

# Bird & Bird

## FDI – Latest developments and refinements to the UK’s NSIA regime

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After the initial bedding-in period of the UK’s FDI regime, in May 2024, the previous UK Government provided updated guidance on the application of the National Security and Investment Act (“NSIA”) and helpful clarification on when deals might be “called in” for a more detailed review. More detail on the UK’s FDI regime can be found in the Bird & Bird FDI Guide. The package of measures included:

- An [updated policy statement](#) that informs when deals will be “called-in” for review – so-called “section 3” statement;
- [Updated guidance](#) on the application of the NSIA to acquisitions outside the UK;
- [Detailed guidance](#) for the higher education and research-intensive sectors; and
- [Updated market guidance](#) (dealing with the review period, acquisitions of voting rights (including veto rights), clearance transactions involving material financial distress, notification guidance).

These updates follow the Government’s [Call for Evidence Response](#) published on 18 April 2024 (see our article [here](#)).

### When will the Government call-in a deal for detailed review

Whilst the 3 substantive assessment criteria for when a transaction will be “called-in” for an in-depth national security review remain unchanged - (i) Target Risk, (ii) Acquirer Risk, and (iii) Control risk, the Government provided further guidance on the relevant risk factors which will inform its assessment in its updated Section 3 Statement.

Key changes include:

#### Risk assessment

- **Target risk:** focuses on the activities of the target and how it might be used in a way that raises a risk to national security in the UK. The Government will consider, for example, “whether the asset acquisition would allow the transfer of technology, intellectual property or expertise to an acquirer, or parties linked to an acquirer, which could undermine or threaten national security now or in the future.”
- **Acquirer risk:** this considers whether the acquirer poses a risk to national security. The Government will assess the acquirer’s history, sector it operates in, intent of the acquisition, capabilities, and ties to hostile state or entities which may seek to undermine or threaten the national security of the UK. Also relevant will be whether the acquirer is, or has been, subject to UK or foreign sanctions in connection with activity that may indicate a risk to national security, and the level of control a sanctioned party will have in the target entity or asset.
- **Control risk:** evaluates the level of control gained by the acquirer and impact. A higher level of control may increase the level of national security risk. This also concerns the amount of control over an asset,

which includes controlling or directing its use, as well as using it. The Government is concerned not just with outright ownership, but also the ability to sway a company's direction. This could be through board seats, special voting rights, or other decision-making arrangements. A control risk is likely to occur if there are cumulative investments across a sector or various stages of the supply chain.

## Expanded risk factors

The Government also provided more detail on certain risk factors in the following areas:

- **Critical infrastructure:** risks to the disruption, erosion or degradation to critical infrastructure and supply chains that could pose national security risks are now considered. Critical infrastructure includes the civil nuclear, public communications networks, space, military and defence, and synthetic biology sectors, among others.
- **Military and security capabilities:** the potential for acquisitions to lead to the disruption or erosion of military, intelligence, security or technological capabilities now or in the future is emphasised as one of the factors that will be considered.
- **Sector strategies:** the impact of transactions on state policies on national security and other sensitive sectors is a new factor.
- **Case studies:** the guidance also provides updated example scenarios to provide further insights and includes 7 examples covering a range of transactions across AI, university licensing agreements, defence contractor, source code/computer programming, communications, energy, and Government contracting with different types of investments from acquisitions of controlling interests to minority investment as well as asset acquisitions in addition to considering the status of the acquirer and fund structures and ownership.

## Updated market guidance

The Government also provided helpful Market Guidance concerning the operation of the NSIA. This includes guidance on how the NSIA regime can apply to outward direct investment ("ODI") as well as procedural guidance and additional information for the research sector/universities to inform decisions on whether to notify transactions.

### Procedural updates - how long the assessment under the NSIA will take

- **Notification:** following submission of the notification, the Government aims to accept or reject notifications within 5 working days (however, this usually takes up to 7 working days).
- **Review Period:** the initial review period lasts up to 30 working days, during which the Government may request further information or call in the acquisition for a full assessment.
- **Assessment Period:** this period begins when an acquisition is "called in" and lasts 30 working days, with possible extensions of 45 working days or more if information or attendance notices are issued or if agreed by the Government and the acquirer.

### Veto rights and trigger events

Whilst the regime captures share acquisitions which cross the 25%, 50% or 75% thresholds (including internal re-organisations), the Government has provided additional clarification on the acquisition of certain voting rights/veto rights and whether these may trigger a mandatory notification. Voting rights means rights that are given to shareholders or members to vote at general meetings (or rights of equivalent effect if no meetings) on all, or substantially all, matters. In the case of minority veto rights, the voting rights only count where they provide the holder with a right to vote on all or substantially all matters governing the affairs of the entity.

"Governing the affairs of the entity" covers a wide range of actions. The Government considers that no type of voting right is excluded when considering whether voting rights acquired allow a person to block resolutions governing the affairs of the entity. The risk arising from control will be assessed alongside the risks arising from the nature of the target and the characteristics of the acquirer, however a higher level of control may increase the level of national security risk.

### **Expedited procedure - updated guidance on acquisitions involving parties who are suffering material financial distress**

In acquisitions involving parties who are suffering material financial distress, it may be possible to expedite the Government's decision on whether to call in an acquisition. The parties should bring this to the Government's attention as soon as possible and provide supporting evidence.

This is likely to include, but is not limited to: (i) restructuring and insolvency advisor confirmation of engagement, along with their analysis and advice to the company supporting the claim that an insolvency event is imminent; (ii) 13-week cash flow statement, clearly showing a deficit and breach of facilities; (iii) current balance sheet and profit and loss account, including projections; (iv) evidence of non-support from lenders and shareholders, including evidence of breaching banking facilities; and/or (v) correspondence with suppliers/creditors of the company evidencing debt demands (and therefore non-support).

### **Universities and research-intensive sectors**

The Government also updated the guidance for investments in the higher education and research-intensive sectors. This encompasses investments into institutions like universities, research bodies, and university spinouts, among others. It also extends to investments in eligible assets such as intellectual property, tangible property (like laboratory equipment), land, or confidential business information.

- **Qualifying Assets:** The guidance expands on the examples of what can be considered a qualifying asset. It includes: (i) patents, including future intellectual property arising from collaboration with other entities; (ii) licences granting the use of assets, whether those licences are commercial or non-commercial or relate only to research and development; (iii) all forms of intellectual property. Additionally, the guidance mentions agreements that could lead to the creation of qualifying assets in the future.
- **No Mandatory Notification:** The acquisition of assets (such as intellectual or tangible movable property) is not subject to mandatory notification. However, the guidance encourages engagement if the parties seek greater certainty that the acquisition will not be called in for review.

The new guidance provides that a party, either the acquirer or the target, to a completed or planned qualifying acquisition that is not covered by mandatory notification can seek assurances on whether the Government is going to call in the acquisition now or in the future. Parties can contact the Research Collaboration Advice Team (RCAT) to receive help on specific cases.

The Government is more likely to be interested in academic collaborations that are connected to, or could be used in connection with, the activities set out in the Notifiable Acquisition Regulations.

Research collaborations and activities receiving funding from a UK Government entity or via a body affiliated with the Government are not automatically exempt and may still need to be notified.

- **NSIA and Export Controls:** This is a new section in the guidance, emphasising that clearance under one does not exempt parties from seeking clearance under the other. The types of research collaborations that may be considered qualifying acquisitions include scenarios where a company gains control over existing or future intellectual property through a collaboration agreement, or where a non-UK entity funds research

and gains rights to the resulting intellectual property. It also includes an example of an academic institution acquiring the right to use another institution's intellectual property, highlighting the potential risks when the acquiring institution has foreign military ties.

- **Other Resources:** The May 2024 guidance references updated resources from the National Protective Security Authority (NPSA) and the National Cyber Security Centre (NCSC) on start-ups, spin-outs and scaleups, which are not present in the guidance before.

## Acquisitions outside the UK

- **Applicability of NSIA to Outward Direct Investment (“ODI”):** The new version of the guidance includes a new section on how the NSIA can apply to ODI from the UK, which involves a UK person acquiring an entity or asset abroad. The revised guidelines state that the NSIA may be applicable when the acquiring party gains control over a qualifying entity or asset outside the UK under the following conditions:
  - the qualifying entity conducts activities in the UK;
  - the qualifying entity provides goods or services in the UK; or
  - the qualifying asset is utilised in relation to the performance of activities or provision of goods or services in the UK.

Certain instances of ODI such as the transfer of technology, intellectual property, and expertise as part of an investment or during the formation of overseas joint ventures, may be considered an acquisition under the NSI Act. In determining whether to call in, the Secretary of State will evaluate if the asset or entity is associated with activities in any of the 17 sensitive NSIA sectors and if this could potentially pose a threat to national security.

- **Mandatory Notification for ODI:** The new guidance clarifies that in certain circumstances, the acquisition of a foreign qualifying entity by a UK person may be subject to mandatory notification. If the relevant tests in the NSIA are met, the acquirer is mandated to notify the transaction to the Government and must receive clearance before completion of the acquisition.
- **Examples:** The May 2024 guidance provides more detailed and varied examples, including scenarios involving mergers, joint ventures, and the transfer of intellectual property.

## Recent final orders and remedies

Whilst there is still limited transparency available to inform when deals will be called in, some of the recent final orders help to provide clarity on the type of remedies that may be imposed, including:

- Limits on the sharing of sensitive information;
- Consent requirements for certain transactions;
- Notice requirement for the exercise of share options and appointment of board members;
- Certain defence capabilities to remain in the UK; and
- Measures to safeguard research and intellectual property, manage supply chain risks, limit access to certain information and require security clearances and vetting of the Board of Management and the appointment of security officers.

On 10 September 2024, the UK government published the third NSIA annual report for 2023-24. This confirms that over the period 1 April 2023 to 31 March 2024, there were over 900 notifications with only 41 transactions called in for a detailed review. Of these call-ins 41% involved acquirers associated with China, 39% the UK and 22% the USA. The call-ins resulted in 10 transactions being abandoned with 5 final orders being issued. The main impacted sectors were defence, critical suppliers to the Government and military/dual-and in addition advanced materials (including semi-conductors), communications and higher education were also important areas as well as AI.

## Top tips

1. Familiarise yourself with the risk factors and keep these in mind when assessing whether to notify the transaction (where a mandatory notification is not required);
2. Take note of the expanded risk factors, including risks to critical infrastructure, disruption of military and security capabilities, and the impact on state policies for sensitive sectors; and
3. Build in sufficient time to consider whether a NSIA filing may be required and consider the impact on the deal timetable and any conditions precedent.

**If you need more information or further guidance in this area, please contact [Anthony Rosen](#) or [Tenisha Cramer](#).**

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