

May 2024

National Security and Investment Act 2021: Call for Evidence Response

Introduction

On 18 April 2024, in its response to the Call for Evidence on the National Security and Investment Act 2021 (the "**NSIA**"), the UK Government sought to set out the areas that it will be focusing on when looking to 'fine-tune' the UK's national security screening regime¹.

The NSIA came into force on 4 January 2022 and introduced a standalone regime that allows the Government, acting through the Investment Security Unit ("**ISU**") in the Cabinet Office, to scrutinise different types of transactions with a UK nexus that are subject to mandatory notification requirements or 'called-in'. If necessary, the UK Government may impose conditions on, or even block, deals if they could give rise to any relevant national security risk.

The Government published the Call for Evidence² on 13 November 2023, to gather the views of cross economy stakeholders on the impact of the regime on businesses and investors, and their experience interacting with the NSIA. In particular, the UK Government were looking to assess whether the scope and requirements of the NSIA are proportionate and effective and to inform its review of the National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021 (the "**Regulations**"³). The period for responding closed on 15 January 2024.

The Government received 110 full responses to the Call for Evidence, with over 75% of all respondents having been involved in transactions that had gone through the national security review system. Of that 75%, almost three quarters had been involved in cases that were cleared to proceed within the initial 30 working days and 19% had been involved in transactions where final orders were made.

The Response

As of 18 April 2024, the Government had already reviewed over 1,700 notifications but had only made 20 final orders under the NSIA. Therefore, to hone the scope of the regime, the Secretary of State is expected to make significant adjustments to the NSIA between now and Autumn 2024. The changes are aimed at balancing the implementation of essential protections needed for national security with the regime being as pro-business and pro-investment as possible. The UK Government has announced its intention to focus on five key areas, namely:



Publishing an updated Section 3 Statement on how the Secretary of State expects to exercise the call-in power

Whilst 80% of respondents confirmed that, in general, they have a good understanding of the risks that the Government sought to address through the implementation of the NSIA, their responses did highlight areas within that lack clarity. For example, many responses requested greater clarity on the Government's view as to which areas are considered the most sensitive and the factors considered as part of the national security review. Some respondents

¹ See: [National Security and Investment Act 2021: Call for Evidence Response - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/national-security-and-investment-act-2021-call-for-evidence-response)

² See: [Call for Evidence - National Security and Investment Act - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/call-for-evidence-national-security-and-investment-act-2021)

³ See: [The National Security and Investment Act 2021 \(Notifiable Acquisition\) \(Specification of Qualifying Entities\) Regulations 2021 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukdsi/2021/12/13/1330001000000001/pdfs/202112131330001000000001.pdf)

also called for a fast track process to be implemented for certain types of parties, such as those who have already had a prior transaction cleared through the regime.

In response, the Government plans to publish an updated Section 3 Statement in May 2024. This updated Section 3 Statement shall seek to clarify the reasoning behind the Government's intervention into transactions. It is hoped that this will be an improvement upon the current guidance published in November 2021⁴, which only discusses the 17 sectors (and closely linked activities) in broad terms. However, the Government has stated that the guidance will not provide a definition of 'national security' itself to avoid undesirably narrowing the parameters of the regime.

The Government has also explicitly stated that this Section 3 Statement will not consider the implementation of any fast track process, as some entities are considered to be so sensitive that they will always warrant screening, despite the impact of the mandatory and suspensory notification requirement. As a result, each relevant transaction needs to be assessed on a case by case basis.

Publishing updated market guidance

81% of the 74 responses on the need for guidance requested that further specific guidance be published across a range of areas. In response to this, the Government has stated that it will look to publish further market guidance on the topics that the stakeholders raise in May 2024, as well as update existing guidance⁵. These include:

- The factors that the UK Government expects to take into account when assessing risk;
- How the NSIA applies to transactions in the academia and research areas;
- How the statutory time limits are calculated;
- The scope of the definitions of the sensitive areas specified;⁶
- The situations in which the NSIA can apply to Outward Direct Investment; and

- The application of the mandatory notification requirement to Automatic Enforcement Provisions in secured lending agreements.

Automatic enforcement provisions in secured lending agreements

The application of the mandatory notification requirement to automatic enforcement provisions in secured lending agreements was a significant topic of discussion within the responses to the Call for Evidence. 20% of all respondents stated that they have now reflected the mandatory notification requirements in the terms of their lending agreements. However, there were conflicting responses on whether or not its application has created uncertainty in the markets (12% agreeing) and has affected access to loans, or to enforcing such provisions (14% disagreeing). While the Government has stated that they will be providing further guidance in this area, it has explicitly stated that it does not expect to exempt transfers of control under automatic enforcement provisions from the application of the NSIA.

Consulting on changes to the mandatory notification areas

63% of respondents provided feedback on proposed changes to the definitions of the 17 sensitive areas of the economy that are subject to the NSIA's mandatory notification requirement. Many responses requested clearer definitions to be provided in respect of these areas as well as guidance on their interpretation, in order to remove ambiguity and reduce the number of unnecessary filings. In particular, criticisms expressed on the scope of the 17 sensitive areas include:

- The sectors of **Advanced Materials, Defence, Suppliers to the Emergency Services, Critical Suppliers to Government** and **Synthetic Biology** have been criticised for their scope currently being too complex. The responses to the Call for Evidence suggested their definitions could be restructured for greater clarity and certainty on whether certain activities are covered.
- **Artificial Intelligence (AI)** – Critics have suggested that this area could be refined to exclude entities which are not 'core' AI companies (i.e., AI is not a core part of their products or

⁴ See: [National Security and Investment Act 2021 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/national-security-and-investment-act-2021) and [National security and investment: statement about exercise of the call-in power - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/national-security-and-investment-act-2021-statement-about-exercise-of-the-call-in-power)

⁵ See: [National Security and Investment: Market Guidance April 2023 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/national-security-and-investment-act-2021-market-guidance)

⁶ Current guidance on the scope of the 17 sectors exists here: [National Security and Investment Act: details of the 17 types of notifiable acquisitions - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/national-security-and-investment-act-2021-details-of-the-17-types-of-notifiable-acquisitions)

services), to prevent unnecessary filings in respect of transactions that do not present any obvious national security threats. This feedback echoed previous criticism of the area that was raised in the consultation on mandatory notification requirements in 2020/2021. At the time, the Government's response was that all companies that develop AI technologies should be captured, no matter how they self-classify, to protect the UK economy against the risk of hostile actors⁷.

- **Communications** – The £50 million turnover thresholds that currently apply remain a point for discussion in this area. In its response to concerns raised in the consultation on mandatory notification requirements in 2020/2021, the Government stated that it implemented these thresholds so as to exempt acquisitions of smaller companies to minimise the burden on the industry⁸.



- **Data Infrastructure** – Feedback indicated that the definition of this area could be refined to remove the requirement to notify where the entity is a contractor or a sub-contractor of listed public sector authorities. This was reasoned to avoid placing an unnecessary burden on businesses, particularly on small companies and start-up entities, perceived to present low risks to national security. Furthermore, the responses showed that concerns remain about the delay caused by undergoing the screening process having a significant, detrimental effect in this area, particularly as the timescales, for example, for developing and building data centres, tend to be notably short.

- **Defence** – Feedback was provided on nuances within the definition of this sector that render it overly broad, including how a qualifying entity can include any subcontractor within a chain involving the Ministry of Defence. Further, the broad nature of 'the provision of goods or services used for defence or national security purposes' was commented on as placing an unnecessary burden on businesses providing goods and services perceived to present low risks to national security, such as catering, gardening or cleaning.
- **Energy** – Feedback indicated that the scope of this area could be expanded to include multi-purpose interconnectors, as the current legal and regulatory regimes have been criticised for not providing an adequate enduring solution for these. Multi-purpose interconnectors have been recognised as a new innovative asset type that will replace certain pre-existing technology in this sector.

The Government also sought feedback on possible additions to the list of 17 sensitive areas, with 26% of respondents expressing support for a standalone Semiconductor area (currently part of 'Advanced Materials') and a Critical Minerals area (for 18 critical minerals, following an assessment by the British Geological Survey). The Government is also exploring the possibility of adding water to the sensitive sectors, which is broadly in line with the approach taken in other jurisdictions.

The Government plans to launch a formal public consultation on updating the definitions of the 17 sensitive areas and on proposing new additions to the list of areas by the summer of 2024. This ties in with the Government's legal obligation to review the definitions of the sensitive sectors every three years (Regulation 4 of the Regulations). It remains to be seen how far the Government will go in the forthcoming consultation.

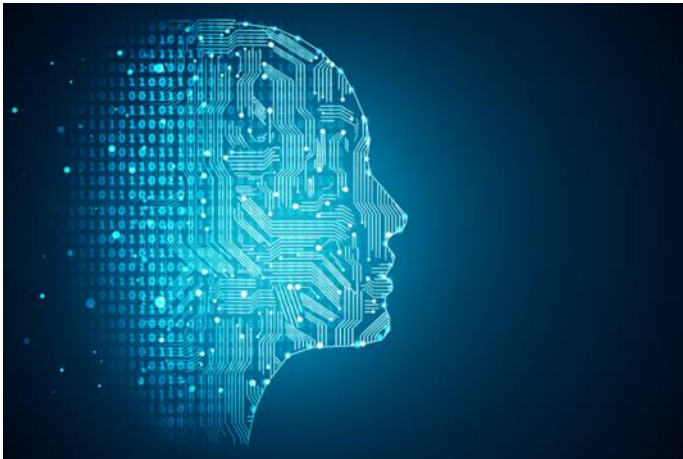
Considering certain technical exemptions to the mandatory notification requirement

The Call for Evidence invited feedback on whether some targeted exemptions from the mandatory notification requirement may be appropriate, for example, for certain types of transactions that tend to confer either minimal levels of control or no additional control.

⁷ See: [National Security and Investment: Sectors in Scope of the Mandatory Regime - government response \(publishing.service.gov.uk\)](https://publishing.service.gov.uk), particularly at page 23.

⁸ See: [National Security and Investment: Sectors in Scope of the Mandatory Regime - government response \(publishing.service.gov.uk\)](https://publishing.service.gov.uk), particularly at page 37.

Overall, the respondents to the Call for Evidence supported the implementation of targeted exemptions in certain areas, including an exemption for the appointment of liquidators, official receivers and special administrators, in order to reduce the detrimental impact on entities in financial distress. In response to this, the Government has stated that it will be bringing forward secondary legislation to put in place such exemptions in this respect.



In addition to this exemption, respondents provided feedback on further possible exemptions including for certain internal company reorganisations (27% of all respondents), transactions involving Scots law share pledges (15%), and for certain public bodies (30%). Their reasoning for supporting these exemptions included reducing the detrimental impact on investment or restructuring timelines as well as a lack of clarity on the national security risks that the Government is actually considering for these transactions. However, the Government has stated that, before deciding whether to implement any of these targeted exemptions (particularly, for certain internal reorganisations), the ISU will undertake a thorough national security risk assessment to understand whether the exemptions would be feasible and not compromise the integrity of the NSIA.

Making further improvements to the operation of the NSIA system, including the National Security and Investment Notification Service

Responses also addressed the Government's call for suggestions on potential changes to the ISU's operational processes, the notification forms and the National Security and Investment Notification Service. 19% of respondents called for greater transparency around the operation of the regime in general, including on the length of the assessment

process, on accessing useful guidance and information, and on the standard level of engagement to be expected by the ISU with transaction parties (i.e., through an established point of contact).

Improvements have already been made by the Government to the ISU's operational processes in many of the areas raised by respondents, including measures for increased communication (calls at key stages and established senior contacts) and accessibility (through Attendance Notices and the notification service). However, the Government has stated that the ISU will be tasked with considering what further improvements should be made in light of the feedback received. Further improvements will also be made to the notification portal as, whilst many responses indicated that the digital notification process generally works smoothly, over 50% of respondents offered suggestions on how to improve this service (such as through addressing technical issues in relation to false positive firewall blocks and implementing other functional improvements). Further, the majority opposed any suggestions to add requirements within the notification forms for additional information to be provided. Therefore, the Government has stated that it will carefully review and consider this feedback before making any amendments to the notification forms.

Conclusion

The UK Government hopes that, by addressing various issues within these five areas of focus, it will improve the NSIA for businesses and investors whilst maintaining safeguards against the small number of investments that could be harmful to national security. While the Government considers and implements these significant adjustments to the NSIA (between now and Autumn 2024), it will continue to closely monitor the success of the NSIA and consider whether further changes will be necessary. In the meantime, as before, parties should continue to consider the timing impact and uncertainty that an NSIA review process can entail and the severe penalties that can be imposed for any failure to notify. Early engagement and submitting clear and thorough notifications should hopefully ensure a relatively smooth and painless process. Whilst the changes due to be enacted between now and Autumn 2024 are hoped to further ease this process, the ultimate form of the changes remains to be seen...

Contact us

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