2022.

The Government’s Recent Call for Evidence

Just short of its two year anniversary, in November 2023 the Government published a [Call for Evidence](#) on the functioning, scope, and performance of the NSI regime so far.

The Government confirmed as part of this Call for Evidence that it wants to ensure that its investment screening powers remain “*proportionate and well-targeted, minimising the burdens it places on companies and investors, while providing the certainty they need to do business*”.

Although the Government confirmed that it was not anticipating making any changes to the primary legislation (such as the thresholds which trigger mandatory notifications), it was keen to hear the views from affected market participants on how the regime has functioned to date.

Among the main areas under consideration and review include:

- whether some targeted exemptions from the mandatory notification requirement may be appropriate (e.g., where investments or acquisitions tend to give minimal levels of control to the investor/acquirer or where there is no change in control);
- whether the 17 sensitive sectors need refining so that there is greater clarity as to what is genuinely deemed a national security risk and to ensure that the sectors remain relevant and up to date; and
- how it can improve the operation of the NSI Act generally, including the transparency of the process and communications between affected parties and the Investment Security Unit (the operational unit responsible for identifying, addressing, and mitigating national security risks to the UK under the NSI Act) (the “ISU”).

Since coming into force, over 1,000 notifications have been made under the NSI Act with most being cleared within 30 working days and only a small handful of deals subject to conditions or blocked entirely.

The Government is keen to adopt and maintain a “small garden, high fence” approach – aiming to capture the small number of deals with potential to harm national security while leaving the majority of transactions unaffected. In refining the operations of the NSI Act, the Government aims to maintain its reputation as an attractive and safe landscape for investment.

Below, we summarise some key areas which are currently under consideration by the Government and which we, and other market participants, feel would be beneficial in improving the ongoing implementation of the NSI Act.

Refining the sectors

One of the main considerations deemed necessary is a review of the 17 sensitive sectors of the economy currently subject to mandatory notification, such as artificial intelligence. Based on feedback from market participants, the Government aims to refine these requirements to ensure that businesses and investors only need to notify the Government about deals that genuinely warrant consideration on national security grounds.

Alongside AI, other existing sensitive areas the Government seeks to clarify and update include advanced materials, communications, data infrastructure, defence, energy, suppliers to emergency services and synthetic biology. Compliance with mandatory notifications places significant burdens on businesses and investors and so it is important for these sectors to be refined so that any sectors which are unlikely to create national security risks are removed from the mandatory notification requirement.

Targeted exemptions

The Government is also considering whether some targeted exemptions to the mandatory notification regime may be appropriate for example, where the transaction tends to give either minimal levels of control or does not present any real change in control, such as internal reorganisations.

Currently, internal reorganisations require mandatory notification even where there is no change in the ultimate beneficial owner. Other events requiring mandatory notification include the appointment of liquidators, official receivers and special administrators, Scots law share pledges and acquisitions by certain public bodies. Often, the requirement to notify these under the NSI Act is felt to be disproportionate and so the Government is exploring certain relevant exemptions, while also ensuring that it remains aware of higher risk scenarios that warrant Government scrutiny.

In addition, greater clarity regarding what constitutes ‘control’ for the purposes of the NSI Act is welcomed. Currently, mandatory notification is required for investments and acquisitions of control over qualifying entities or assets where there is or could be a potential risk to national security as a result. In most cases, control requires at least a 25% interest in a qualifying entity, but transactions below this threshold could still be caught by the NSI Act where an individual has “material influence” or “control rights” over a qualifying entity or asset as a result of such transaction.

We think that market participants would appreciate further guidance on specific situations (such as investor director consent rights and automatic enforcement provisions to name a few) to better understand whether a notification is required.

Better communication and visibility

In addition, the notification and assessment process does perhaps require updating to streamline administrative procedures for businesses and investors, while still providing the ISU with the necessary information for assessments. Greater transparency and communication from the ISU would certainly be helpful to improve efficiency throughout the notification period. One suggested area of improvement would be the appointment of a specific case officer so that the notifying acquirer has a fixed and identifiable contact throughout the process.

Outlook

The responses to the [Call for Evidence](#) will be used to assist the UK Government in refining and improving the operations of the NSI Act. The deadline for submitting responses is 15 January 2024.

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