

## The UK government updates the NSIA guidance and clarifies the scope of the call-in power: What you need to know

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Last month, in response to last year's consultation on how to "narrow and refine" the scope of the National Security and Investment Act (NSIA) (Consultation), the [Government announced upcoming changes](#) to "fine-tune" the operation of the NSIA. Ticking off the first step in its to-do-list, the Government's updated Market Guidance and revised National Security and Investment 'Section 3 Statement' have now been released.

Many of the clarifications provided reaffirm the previously understood legal position and/or are incremental improvements on previous guidance. However, there are a few key points investors will want to be aware of – notably, more detailed guidance on the risk factors that will be considered for a call-in (now supported by additional case studies) and explicit guidance on the treatment of joint ventures and greenfield investments, and how the NSIA will apply to outbound investment.

### New 'Section 3 Statement' – a detailed list of risk factors for call-ins

The new [Section 3 Statement](#) explains how decisions are made and what the Secretary of State is seeking to protect by using the call-in power. It also sets out what factors are taken into account when calling in an investment that is not subject to a mandatory filing. The Statement adopts a similar framework for analysis to the previous iteration (i.e. focusing on target risk, acquirer risk and control risk), but provides a greater level of detail on the risk factors relevant to a decision to call in an investment (supported by a number of case studies). In further detail:

- **Target entity and asset risk.** A first consideration is whether the target could be used in a way that raises a risk to national security. This includes looking at whether the entity carries out activities closely linked to the mandatory sectors, whether it has a sensitive supply relationship with the Government in an area related to a mandatory sector, or whether assets could be used in connection with a mandatory activity.
- **Acquirer risk.** Another key consideration is whether the acquirer poses a risk, for example because of its (or any linked parties') past behaviour and intent, its existing capabilities, or its ties or allegiance to a State or organisation that is hostile to the UK. The Statement reaffirms that the Secretary of State will not make judgements based solely on an acquirer's country of origin. At the same time, certain risk factors clearly point to heightened scrutiny of Chinese investors (e.g. the guidance notes that the Investment Security Unit (ISU) will consider whether the country of origin has laws which allow that country's security service to covertly monitor communications to, within, and out of the country, as well as compel businesses and organisation to share information and data).

- **Control risk.** A final factor that will be considered is the level of control being acquired. This will be looked at alongside the other factors – and where the other risk factors are higher, a low level of control will be considered to reduce the overall risk to national security. Interestingly, the Statement notes that control risk from cumulative investments across a sector or supply chain will be considered, as will the amount of control that could be gained through the exercise of financial instruments (such as loans). However, these factors are not fully probed in the NSIA filing forms, so it is not yet clear how these factors will be assessed going forward.

The Statement also explicitly confirms the pre-existing position under the NSIA that the formation of new entities (i.e. joint ventures and greenfield investments) can also be called in where this involves the transfer of intellectual property (IP) or a change of control in certain assets.

There are several points where stakeholders had called for further clarity, which are not reflected in the response:

- The Business and Trade Committee submitted in response to the Consultation that the lack of a clear definition of “national security” undermines the NSIA system. The Statement explicitly rejects providing a definition of “national security”, reflecting the Government’s earlier stated concerns that this could result in risks potentially being missed.
- When responding to feedback on how to narrow and refine the NSIA, a number of respondents called for a fast-track option for frequent flyers. While the Statement notes that a “*history of passive or long-term investments...may indicate less risk*” it emphasises that each acquisition is assessed on a case-by-case basis.
- The Statement does not provide any detailed guidance on how the Secretary of State will assess risk in the context of a fund structure (where e.g. there are purely passive limited partners) beyond noting that the source of the funds for an acquisition (including members of the investment consortium) will be considered.

## Updated Market Guidance

As foreshadowed, the updated [Market Guidance](#) provides direction on a range of issues relevant to the operation of the NSIA (including timelines for NSIA assessments, outward direct investment and the NSIA’s application to higher education / research-intensive sectors). Some of the key points are discussed below.

### Outward Direct Investment

The Market Guidance clarifies that the NSIA can apply to [Outward Direct Investment](#) where an entity being acquired carries on activities in the UK (or supplies goods or services to the UK) or where an asset being acquired from outside the UK is used in connection with carrying on activities in the UK (or supplying goods and services to the UK).

What this means in practice is that UK-based investors seeking to purchase foreign entities or assets could find their transactions being called in – for example, where sensitive IP is shared from a UK company with another entity as part of a merger or JV, or where the foreign target has a subsidiary

providing services to UK-based defence companies, or where the foreign target provides products and support services in relation to sensitive sectors in the UK.

The Market Guidance reaffirms the previously understood legal position with respect to outbound investment under the NSIA, but perhaps foreshadows greater scrutiny in this area (which is already subject to a consultation run by the Department of Business and Trade, to better understand potential risks of outward direct investment). This clarification is also reflective of a global move to provide for outbound investment screening, echoing proposals currently being considered in both [the EU](#) and [the US](#).

### **Application to academia**

The Guidance clarifies what will qualify as an acquisition, and [what sort of academic collaborations will need to be notified](#). In particular, collaborations related to activities in mandatory sectors are likely to be of interest to the Government, especially where an acquirer gains greater control over an asset (i.e. through licensing or rights over IP). The focus on academia has also been reflected in prior enforcement action, with the [first deal blocked under the NSIA](#) involving a licence agreement for vision sensing technology between Beijing Infinite Vision Technology Company and the University of Manchester.

### **Timelines and notification forms**

The Guidance explains how timelines are calculated and provides clarification that timelines for screening can only be expedited in exceptional circumstances (i.e. [material financial distress](#)) and usually only at the stage when the Secretary of State is deciding whether or not to call in an acquisition. The Guidance also provides updated top tips when completing a notification form.

### **What's next?**

In its [response](#) to the call for evidence, the Government referenced plans to launch a consultation on updating the mandatory sectors this summer, including proposals for a standalone Semiconductor sector and Critical Minerals sector, as well as potential proposals to add water to the list of areas subject to mandatory notification. However, as noted in our [previous post](#), more substantive reforms (such as exemptions for internal restructurings, or substantial changes to improve transparency with the ISU) are not in the immediate pipeline (and inherently uncertain given the upcoming general election).

This is an area we will be watching closely in the coming months, so stay tuned for further developments.