

## UK National Security and Investment Act Update

16 September 2024

On 10 September, the UK Cabinet Office published the third Annual Report on the UK National Security and Investment Act (the Act).<sup>1</sup> This year's Annual Report is the second to provide a full analysis of the prior year in review, allowing us to see how the regime has evolved in its third year since it came into force. Highlights from the Annual Report are presented below, together with a summary of other important developments over the last year.

### Highlights from the Annual Report

- **Defence continues to dominate.** According to the Annual Report, nearly 48% of all mandatory notifications concerned activities in the defence sector. Like many investment screening regimes, defence is a key policy focus. Similarly, transactions involving military and dual use (i.e., military and civilian use) goods and services are also in the cross-hairs, as the highest proportion of 'called in' acquisitions related to defence (34%) but military and dual use sector acquisitions came in a close second (29%). Whilst it is notoriously difficult to confirm whether a target's business activities fall within the specified list of military and dual use goods and services, an important check is to confirm whether the company holds export licences in relation to the UK as this can bring a transaction within the scope of the mandatory notification regime. It is equally important to diligence any UK defence sector customers (and indirect customers) of the target, as large numbers of transactions fall within the mandatory notification regime on this basis.
- **Increased focus on data with several cases resulting in data commitments.** Whilst the defence and military and dual use sectors represent the majority of remedy cases, the government has imposed remedies across a range of other sectors including communications, energy, computing hardware, advanced materials and satellite and space technology. The past year has also seen an increased interest in

imposing commitments relating to sensitive data, including requirements that such data is maintained in the UK and not exported, and that sensitive information flows from the company are restricted.

- **Continued interest in acquisitions by Chinese acquirers.** Of the 41 transactions 'called-in' for in-depth review, 41% involved Chinese acquirers. However, it is also noteworthy that 39% of called-in transactions concerned UK acquirers and 22% concerned U.S. acquirers.<sup>2</sup> Whilst the nationality of the acquirer is an important consideration, these figures suggest that the activities undertaken by the target are the most important factor – meaning there are some deals where the target's activities are so sensitive that it will be called in, regardless as to whether the acquirer is from a 'friendly' allied country of the UK, or indeed if the acquirer is UK-based. This is consistent with our experience and was also a point noted by the government in its amended guidance published earlier this year. The extent to which a target business conducts sensitive activities that necessitate some engagement between the Investment Screening Unit – the body tasked with overseeing the filing and review process (ISU) – and other government bodies, such as the Ministry of Defence, is a driver in the timeline for approvals under the NSI regime (and related likelihood of a call-in notice).
- **Retrospective validation applications are being submitted regularly without sanction.** The Annual Report references 33 retrospective validation applications (i.e., notifications submitted after the relevant transaction has already closed without receipt of NSI approval) made during the reference period and confirms that no penalties were issued in respect of the missed filings to which these applications related. It is noted in the Annual Report that where offences were identified but a decision was made not to impose penalties, parties were asked to provide reassurance to the government that steps had been taken to prevent any reoccurrence. This shows the ISU taking a constructive approach and one that avoids the NSI regime becoming a deterrent to investment in the UK as a result of a strict application of a very broad mandatory filing regime.
- **Number of filings increased from last year, however a smaller number were 'called in' for a detailed review.** A total of 906 filings were received by the ISU in the year to 31 March 2024. This figure has increased slightly from the 865 notifications received in the prior year. Only 37 transactions were 'called-in' for a more detailed review during the year (approximately 4.4% of all filings reviewed, and a reduction of nearly 50% in absolute terms on the number of transactions called in during the prior year). We might speculate on whether the ISU is becoming more confident in clearing transactions without conducting an extended review through the call-in process, but this may simply be a reflection on the particular transactions that were taking place during the period. Four non-notified transactions were issued with a call-in notice,

suggesting the ISU continues to keep a close eye on transactions that are not reported.

- **Reviews are mostly quick but can be unpredictable where remedies are required.** All accepted notifications were either called in or cleared within the statutory 30 business day review period (albeit the ISU almost always requires that full 30 business day period). However, where a transaction is made subject to commitments, on average an additional 34 business days have been required to complete the review. As a takeaway, the predictability of timing for reviews under the Act in straightforward cases has been applauded, however, it is harder to predict the timeline for reviews in more complex cases.

## NSI Enforcement Record

To date, **five deals have been blocked or unwound – all involving Russian or Chinese buyers.** However, no deals were blocked or unwound in the year covered by this Annual Report. The government has prohibited deals across a variety of sectors, including telecommunications; semiconductors; dual-use electronics; and the licensing of dual-use vision sensing technology; but all with the common theme of the country of origin of the controlling investors. The government has also intervened in transactions where the immediate acquirers is seemingly based in a neutral third country (e.g. Luxembourg, the Netherlands) but who were found to be ultimately controlled by Russian or Chinese (or Hong Kong) investors.

A further **15 transactions have been approved subject to conditions**, including five this year. Common conditions have included requirements to (i) maintain strategic capabilities/security of supply in the UK or ensure continued UK ownership of the relevant companies, (ii) protect, provide access to, or restrict sharing sensitive information and/or technology, (iii) create a UK board of directors with approval authority over strategic decisions, (iv) obtain the government's approval to appoint specific operators, (v) maintain UK headquarters or presence and to protect/expand employees and local R&D capabilities, and (vi) notify the transfer of assets out of the target. Such **conditions have been imposed on UK and non-UK acquirers.** Furthermore, a reported **10 deals were abandoned/filings withdrawn, eight of which involved Chinese buyers.**

LetterOne (a historically Russian backed investment firm) issued a **challenge to a ruling under the NSI Act** after it was required to sell regional broadband provider Upp, in accordance with a commitment decision issued under the NSI in December 2022. The appeal against the forced divestment has already reached the high court, where it will be considered whether the decision was justified under national security grounds

or if lighter commitments and ongoing monitoring would have been sufficient to alleviate those concerns. Interestingly, a separate deal involving LetterOne was cleared subject to conditions in July of this year, imposing a requirement that LetterOne inform the government in advance of any share conversion that would lead it to own more than 10% in Harbour Energy (a UK oil company) or any board appointment.

## Potential Further Reforms

Since the Labour government came into power, focus on the Chancellor of the Exchequer Rachel Reeves' 'securoconomics' suggested changes might come into play with the regime including stricter enforcement, however these have yet to be seen. One mooted change of policy would be a greater focus on potential economic commitments (i.e., the retention of jobs and business in the UK) alongside the national security process; noting that while this is not strictly covered by the NSI Act, this precedent was set by the outgoing Conservative government.

In the final days of the Conservative government, further changes were expected to be implemented to the NSI regime, including (i) a refining of which transactions were caught, excluding for example internal fund-to-fund transfers, (ii) an expansion of the 17 mandatory notification sectors to include new sectors such as semiconductors and critical minerals, and (iii) a potential new outbound screening regime, however none of these changes have yet been publicly discussed by the Labour government, and it is not known if the current government will push forward these changes, although a number of them are not seen to be politically controversial. Recent government announcements have confirmed, however, that data centres will be classified as "critical national infrastructure", demonstrating the government's new interest in this sector – we should anticipate greater scrutiny of transactions notified under the NSI in this sector, as a result.

The NSI regime will remain an important tool used by the government to address national security risks and the global political environment may prompt further changes to the scope and enforcement priorities pursued under the regime.

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1. The National Security and Investment Act 2021 – Annual Report 2023-2024: 10 September 2024 [↔](#)

2. These figures aren't necessarily a true proportion of all filings given that one acquisition can be associated with more than one country. [↔](#)

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## Related Services

Practices

- Antitrust & Competition

## Suggested Reading

- 09 September 2024 Kirkland Alert Top EU Court Finds That the EU Commission Cannot Review Below-Threshold Transactions
- 06 September 2024 Award Lawdragon Recognizes 45 Kirkland Attorneys in its List of 500 Leading Litigators in America 2024
- 04 September 2024 Award Kirkland Partner Olivia Adendorff Named to Global Competition Review's 40 Under 40 2024

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