

On 16 June 2022, Business Secretary Kwasi Kwarteng published a report reflecting on the operation of the National Security and Investment Act 2021 (NSIA) during the first three months of the regime, from 4 January to 31 March 2022 (Report).

The NSIA requires notifications to be made to the government where transactions fall into one or more of 17 sensitive areas of the economy, and grants the government extensive powers to “call in” for review transactions that meet the relevant criteria and may, on the face of it, give rise to national security concerns.

The Findings in the Report

Statistics

222 notifications were made in the relevant period – 196 mandatory, 25 voluntary, and 1 retrospective validation application for an acquisition that had completed without approval and would otherwise be legally void.

Mandatory notifications – Of the 196 made, 178 were accepted, 7 were rejected, and 11 were still being evaluated as at 31 March 2022 (the report cut-off time).

Voluntary notifications – Of the 25 made, 22 were accepted, 1 was rejected, and 2 were still being evaluated as at 31 March 2022.

Retrospective validation application – This was accepted.

Only a small number (approximately 4%) of notifications were rejected. Reasons for rejection included:

- (i) Several mandatory notifications should have been voluntary
- (ii) One mandatory notification should have been a retrospective validation application
- (iii) Insufficient information, or the notification covered multiple qualifying acquisitions that should instead have been submitted as two notifications

Of the 222 notifications received, 17 were called-in by the government for further assessment (3 of these were ultimately cleared, with the other 14 cases still being evaluated as at 31 March 2022). The only two publicly reported called-in transactions to date are (i) the acquisition of Newport Wafer Fab (the UK’s largest semiconductor plant) by Nexperia (a Dutch subsidiary of Chinese company Wingtech); and (ii) Altice’s increased shareholding in BT (from 12.1% to 18%). Both of these completed in 2021, prior to the coming into force of the NSIA.

To What Sensitive Areas Have Notifications Related?

Most of the mandatory notifications related to five key sectors – defence, military and dual use, critical suppliers to government, artificial intelligence and data infrastructure. Mandatory notifications have now been received for acquisitions taking place in each of the 17 sensitive areas of the economy. In relation to voluntary notifications, most of these related to professional, scientific and technical activities, followed by data infrastructure, other service activities (which are detailed further in the report), energy and computing hardware.

Call-in notices mainly concerned transactions in the military and dual use, defence and critical suppliers to government schedules. Five of the call-ins related to voluntary notifications.

Other Statistics – Timeframes and Penalties

Average time to inform parties that a notification has been accepted as complete – 3 working days

Shortest time to issue a call-in notice – 11 working days

Average time to issue a call-in notice – 24 working days

There have been no penalties for breaches of offences under the NSIA as at 31 March 2022 (such as for completing a notifiable acquisition without approval). There were also no criminal prosecutions or judicial reviews of decisions under the NSIA.

How Do the Numbers Stack Up Against the Government’s Impact Assessment?

Based on the original Impact Assessment by the government (estimating that the NSIA would lead to 1,000 to 1,830 notifications per year), 222 notifications is slightly below projections (even the lower projection).

The government has indicated that this lower-than-expected number of notifications could be due to a COVID-19-related M&A decline towards the end of 2021. Other reasons, in our view, might include (i) a rush to get deals completed prior to the entry into force of the NSIA on 4 January 2022; or (ii) a lack of awareness of the application of the NSIA by acquirers, investors, sellers, etc.

The number of call-in notices issued (17) appears to be more or less “on track” for the government’s estimate in its Impact Assessment of between 70 and 95 call-ins per year.

MoU Between the Department for Business, Energy and Industrial Strategy (BEIS) and the Competition and Markets Authority (CMA)

A Memorandum of Understanding (MoU) on the operation of the NSIA was published on the same day as the Report, setting out the parameters for cooperation, coordination and information sharing between BEIS (and the Investment Security Unit within it, which has responsibility for the operation of the NSIA) and the CMA. It covers the informal engagement between the bodies in relation to transactions that are notified to both of them, in order to avoid the unnecessary duplication of work (and inconsistency of results).

What to Expect Next

The Report complies with the government's statutory requirement to publish an annual progress update. All further reports will cover years from 1 April to 31 March. Next year's annual report will certainly provide an even more useful insight into the statistics around notifications being made and the types of transactions causing, or potentially causing, concern.

As noted above, the number of notifications is currently tracking below the government's lowest estimates, albeit it is still early days. Our expectation is that, should the number of notifications not increase in the coming months, the ISU may start to look into why that number is low, which may well lead to more enforcement action, for instance by actively looking for suitable cases to impose heavy fines for non-compliance to increase awareness. A substantial number of the notifications made to date have no doubt been made on a precautionary basis, reflecting some of the very broad definitions in the schedules to the NSIA.

Observations and Practical Tips Based on Our Experience of the NSIA to date

- The NSIA can and does catch all types of transactions, whether the parties are UK-based or foreign (so long as the qualifying entity – the target – carries on activities or supplies goods or services to persons in the UK). It is not a pure FDI regime.
- Although the NSIA deals with the national security interest, its scope reaches far beyond the traditional defence and security sectors. Many transactions that, on the face of it, appear to have little to do with national security can fall within the 17 sensitive areas of the economy that require notification under the NSIA.
- Assessment of whether transactions are likely to require mandatory NSIA notification (and pre-completion clearance) should be started as soon as possible, as a notification requirement can have an impact on the deal timetable (often resulting in split signing and completion).

- The majority of transactions, even if they trigger a mandatory filing, will not give rise to national security concerns (but the ISU has 30 working days from acceptance of a complete notification to make its assessment/grant clearance).

If you have any questions regarding the Report, or anything else NSIA-related, please do get in touch with one of our team members:

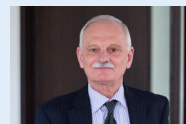
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