

July 2023

State of the Union – Second NSIA Annual Report Published

On 11 July 2023, the Cabinet Office ("**CO**")¹ published the [second annual report](#) ("**Report**") on the operation of the UK's National Security and Investment Act 2021 ("**NSIA**"). The Report, which is the first to cover a full 12-month period,² provides revealing information and data on how the NSIA has functioned in the last year, such as the areas of the UK economy most affected by the legislation and deals which have been scrutinised most carefully by reference to the nationality of the relevant investor/acquirer.

It has been 18 months since the NSIA came into force on 4 January 2022 (see [here](#) for an overview of the NSIA regime). The Report has been eagerly anticipated as it provides a rare insight into a regime that otherwise operates with significant opacity. Our briefing on the [key lessons](#) learnt from the NSIA's first full year in operation set out the most relevant trends experienced by both practitioners and deal parties. The Report now provides quantifiable data to underpin these trends.

With that said, the Report does not contain any specific views from the CO as to the types of deals it is most inclined to review from a national security standpoint, nor how it sees this landscape evolving in the future. This, for many investors, would provide greater certainty for future deals. In the absence of any insight into its substantive review process, the CO doubtless hopes that the statistics in the Report will suffice to reassure deal makers that the NSIA is not hindering investment activity in the UK.

Overview of the Report

High rate of clearance decisions

In an encouraging statistic for investors, the Report notes that 92.8% of all transactions reviewed by the CO between 1 April 2022 to 31 March 2023 ("**Relevant Period**") were cleared within the initial 30 working day review period.



¹ Please note that the CO took over responsibility for the oversight of the NSIA regime in February 2023, where this role had previously been exercised by the Department for Business, Energy & Industrial Strategy ("**BEIS**"). The relevant Secretary of State ("**SoS**"), the ultimate decision-maker under the NSIA, is now the UK's Deputy Prime Minister which, at the time of writing, is Oliver Dowden MP.

² Namely, 1 April 2022 to 31 March 2023. The previous annual report covered only a 3-month period between 4 January 2022 (the date the NSIA regime came into force) and 31 March 2022.

Total number of filings

Perhaps one of the more surprising aspects of the Report is the volume of NSIA filings that were submitted to the CO during the Relevant Period. These figures are shown below:³

	Total number of NSIA filings <u>received</u> ⁴		Total number of NSIA filings <u>reviewed</u> ⁵	
	No.	%	No.	%
Mandatory ⁶	671	77.5%	617	80.5%
Voluntary ⁷	180	20.8%	137	17.9%
Retrospective ⁸	15	1.7%	12	1.6%
TOTAL:	866	100.0%	766	100.0%

Whilst these numbers may seem significant, they are far below the volume of NSIA filings that some predicted would be generated by the introduction of this legislation. Indeed, the [Impact Assessment](#)⁹ published by the UK Government in November 2020 anticipated that the NSIA would generate between 1,000 and 1,830 notifications per year. Other stakeholders at the time predicted the number would be even higher still.

Time taken to confirm acceptance of filings

Once an NSIA filing is submitted, the CO must confirm to the notifying party that the filing is "accepted" – in effect, that the filing is complete – before the initial review period of 30 working days will start. A filing will be "rejected" if, for instance: (i) it is deemed to contain insufficient or incomplete information; and/or (ii) the transaction was notified under the mandatory regime when it actually falls under the voluntary regime (or vice versa).¹⁰

Notably, the average time taken for the CO to reject filings submitted under the NSIA's mandatory regime has doubled since the [first NSIA report](#) published in June 2022. It has also taken slightly longer for the CO to accept mandatory notifications. On the other hand, the time taken for the CO to reject voluntary notifications has become slightly more efficient. This data is shown below:

³ See page 11 of the Report for the number of NSIA reviews received and pages 21-22 for figures on the number of NSIA filings reviewed.

⁴ An NSIA filing is received by the CO once it has been submitted via the NSIA [online portal](#).

⁵ As the Report notes, whilst filings may have been *received* during the Relevant Period, not all will have been *reviewed*. This is because there is a gap between submission of an NSIA filing (which the CO receives) and the review of an NSIA filing. The latter will only occur once the CO confirms acceptance of the NSIA filing. As there is a gap between submission and acceptance, the difference in the number of NSIA filings received and those which were reviewed reflects the fact that some filings were: (i) received before the start of the Relevant Period and reviewed during the Relevant Period; and (ii) received during the Relevant Period, but not reviewed until after the Relevant Period.

⁶ Mandatory NSIA filings are triggered by transactions which: (i) involve an acquisition of shares and/or voting rights above specified thresholds (e.g., >25%); and (ii) involve a target entity which is active in one (or more) of the 17 key sectors of the UK economy. The definitions of the key sectors are set out under The National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021 ("Key Sectors SI").

⁷ If a transaction does not fall within the mandatory regime, parties may elect to voluntarily notify the CO of any particular deal. The impetus to do so would be if the parties consider that the CO might determine, if/when it learnt of the deal, that the same could raise (perceived) national security concerns.

⁸ If a transaction is not notified under either the mandatory or voluntary regimes, parties can retrospectively submit an NSIA filing post-closing.

⁹ Impact Assessment: National Security and Investment Bill, 9 November 2020 (IA No. BEIS006(F)-20-CCP) ("Impact Assessment"). Page 22.

¹⁰ Note here that the mandatory and voluntary NSIA filing forms are slightly different. The template filing forms can be viewed [here](#).

	Average number of working days	
	First NSIA report ¹¹	The Report
Time taken to confirm acceptance of mandatory NSIA filings	4	5
Time taken to reject mandatory NSIA filings	6	12
Time taken to confirm acceptance of voluntary NSIA filings	5	5
Time taken to reject voluntary NSIA filings	12	9

If a filing is rejected by the CO, it can be corrected and re-submitted by the notifying party. However, this can impact the deal timetable and introduce unnecessary delay. It is therefore important for parties to prepare as complete filings as possible and on the correct filing form before submitting to the CO via the online portal.¹²

Areas of the UK economy most affected

Of the 17 key sectors set out under the NSIA's mandatory notification regime, 'Defence' has been responsible for the highest proportion of mandatory NSIA filings. 47% of all mandatory filings made during the Relevant Period pertained to target companies whose activities were caught by this sector. By comparison, the key sectors responsible for the second and third highest rates of mandatory filings were 'Critical Suppliers to Government' (22%) and 'Data Infrastructure' (19%). It is likely that the significant volume of 'Defence'-related mandatory filings is, at least partly, due to the fact that the definition of this sector under the Key Sectors SI is broadly drafted. Indeed, not only can it apply to companies with only indirect contracts with the Ministry of Defence ("**MoD**") (or any other entity active in the UK's defence sector), but it can also apply to companies providing innocuous goods and/or services. For example, a company providing cleaning or catering services at an army barracks would be caught by this sector.¹³



¹¹ The Department for Business, Energy & Industrial Strategy. *National Security and Investment Act 2021 – Annual Report (4 January 2022 – 31 March 2022)*. 16 June 2022. Page 12. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1083295/E02757792-nsi-annual-report-2022.pdf

¹² Here, it is worth noting that by far the most common reason the CO had for rejecting both mandatory and voluntary filings was that they had been submitted under the wrong filing regime (i.e., purported voluntary deals should have been mandatorily notified (and vice versa)). In total, this reasoning accounted for 23 of the 43 total rejections made during the Relevant Period (54%). By contrast, filings were only rejected on the basis of incomplete information in 3 of the 43 rejections made (7%). See page 14 of the Report.

¹³ The Cabinet Office. *National Security and Investment Act: details of the 17 types of notifiable acquisitions*. Last updated 27 April 2023. Available at: <https://www.gov.uk/government/publications/national-security-and-investment-act-guidance-on-notifiable-acquisitions/national-security-and-investment-act-guidance-on-notifiable-acquisitions>

Call-ins

Call-in notices are issued by the CO in respect of deals which have been notified (under either the mandatory or voluntary regimes) and which the CO wishes to scrutinise more closely in an in-depth review.¹⁴ Call-in notices can also be issued in respect of deals which parties chose not to notify, but which the CO has learnt of¹⁵ and decided it would like to review under the NSIA due to perceived fears or suspicions that such deals could affect the UK's national security.

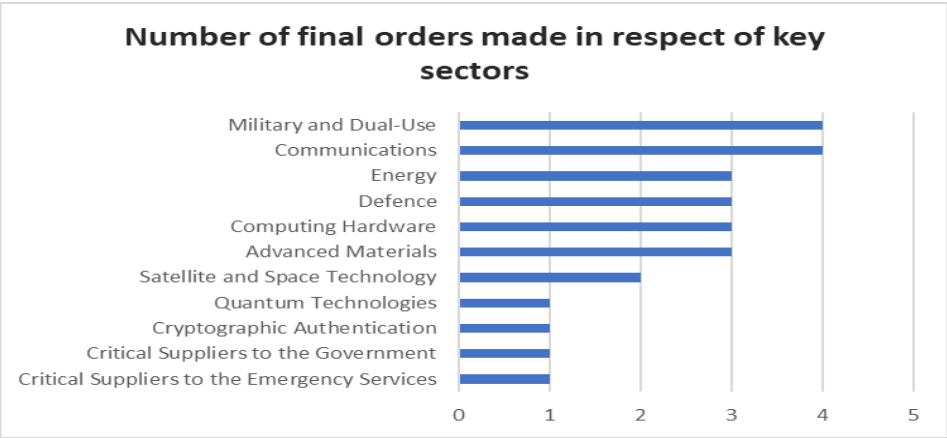
The Report notes that, of the 766 NSIA filings reviewed by the CO during the Relevant Period, only 55 (7.2%) were called-in for an in-depth assessment. This figure rises to 65 (8.5%) if you include call-in notices issued in respect of non-notified transactions. Again, and interestingly, these figures are lower than the forecast estimates set out in the [Impact Assessment](#) published in 2020, which predicted between 70 – 95 call-ins in each 12-month cycle.¹⁶

Final orders

Final orders, unlike final notifications,¹⁷ are issued by the CO in respect of transactions which the CO has determined may only proceed subject to acceptable remedies¹⁸ (e.g., divestments) or which the CO decides should be prohibited outright. The latter can include unwinding orders if the transaction in question closed prior to the conclusion of the CO's review.

The Report notes that, during the Relevant Period, the CO issued a total of 15 final orders (accounting for 20.8% of all deals which were called-in).¹⁹ Five of these final orders constituted outright prohibitions (including unwinding orders). A further nine transactions were cleared subject to remedies, the most common of which included ringfencing measures around sensitive information and guarantees in terms of security of supply. One final order was revoked.

In the Report, the CO included the graphic below to indicate which key sectors were most relevant to the final orders issued during the Relevant Period:²⁰



¹⁴ Here, it is worth noting that NSIA review periods are divided into: (i) an initial review period of 30 working days, which runs from the date the CO confirms a filing is accepted; and (ii) an in-depth assessment period comprised of an additional 30 working days, which can be extended by a further 45 working days at the CO's discretion and even longer still if mutually agreed between the CO and the notifying party.

¹⁵ The CO, much like a competition regulator like the Competition & Markets Authority ("**CMA**"), will monitor public announcements and relevant trade press and, in so doing, may pick up deals that have not been notified to it under the NSIA. The CO may also learn of such deals by way of third party complaints.

¹⁶ Page 22 of the Impact Assessment.

¹⁷ Final notifications are akin to (unconditional) clearance decisions. They are issued when the CO is satisfied that "no further action" is required in respect of a particular NSIA review.

¹⁸ Similar to a merger control review, remedies can be structural (e.g., divestments) or behavioural (e.g., firewalling sensitive information, preventing the licensing of certain technologies, commitments to maintain operations and/or jobs in the UK etc.).

¹⁹ Please note that this figure has been calculated based on a figure of 72 call-ins issued during the Relevant Period. This figure (72) is different from the figure of 65 cited in the section on call-ins above, given that, where final orders are concerned, the CO elected to call-in some transactions before the start of the Relevant Period but issued the final order during the Relevant Period.

²⁰ See page 35 of the Report.

Two points should be noted in respect of the graphic above:

- It is possible for different transactions (and, in turn, the final orders issued in respect of the same) to relate to more than one key sector. This is why the figures in the graphic do not add up to the total of 15 final orders issued during the Relevant Period.
- A further final order was issued during the Relevant Period in respect of a category called "Academic Research and Development in Higher Education". Although not a key sector under the Key Sectors SI, it is worth highlighting that the first prohibition order issued under the NSIA related to this area of the UK economy. The deal in question was voluntarily notified and concerned a licensing arrangement between the University of Manchester and a Chinese acquirer called Beijing Infinite. The CO determined that the software in question had dual-use (i.e., military applications) and thus prohibited the deal. This particular final order is worth mentioning as it emphasises two things. The first is that even deals outside the mandatory regime can, and will be, closely scrutinised by the CO if there are (perceived) strong reasons for doing so. The second, and connected, point is that deals involving acquirers from particular countries may pique the CO's interest more than others.

Investor origin

Since it was first introduced, the NSIA regime has been particularly distinctive in that it is technically agnostic towards the nationality of the relevant investor. This stands in contrast to many other investment screening regimes introduced by countries around the World, which are typically focused on particular "foreign" investors and/or include exemptions for investors from specified countries. The CFIUS regime in the U.S., for example, includes exemptions for investors from Australia, Canada, New Zealand and the UK. The NSIA, meanwhile, can (and often does) apply to UK-UK investments which have no foreign element at all.



The Report both confirms and rebuts this purported nationality agnosticism. On the one hand, the vast majority (58%) of accepted NSIA filings submitted during the Relevant Period came from UK-based acquirers. The second and third most common acquirer type by reference to individual country of origin came from the U.S. (25%) and France (6%) (typically seen as "friendly" countries). Moreover, the CO has issued final orders in respect of deals involving acquirers from the UK (4 in total), the U.S. (3) and other countries such as Luxembourg and the Netherlands (1 each). This suggests that the CO places greater weight on the nature of the target entity or asset being acquired than it does on the nationality of the investor.

On the other hand, this suggestion is arguably belied by the fact that investors involving Chinese acquirers, which constituted less than 5% of all NSIA filings submitted during the Relevant Period, also counted for a disproportionate figure of 42% of all call-in notices and 8 out of the 15 final orders issued (53%). It is, therefore, clear that deals involving Chinese acquirers have received particular scrutiny from the CO.

It is also worth mentioning that, perhaps surprisingly, the percentage of transactions involving Russian-based acquirers accounted for a much smaller proportion (4%) of all call-in notices issued during the Relevant Period. In fact, countries such as the UK, the U.S., Canada, France and Israel all accounted for a greater percentage of call-in notices issued during the Relevant Period than Russia. Similarly, only 1 final order was made in respect of a deal involving a Russian acquirer. In light of the ongoing conflict in Ukraine and the sanctions imposed against many Russian entities/individuals, we would have expected this figure to be higher. Time will tell whether this trend will alter as the NSIA regime continues to both establish itself further and evolve.

Comment

The CO claims at the beginning of the Report that the NSIA regime is "light touch" and that the "majority of businesses in the UK [have had] zero interaction" with it.

Certainly, the figures on total NSIA filings are an interesting revelation. As noted, many believed the NSIA would risk causing significant disruption to UK investment activity due to the breadth of the regime and the variety of deals it could affect. The fact that far fewer NSIA filings were submitted during the Relevant Period as compared to estimates given before the NSIA came into effect could suggest that the NSIA is having a less disruptive impact than initially forecast.

However, it is difficult to extrapolate definitive conclusions on this from the Report. It is equally possible that the (comparatively) low number of NSIA filings made during the Relevant Period is due to the difficult economic challenges facing the UK (and many other countries), such as high interest rates and inflation, a stagnating economy and supply chain disruption. It is also possible that investors have simply shied away from investments that would otherwise have triggered an NSIA review. The statistics in the Report cannot clarify either side of this coin.

More broadly, it is salient to note that the Report, as per the CO's modus operandi under the NSIA to conduct its reviews in "black box" fashion, does not give any indications as to how the CO substantively approaches its reviews. With this in mind, though the Report provides some interesting insights into the NSIA, these largely relate to procedural issues. With the exception of the clear focus on China and some indication as to the key sectors that have most piqued the CO's interest, investors are not much better placed to anticipate deals which might encounter difficulties under the NSIA. The high proportion of clearance decisions will doubtless give rise to optimism, but we expect this to remain a cautious optimism for the time being.

Contact us

Should you have any queries or wish to discuss any matter in this briefing, please do not hesitate to contact the Competition Team.



Marta Isabel Garcia

Partner

T: +44 20 7809 2141

E: marta.garcia@shlegal.com



Will Spens

Associate

T: +44 20 7809 2365

E: will.spens@shlegal.com