

Changes coming for the NSIA, but does the “fine-tuning” go far enough?

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At the end of last year, the Government requested feedback on how to “narrow and refine” the scope of the National Security and Investment Act (NSIA), improve the operation of the NSIA system, and make it more business-friendly.

More than 100 law firms, trade bodies, financial institutions, businesses, academic institutions and others contributed to this call for evidence - including Linklaters, whose suggestions were summarised in our earlier [post](#). The UK Government has now released its [response](#), setting out its estimated timeline and focus points with respect to updating the NSIA regime, and published an additional [response](#) to points raised by the Business and Trade Committee (the Committee).

This blog looks at next steps, and whether the envisaged changes are likely to meet their stated objective of streamlining investment screening in the UK, and lessening the burden on the Investment Security Unit (ISU) and businesses – or whether further change is needed.

What comes next: Guidance, new mandatory sectors and some exemptions...

The Government foreshadows a number of steps that will be taken in the next twelve months to address the concerns raised by those who responded to the call for evidence and to “fine-tune” the regime, namely:

- **Clarification on exercising the call-in power.** The first step towards reform can be expected in May 2024, with a revised NSI Section 3 Statement that will focus on clarifying what factors are taken into account when exercising the call-in power. This will set out which areas of the economy the Government considers most sensitive, and how the national security risks of a transaction are assessed. The current Section 3 Statement adopts a very high-level approach, and it remains to be seen whether the Government will provide more detailed guidance in the revised version. However, as noted in the response to the Committee, the revised statement will not contain a definition of national security, given the Government’s concerns that this could result in risks potentially being missed.
- **Updated market guidance.** After a large majority of respondents voiced a need for updated market guidance, the Government has indicated it will provide such guidance on a range of issues, including detailing the factors taken into account when assessing risk, what is captured by mandatory area definitions, and how the NSIA will apply to specific situations (including its application of the NSIA to academia and Outward Direct Investment). The updated market guidance is expected in May, and will include updating existing guidance (for example, the [guidance for universities](#)).

- **New mandatory sectors, with a focus on Semiconductors, Critical Minerals and... water?**
The Government also plans to launch a consultation on updating the mandatory sectors this summer, with a focus on proposals for a standalone Semiconductor area and a Critical Minerals area, as well as considering whether to add water to the list of areas subject to mandatory notification (alongside critical infrastructure in the energy space, which is already subject to mandatory notification). However, the Government is intentionally reticent about the nature of the specific proposals planned, noting in its response to the Committee that it “will not comment on the specific proposals now” – so the extent to which any new or revised sectors will have the effect of streamlining the NSIA remains to be seen.
- **Exemptions for the appointment of liquidators – subject to parliamentary time.** We can also expect some refining of scope, by way of exemptions, of the mandatory notification requirements for the appointment of liquidators, with the Government planning to put forward legislation in Autumn 2024 - if Parliamentary time allows. However, this timing is likely to run up against the Government’s preparations for the next general election (expected in the second half of this year), leaving the future status of these planned exemptions unclear. The Government has also noted that “further work is first required”.
- **Fix the firewall.** One commonly reported concern was the issue of ‘false positive’ firewall blocks, preventing users from progressing a notification on the ISU’s portal. The ISU is trialling solutions for this, and additional improvements to the portal can be expected.

... but no substantial reforms imminent

When the Government issued its call for evidence, one aim was to help “hone the scope” of the mandatory notification requirements of the NSIA. This call comes off the back of numbers in the NSIA Annual Report suggesting that a significant proportion of reviews give rise to no national security concerns - and with the Government’s response subsequently reporting that roughly only 1% of the numerous (over 1,700) notifications made during the NSIA’s lifetime have resulted in final orders being made (as of 23 April 2024). Despite this, the Government’s response makes it clear that its approach is one of “fine-tuning” and that substantial NSIA reform advocated by many stakeholders is no longer on the cards. Specifically:

- **No “fast-track” for frequent flyers.** While acknowledging that some respondents called for an expedited process for acquirers who already had a prior transaction cleared, the Government is not considering a fast-track process, citing a preference for assessing transactions on a case-by-case basis, and noting that the updated Statement should help businesses better understand where the Government might intervene. While clarification on the call-in power is certainly welcome, this does not mitigate the impact of the mandatory and suspensory nature of the filing obligation in many cases for frequent flyers.
- **No exemptions for internal restructurings (yet).** The Government has received feedback from a range of stakeholders that the requirement to notify internal reorganisations is disproportionate given the vast majority of these involve no national security risk, and that this obligation can create material obstacles for ordinary course business activities. Nevertheless, exemptions for internal restructuring are not likely to be included in the Autumn 2024 round of proposals, with the Government citing the need to carry out “further work” to consider the feasibility and potential impacts of such exemptions.

- **No exemption for enforcement of security.** Despite concerns raised by some stakeholders that mandatory notifications for enforcement of security creates potential delays in enforcing security, there are no plans to provide exemptions – even, presumably, where the lender enforcing security does not intend to retain ownership of the shares, but sells them to a third-party acquirer to recover its investment.

...and a murky view on future transparency

Responding to concerns that the ISU is somewhat of a “black box”, the government notes that the ISU also plans to consider further improvements to the operation of the NSI system. However, what these improvements will look like remains to be seen.

So far there is no indication that we can expect dedicated case teams, greater transparency during the review process regarding the nature of any potential national security concerns (for example, by having state-of-play meetings), or clear decision rationale in final orders. Instead, the Government’s response cites improvements that have already been made, such as the ISU routinely offering calls at key stages in the process, and providing senior contacts for parties to engage with following a call-in.

We also don’t expect to see more frequent or detailed reporting, with the Government noting in response to the Committee’s calls for greater transparency that the UK regime is already “amongst the most transparent internationally” in respect of data reported, citing the need to prioritise resources towards operating the NSI system, rather than increasing the frequency of reports.

Conclusion

While the Government has set the stage for what it will (and won’t) be looking at as it “fine-tunes” the NSIA, the devil is in the detail – especially when it comes to the mandatory sectors. So, while the more substantial reforms advocated by many stakeholders will have to wait (including with respect to exemptions from mandatory notifications for internal restructurings), there is still room in practice to ease the burden on businesses, in particular through issuing guidance on what is captured by the mandatory area definitions and by narrowing and refining those definitions. This is an area we will be watching closely in the coming months, so stay tuned for further developments.