The City of London Law Society

The Law Society

Call for Evidence – National Security and Investment Act: Response
15 January 2024

Introduction

1. The views set out in this response have been prepared by a joint Working Group of the Company Law Committee of the City of London Law Society (the "**CLLS**") and the Company Law Committee of the Law Society (the "**Joint Working Group**").

2. The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 21 specialist committees.

3. The Law Society is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. It represents the profession to Parliament, Government and regulatory bodies in both the domestic and European arena and has a public interest in the reform of the law.

4. The Joint Working Group is made up of senior and specialist lawyers from both the CLLS and the Law Society who have a particular focus on issues relating to company law and corporate governance. This response reflects their views having regard to the experience of the CLLS' and the Law Society's member firms in advising their wide range of clients on the National Security and Investment Act 2021 (the "**NSI Act**").

5. The Joint Working Group is pleased to have this opportunity to respond to the Government's call for evidence on the operation of the NSI Act and welcomes the Government's willingness to consider suggestions as to how the system can be made more business friendly while fulfilling the Government's primary responsibility to protect the UK's national security.

6. As set out in the responses below, the Joint Working Group has endorsed the responses being given to this consultation by the CLLS Financial Law Committee and the CLLS Insolvency Law Committee. We have clearly indicated where we have done so.

7. The Joint Working Group acknowledges and recognises that much has been achieved in the first few years of the NSI Act's regime and that it is the nature of new regulation that there may be some initial uncertainty as the regime matures. The intention of the Joint Working Group's responses is therefore to work with the Government to develop the NSI Act regime to ensure greater clarity and guarantee that the NSI Act is operating as intended. In order for this development to occur, we have therefore presented the Joint Working Group's experiences and resultant suggestions in this response.

8. The contents of this response to the call for evidence are based on experience of the member firms of the Joint Working Group in advising their respective clients on the NSI Act and highlight certain areas which have given rise to particular difficulties in practice. These issues can often result in significant adverse practical consequences, including material delays in the execution of legitimate transactions, the introduction of unwelcome uncertainty on whether transactions will be completed (and, when they are completed, under what conditions), and the incurrence of significant incremental costs, to an extent which is often disproportionate to the likelihood of any realistic potential threat to the UK's national security.

9. We hope that the suggestions set out in this response will be helpful to the Government's consideration of how the regime can be made clearer, more certain and easier to navigate in practice such that its burden on legitimate business activities is minimised without jeopardising the UK's national security.

FOR FURTHER INFORMATION PLEASE CONTACT:

John Adebiyi (john.adebiyi@skadden.com) and Jason Hewitt (jason.hewitt@skadden.com)

A. RESPONDENT INFORMATION

1. What type of organisation do you work for?

Please see the description of the Joint Working Group above.

2. What area of the economy do you operate in?

N/A

3. What is the headcount of the organisation you work for?

N/A

4. In what countries does your organisation operate? Please tick any of the following that apply and provide details if relevant.

UK

5. Have you submitted a notification under the NSI Act or been involved in other ways with the NSI Act? Please tick any of the following that apply and provide details if relevant.

Member firms represented by the Joint Working Group regularly advise their clients on the NSI Act and submit all forms of notifications thereunder (voluntary, mandatory and for retrospective validation) on their clients' behalf, as both acquirers and targets.

B. IF YOU HAVE SUBMITTED A NOTIFICATION UNDER THE NSI ACT

6. If you have submitted a notification under the NSI Act, or been involved in an acquisition subject to NSI screening, did you interact as:

Please see the response to question 5 above.

7. If you have submitted a notification, was it a voluntary or mandatory notification, or retrospective validation application?

Please see the response to question 5 above.

8. What was the final outcome of your acquisition screening?

Clients of member firms represented by the Joint Working Group have been involved in a wide range of final outcomes.

C. CALL FOR EVIDENCE FOLLOW-UP

9. Please indicate if you are content for the ISU to contact you about your response to this call for evidence:

Yes.

10. If Yes, then please provide your name, an email address and your organisations' name below:

Name: John Adebiyi and Jason Hewitt

Email john.adebiyi@skadden.com and jason.hewitt@skadden.com

Organisation name: Skadden, Arps, Slate, Meagher & Flom (UK) LLP (on behalf of Company Law Committee of the CLLS and the Company Law Committee of the Law Society).

D. HOW THE NSI ACT WORKS AND HOW IT IS LIKELY TO BE USED

11. I / my organisation understand(s) the types of risk the Government seeks to address through the NSI Act.

Agree.

The member firms represented by the Joint Working Group act on behalf of a wide range of clients who have a varying understanding of the types of risk the Government seeks to address through the NSI Act. While the Section 3 statement published by the Secretary of State provides a helpful framework for clients to assess the potential national security risks which the Government seeks to address, in the experience of the Joint Working Group it is often difficult for clients and other market participants to understand areas of sensitivity for the Government in the context of specific transactions. In light of its experience gained under the NSI Act over the last two years, it would be helpful for the Government to expand on the three risks (namely, target, acquirer and control) identified in the Section 3 statement and the factors that raise or lower the risk profile of a transaction.

The Joint Working Group acknowledges that the nature of national security considerations naturally limits the degree to which the Government is able to provide detailed guidance on all aspects relevant to its assessment of in-scope transactions, but considers that there are a number of steps (discussed further in this response) that could be taken by the Government to enable market participants to better understand how the Government is likely to assess the national security risks raised by particular transactions, how it is likely to exercise its powers under the NSI Act in the circumstances of a specific transaction and what form of mitigation might be regarded as effective to address concerns that have been identified.

12. I / my organisation understand(s) how the NSI Act works and the requirements it places on my organisation.

Agree.

13. I / my organisation understand(s) the circumstances of an acquisition that make it more likely that the Government will call it in or impose a final order under the NSI Act.

Neither agree nor disagree.

14. My / my organisation's approach to investment has changed since January 2022.

N/A

15. The commencement of the NSI Act was an important factor in changing my / my

organisation's approach to investment.

N/A

16. Tick any of the below that apply to how your approach has changed:

N/A

17. Please provide any additional detail on your answers to Questions 14 - 16, including why your approach has changed (if applicable).

As discussed in the introduction, the Joint Working Group acknowledges and recognises the Government's achievements under the NSI Act to date. The intention of the Joint Working Group's responses is therefore to work with the Government to develop the NSI Act regime to ensure greater clarity and guarantee that the NSI Act is operating as intended.

Currently, parties to transactions that may be in-scope of the NSI Act, and their advisers, face significant challenges in understanding how the Government is likely to view the transaction from a national security perspective, the likelihood of the Government exercising its powers under the NSI Act and the manner in which it may exercise those powers.

The reasons for this include:

- Lack of clarity in the way certain of the activities within the scope of the National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021 (the "**Notifiable Acquisition Regulations**") are defined.

- Lack of detailed guidance from the Government and, in some instances, inconsistencies between the Notifiable Acquisition Regulations and the guidance published by the Government. For example, the guidance could be construed to ascribe a considerably wider scope to the "Defence" sector than appears to be the case under the Notifiable Acquisition Regulations, with the guidance noting that the obligation to notify extends to contractors or subcontractors who provide goods or services without clear 'military' applications, such as catering or cleaning.

- Lack of detail provided by the Government as to the rationale for the terms of final orders, making it difficult for market participants to understand why final orders were made on the specific terms and why other measures and/or mitigants (for example the imposition of conditions rather than a transaction being blocked or reversed) were deemed to be insufficient by the Government in the specific circumstances.

- Lack of any formal structure for communication of repeated or common questions that may be relevant to future notifications.

Additionally, where transactions do not raise any substantive national security concerns, the NSI Act has created friction for clients, in particular:

- In identifying whether a filing is required (leading to material additional due diligence).

- If a filing is required, the addition of several weeks to the transaction timeline to prepare and submit a filing and await clearance. The timing impact can then have a knock-on impact on transaction financing (and related costs), deal certainty and other aspects of the deal.

- The addition of a regulatory condition precedent to transactions where there are often no other regulatory requirements, which introduces an (often unwelcome) element of uncertainty to the prospects for the successful completion of the transaction.

18. How could Government improve its communication regarding the scope and operation of the NSI Act?

Pre-notification point of contact.

In the experience of member firms represented by the Joint Working Group, the availability of a senior case officer to respond to pre-notification queries would assist in streamlining the application process and addressing initial gating items. In the alternative, the Investment Security Unit (the "**ISU**") could look to adopt a pre-notification procedure, similar to that used by other third country FDI regimes (for example, the FDI regime in Germany), including the introduction of an option to have one or more calls with the ISU prior to filing a notification.

Assignment of a case officer to notifications following the notification being made (i.e., during the review period prior to a call-in).

In the experience of member firms represented by the Joint Working Group, this is routine in many other jurisdictions with foreign investment review processes, including Spain and Austria. A frequent challenge for market participants is planning broader transaction timelines without being able to seek guidance as to timing from the ISU or clarification of where a transaction sits in the ISU's process. Transaction parties incur real costs during the transaction planning process, such as commitment fees and ongoing interest costs for debt finance facilities and legal and other advisory fees. While the Joint Working Group appreciates that absolute commitments as to the timing of the ISU's review of transactions cannot always be given outside of the statutory timelines provided for in the NSI Act, an indication of how a process is tracking through case officer discussions would be very helpful to assist market participants in transaction planning. In the experience of member firms represented by the Joint Working Group, their clients and other market participants often express surprise that such a facility is not available.

Ongoing guidance on the 17 mandatory notification sectors under the Notifiable Acquisition Regulations.

The Joint Working Group appreciates the guidance provided by the Government on how to interpret the 17 mandatory notification sectors. The ongoing development of this guidance, especially by reference to questions raised in specific transactions (to the extent possible, while preserving the confidentiality of sensitive information), would help market participants better understand and interpret the scope of those sectors. This is important to ensure a consistent understanding across the market of whether a target business falls in a mandatory notification sector or not. In some jurisdictions, a formal roundtable with legal advisers exists as a forum for the relevant authority to obtain ongoing feedback on particular challenges arising on deals in order to improve the market's understanding of

how it applies the relevant regulations. The Joint Working Group has appreciated the previous engagement of the Government and the ISU on some of the procedural and other aspects of the operation of the NSI Act and believes that further engagement and sharing of experiences and insights will prove valuable going forward.

Further information on final orders.

The Joint Working Group appreciates that there are national security considerations which limit the amount of detail which the Government can publish in connection with the rationale for final orders. However, a common area of difficulty experienced by member firms represented by the Joint Working Group is to anticipate what conditions, if any, may be imposed in the circumstances of a particular transaction and how those conditions might impact their clients' commercial goals. In complex cases, this can lead to parties not proceeding with transactions and the potential commercial benefits of such transactions being foregone. In conversations with clients, member firms of the Joint Working Group have been informed that investors are on occasion put off investing in the UK over concerns that a final order may be imposed, resulting in potential reputational damage and/or other adverse implications for their business.

The Joint Working Group believes that it would be helpful if the Government would publish more information on final orders, so that the severity of any remedies imposed is transparent, or would provide additional explanation that a final order does not necessarily mean that the acquirer involved poses a national security threat.

The Joint Working Group also submits that it would be helpful if further anonymised guidance (i.e. not being linked to specific final orders which have been made) could be provided in the form of case studies or FAQs to illustrate the kinds of conditions and mitigation that may be imposed in particular situations, and the rationale for them, and to explain the circumstances in which the Government is likely to consider that the imposition of conditions of any nature would be insufficient to avoid risks to national security such that a transaction is likely to be blocked or reversed. It may also be helpful if the further guidance could include commentary on situations which are unlikely to lead to remedies being imposed, for instance it is currently difficult to understand based on publicly available information why remedies have been imposed in Case A but not in the seemingly similar instance of Case B.

Informal and formal guidance.

The offering of informal guidance in the form of contacting the ISU is one which the market welcomed. However, more detail on the process of getting such informal guidance, in particular the timings for a response, is required. In the experience of member firms represented by the Joint Working Group, emails seeking informal guidance can often go unanswered for lengthy periods, and the option of seeking informal guidance from the ISU can be considered impractical in the context of tight deal timelines and the need for transaction certainty. This contrasts with the manner in which other regulatory authorities, such as the Takeover Panel, operate, which has effective channels for informal and prompt communication that is vital to smooth transaction processes.

The Joint Working Group believes that there are two types of guidance that it would be helpful for the ISU to provide:

- Meaningful informal advice on whether a transaction is within scope of the mandatory regime. While this is already offered by the ISU, in our experience the ISU's responses to questions about this can simply refer to the guidance, appear to be template/stock responses, and/or suggest the parties seek legal advice (even in cases where we request guidance on behalf of clients as their legal adviser).

- Guidance on whether a transaction is likely to be problematic/raise substantive concerns. It is currently unclear to the Joint Working Group whether the existing informal guidance offered by the ISU would cover such substantive questions (and we understand that this is offered by authorities in other jurisdictions).

Generally, the introduction of a formal guidance process may assist with both of these points and give parties greater clarity/certainty.

Response times to minor changes following clearance.

Once clearance has been received from the ISU, there are occasionally instances in which minor changes to a transaction (such as the insertion of an additional wholly-owned intermediate holding company) require further ISU approval. In the experience of member firms represented by the Joint Working Group, the approval of these changes can take a considerable amount of time which is disproportionate to the matter which requires consent, particularly when changes are of very little substance from the perspective of beneficial ownership of a qualifying entity carrying on specified activities.

19. Are there areas of the NSI Act on which you would like additional guidance, for example around acquirer, control, or target risk, or the scope of the Act?

Identification of certain market participants who do not raise national security concerns

The Joint Working Group recognises that the possibility of identifying certain market participants as not raising national security concerns (such that trigger events involving such parties would be subject to limited, or no, review under the NSI Act (commonly known as “white lists”)) has been raised in prior discussions with the Government. Clients of member firms represented by the Joint Working Group remain of the view that the creation of a white list would be beneficial, especially in relation to investors who transact frequently, such as private equity and other financial investors (particularly those already subject to regulation by a relevant regulatory authority either within or outside of the UK). Since the introduction of the regime under the NSI Act, many of such financial investors have made numerous filings under the NSI Act, which have often had a significant impact on deal timelines and processes, even though such investors usually do not, in reality, represent any potential risk to the UK’s national security. The Joint Working Group understands that in respect of certain of the mandatory notification sectors, such as Defence and Critical Suppliers to Government, the Government will have particular sensitivities with respect to the target risk and, as such, a “white list” approach would not be appropriate for those sectors. However, such an approach may be appropriate for other, less sensitive, sectors and would likely greatly reduce the regulatory burden on market participants and the number of filings submitted to the Government without a material increase in the level of risk to the UK’s national security. In particular, the Government would be able to impose appropriate limits in the availability of such white-list exemptions through the specification of criteria that investors must meet in order to qualify as an investor from a white-list jurisdiction, as is

the case under the CFIUS regime (see the US Code of Federal Regulations, Title 31, §800.219).

In the experience of member firms represented by the Joint Working Group, relative to foreign direct investment regimes in many other jurisdictions the regime under the NSI Act is a significant outlier in its application to domestic UK investors. We would suggest that consideration be given to providing for trigger events which involve solely domestic UK entities as acquirers to be subject to a limited, 'fast-track' or 'streamlined' review process.

Certain other jurisdictions allow low risk investors to obtain a standing approval for all investments in certain less sensitive sectors for a specified period of time. For example, a low risk UK-managed investment fund might be granted approval for a period of 12 months for any acquisitions outside of the most sensitive sectors under the Notifiable Acquisition Regulations, such as the "Critical Suppliers to Government", "Defence" and "Military and Dual-Use" sectors. We would urge the Government to consider adopting a similar approach.

Specific process for investments from free trade agreement partner jurisdictions

Further, in order to offer additional incentives for inward investment into the UK, the members of the Joint Working Group submit that acquirers from jurisdictions with whom the UK has entered into free trade agreements should be eligible for a 'fast-track' or 'streamlined' clearance process in relation to any transactions they might enter into to ensure that any ISU filings are not a barrier to such investment. We would urge the Government to consider introducing such a scheme under the NSI Act.

Application of the "oversight" test

A separate issue that requires clarification relates to the application of an "oversight" test for the purposes of assessing whether a parent or holding company may be considered to carry out activities that are specified in the Notifiable Acquisition Regulations, purely through the oversight of a subsidiary that actually performs those activities. Take, for example, a scenario in which a Buyer acquires 26% of Company A, which already owns 100% of Company B. Company B carries out activities in the UK that are specified in the Notifiable Acquisition Regulations and is therefore an Entity with Specified Activities ("**ESA**"), whereas Company A oversees the activities of Company B but does not carry them out itself. On a literal reading of the rules, Company A is not a qualifying entity with specified activities, because it does not itself carry out those activities (the rules in paragraph 3 of Schedule 1 to the NSI Act also provide that Buyer is not treated as indirectly holding Company A's interest in Company B, since Buyer will not acquire a majority stake in Company A). Accordingly, the rules on their face suggest no filing is required for the Buyer's acquisition of a 26% interest in Company A.

However, there are contradictions to this in the ISU guidance "How the National Security and Investment Act could affect people or acquisitions outside the UK" (under the heading "Common circumstances that could allow the government to investigate an acquisition"), which indicate that a company may be "carrying on activities in the UK" for the purposes of section 7(3) of the NSI Act, even if it does not itself perform such activities, but "oversees" a subsidiary that does. The courts have adopted a similar view when interpreting the test for "carrying on business in the UK" under the Enterprise Act

2002 and other legislative regimes – see, in particular, the Court of Appeal judgment in *Akzo Nobel v. Competition Commission [2014] EWCA Civ 482*. If a similar oversight test also applies for the purpose of section 6(4) of the NSI Act, with the result than a parent/holding company may be considered to be carrying out specified activities in the UK purely through its oversight of a subsidiary, then a filing would be required. This point still causes considerable uncertainty in the market and a risk that businesses receive inconsistent advice with regard to their legal filing obligations.

The view of the Joint Working Group is that an oversight test should not apply, particularly in the case of a parent/holding company which simply acts as a passive holding company and does not actively participate in the activities of the ESA that are specified in the Notifiable Acquisition Regulations. Failure to notify a qualifying acquisition of control over an ESA is a criminal offence. Accordingly, under the Human Rights Act 1998 and Article 7 of the European Convention on Human Rights, the provisions of the NSI Act that determine criminal liability should be clearly defined in law and should not be construed extensively.1 Consequently, if a subsidiary carries out specified activities in the UK for the purposes of s.6(4) of the NSI Act and its parent has no such UK activities, the parent company should not be treated as having the specified activities imputed to it on the basis of an oversight test that appears nowhere in the legislation. Recognising this position would not create a loophole: in either case the Government would have jurisdiction to review an acquisition of the foreign parent as a result of the indirect holdings test in Schedule 1, paragraph 3, as that provision means that the acquisition of the parent would be treated as equating to the direct acquisition of the subsidiary with UK activities. Moreover, to the extent that the acquisition of such a minority interest falls outside the mandatory filing regime, it will often amount to material influence and therefore be subject to the Government's powers to call-in transactions which it considers require review.

Irrespective of whether the Government agrees with the above analysis, it should state clearly its position on the application of the oversight test and, if applicable, give guidance on the nature of that test, to eliminate the market uncertainty that currently exists.

Meaning of the ability to secure or prevent the passage of any class of resolution

The Joint Working Group is of the view that it would be helpful to have more guidance on the transactions captured by section 8(6) of the NSI Act (i.e. what is covered by the ability to secure/prevent the passage of any class of resolution governing the affairs of the entity).

The Government's current guidance indicates that "contractual rights are not covered by the NSI Act under section 8(6) on the basis that such contractual rights are not themselves voting rights as set out in section 8(7)" and "contractual voting rights would need to enable the acquirer to secure or prevent the passage of all resolutions of a particular class to be relevant for the purposes of section 8(6)". Additionally, consistent with section 8(7), this guidance indicates that section 8(6) would only apply if the relevant party has rights allowing it to "vote at general meetings on all, or substantially all,

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1 *Jorgic v. Germany*, no. 74613/01, ECHR 2007-III, para. 100.

matters".

Whilst the Joint Working Group appreciates this guidance, it remains unclear what the Government would regard as falling within section 8(6) if contractual rights (e.g. rights contained in a Shareholders' Agreement) are not relevant (provided they don't fall within paragraph 5 of Schedule 1). A clarification on what is meant by "class" of resolution in this context would also be helpful, for instance whether this refers to ordinary resolutions, special resolutions, or something more specific?

20. Where else do you go to seek guidance or support on national security considerations when approaching investments in your sector or forming research partnerships?

In addition to seeking advice from their legal advisers, clients of the member firms represented by the Joint Working Group seek advice from government / public relations and strategic advisory consultancies.

21. Do you understand where the NSI Act may apply to Outward Direct Investment (ODI), and would you welcome additional guidance?

The Joint Working Group welcomes additional guidance in relation to the NSI Act's applicability to ODI. In practice, we understand the NSI Act's application to ODI to arise in the following situations:

- A UK investor may require NSI Act approval in connection with an investment in a foreign group that has activities in the UK within one of the 17 mandatory notification sectors under the Notifiable Acquisition Regulations. In addition, the Secretary of State would have jurisdiction to call in transactions involving UK-based businesses which do not conduct activities in the UK in those sectors but which have foreign operations, the acquisition of which may give rise to risks to national security.

- A UK investor may be called in under the NSI Act in relation to an investment in foreign assets that are used in connection with the supply of goods or services to UK customers.

E. SCOPE OF THE SYSTEM

22. Are there particular types of acquisitions that are currently subject to mandatory notification requirements that you do not think should be?

In addition to the discussion in other sections of this response, the Joint Working Group considers that the following acquisitions ought not be subject to mandatory notification:

- The NSI Act provides that acquisitions involving an increase in ownership from more than 50% but less than 75%, to above 75%, will trigger a mandatory notification in relation to qualifying entities that carry on activities in the UK within one of the 17 mandatory notification sectors under the Notifiable Acquisition Regulations. In practice, an investor is unlikely to gain materially greater control rights in such an acquisition that could not be considered upon a notification when acquiring above 50%. We would propose that this requirement is removed.

The Joint Working Group also endorses the response provided to this question by the CLLS Financial Law Committee.

23. Have the timelines associated with mandatory notification affected acquisitions in which you have been involved?

In the experience of members of the Joint Working Group, delays to transaction timetables occur most commonly in respect of intra-group transfers (see also section 24 below), as these are usually not subject to other regulatory clearance requirements and could otherwise be implemented more quickly, meaning that the need to obtain a prior NSI Act clearance often causes these transactions to be delayed. In addition to delays caused by the period during which the transaction is under review by the ISU, even relatively straightforward intra-group restructurings can incur the significant added costs and delays of due diligence to determine whether any existing group entities fall within the definition of an ESA.

Internal Reorganisations

24. Are there types of internal reorganisation that are more or less likely to result in substantive changes in who controls or influences an entity, and if so how would you characterise these types of reorganisations?

There are several different types of internal reorganisations, some of which are conducted in connection with a third party transaction that would result in a substantive change in control in a way which might raise potential risks to the UK's national security and others of which are conducted purely for internal group purposes. Generally, we believe that a reorganisation that does not result in a change of ultimate beneficial owner (the "**UBO**") should not be considered a substantive change in control requiring notification under the NSI Act and that where an internal reorganisation is conducted either in advance of, or following, a third party transaction, it is only the third party transaction, and not the internal reorganisation, that should be subject to the NSI Act

notification regime.

Reorganisations for purely internal purposes

Many corporate groups conduct their business through a range of wholly-owned subsidiaries and may look to reorganise their groups outside the context of any third party transaction. Examples of common types of reorganisations that would fall under this umbrella include:

- *Holding company restructurings*: it is common in the experience of member firms represented by the Joint Working Group for clients to reorganise their holding structure. This may be motivated by a range of reasons, including changes in tax legislation, efficient capital allocation and/or to meet other business/commercial objectives. In such reorganisations, this can mean that the direct/indirect ownership of a UK company will change within the group, whether by sale, distribution, or contribution of shares, the introduction of a new intermediate wholly-owned subsidiary, or the transfer of wholly-owned subsidiaries within the wholly-owned corporate group.

- *Legal entity rationalisation*: similar to the holding company restructuring, this type of reorganisation frequently involves transfers of shares in a UK-incorporated company intra-group, as a pre-step to rationalisation/dissolution.

- *Financing restructuring*: in a financing context, moving an entity within a group into another part of that group so that it is captured as a "borrower" under a lending agreement and/or related security arrangements;

- *Transfers by operation of law in another jurisdiction*: the transfer of shares in a UK company pursuant to a merger (similarly with a liquidation or a distribution) taking place in an overseas jurisdiction and involving wholly-owned subsidiaries within the same corporate group as the UK company.

In each of the above scenarios, the overall ownership of the corporate group will remain consistent and the UBO will remain the same, yet under the current NSI Act notification regime a notification may be required. It is difficult to conceive of any realistic risk to the UK's national security which would be raised by any such transaction.

As the NSI Act regime currently stands, groups conducting internal reorganisations that involve entities which conduct activities in the UK are often finding it necessary to make a filing under the NSI Act and obtain approval prior to completion of such reorganisations, where no regulatory filings of any sort are required in any other jurisdiction. At best this can present a significant inconvenience and at worst it can prevent timely implementation of reorganisations with significant adverse cost and other commercial consequences.

In the scenarios described above, a transfer of shares in an ESA, or in a holding company of such an entity, to another group entity has no impact on the degree of control that may be exercised over the ESA, or on the identity of the entity that exercises that control. In particular, direct or indirect subsidiaries of the ultimate parent (particularly wholly-owned subsidiaries) have no independent agency when exercising their governance rights over an ESA: they must act as directed by their ultimate parent and under the oversight of the parent. If they do not, the parent can exercise its rights to

replace the subsidiary's board of directors and senior management and/or to give directions as to the conduct of the subsidiary's business. There is therefore no meaningful distinction to be made between a subsidiary's control rights over the ESA, and those of its ultimate parent. An entity that is closer to the ESA in the chain of ownership (e.g., a direct shareholder in the ESA) has in practice no greater ability to control the activities of the ESA, or to access information relating to the ESA's activities, than its ultimate parent, irrespective of how many intermediate holding companies sit between them.

For UK incorporated entities, while section 172 of the Companies Act 2006 places a duty on directors to "promote the success of the company for the benefit of its members as a whole" this does not in practice give rise to a material likelihood that, within a group structure with a common ultimate parent entity, a transferee of shares in an ESA would make different business decisions than the transferor, as both will have the same ultimate parent and in assessing what would benefit its "members" (i.e. shareholders in a company with share capital for whose benefit they must act), the directors will have regard to the interests of the ultimate group parent entity.

There is therefore no national security risk that could arise from a transfer of shares to another group entity that would not also have arisen absent the transfer. Consequently, there is no causal link between the transaction and any potential national security risk, contrary to the statutory requirements of section 1 of the NSI Act (in respect of opening an investigation) and section 26 of the NSI Act (in respect of final orders), which both require that the relevant national security risk must arise from the trigger event.

However, the Joint Working Group recognises that the Government might perceive there to be potential national security risks if an intra-group transaction allows a third party (as opposed to a different entity within the same corporate group) the possibility of obtaining some material level of influence over an ESA or access to its information, e.g., if the transferee is incorporated in a different jurisdiction, the laws of which might allow a foreign government body or regulator to compel certain conduct, or the provision of certain information, in respect of an ESA. We understand that similar considerations may have motivated the imposition of (much narrower) obligations to notify certain intra-group transactions in Germany, for example. However, the Joint Working Group does not consider this to be a risk of sufficient magnitude to merit bringing transactions involving a change in the jurisdiction of incorporation of a holding company within the scope of the mandatory regime. In particular, businesses have no incentive to effect intra-group transfers that give rise to such risks of governmental interference. This is evidenced by the fact that there have not, to the knowledge of members of the Joint Working Group, been any publicly reported instances of intra-group transactions being prohibited or subject to remedies in any of the major jurisdictions that impose limited obligations to notify intra-group transactions (in particular, Germany, Spain, Australia and the US).

If the Government is not minded to adopt the Joint Working Group's recommendation to exclude all intra-group transfers, it should consider the following ways to make the requirement more proportionate:

- excluding transfers between connected persons (within the meaning of Schedule 1, paragraph 9 of the NSI Act) that are incorporated in the same jurisdiction. This would address the risk outlined above (which is marginal, in the view of the Joint Working

Group) regarding foreign laws or regulators. Germany has an exemption for such transactions;

- excluding transfers in which there is no new addition to the chain of ownership of direct and indirect holders of shares in an ESA (i.e. because one of the entities in the chain of ownership is removed, and the shares that it owns are transferred to another entity that sits above it in the chain of ownership), or in which any entity that is added to the chain of ownership is a newly incorporated wholly-owned entity that has been formed for the purposes of the transaction;

- excluding filing obligations for temporary intra-group transfers of control, so that the transfer of a company to a special purpose vehicle prior to its sale to a third party is not a separately notifiable trigger event;

- disapplying the voiding provision under section 13(1) of the NSI Act for all transfers between connected persons that remain within the scope of the mandatory filing regime. If supplemented with an obligation to make the filing on or before the date when the transfer takes place, the Government will be made aware of such transactions and able to call in those that it considers to give rise to concerns in a timely manner, while transaction parties would be able to self-assess the risk of national security concerns and proceed to closing in those cases that manifestly raise no such concerns (i.e. almost all of them); and

- using the voluntary regime for all internal reorganisations. The annual report published by the ISU covering the period from 1 April 2022 to 31 March 2023 stated that the ISU received 180 voluntary notifications out of a total of 866 notifications. This shows strong engagement with the voluntary aspect of the regime by investors.

Internal reorganisations in connection with third party transactions

Internal reorganisations conducted in connection with a third party transaction typically fall within one of two categories

- *Post-acquisition integration*: a post-acquisition integration typically takes place following completion of a third party acquisition and often involves transfers of subsidiaries within a group in order to create an efficient structure for integration of businesses. For example, to integrate the UK businesses of the acquired group and the acquirer group, a typical structure would involve the transfer of the acquired UK subsidiary to become a subsidiary (or a sister company) of the acquirer UK entity, following which the acquired UK entity would transfer its business and undertaking to the acquirer UK entity and the acquired UK entity would be dissolved. In this fact pattern, notwithstanding that the preceding third party acquisition may have been notified to and cleared by the UK authorities under the NSI Act, under the current legislation it may be necessary to prepare and submit a separate mandatory notification in respect of the post-acquisition integration share transfer(s). We would suggest that notification/clearance should be triggered only in relation to the third party acquisition and not the (purely internal) post-acquisition integration process.

- *Separation*: a separation is typically motivated by a desire to divest a line of business. Typically a separation reorganisation will involve moving entities and assets into an appropriate holding structure which could subsequently be divested in an efficient way.

In these circumstances, although the reorganisation may be motivated (for example) by a potential third party sale, the entry into a joint venture arrangement, or a listing, the separation transactions taking place to create the structure are purely internal and do not change the ultimate ownership of the group or its UK entities. In this fact pattern, we would suggest that the notification to and clearance by the Government under the NSI Act should be triggered only in relation to the subsequent third party transaction and not the intra-group preparatory structuring steps. The third party resultant transaction would trigger a filing under the NSI Act if the assets or entities fall within a mandatory notification sector meaning the ISU would still have the opportunity to review the transaction.

The Joint Working Group submits that both post-acquisition reorganisations and separations should be out of scope of the NSI Act.

Comparison with other jurisdictions

As referenced above, many other FDI regimes do not capture all internal reorganisations. In Spain, to the extent that any internal reorganisation does not include any non-passive new investors or third party shareholders acquiring at least a 10% interest or control and the relevant entity remains indirectly under the same ownership and control degree by the UBO, no filing is required.

In France, the French Government's FDI guidelines provide (in section 1.4.1) that no filing requirement applies if the investment is made between entities all belonging to the same group, i.e. more than 50% of the capital or voting rights are held, directly or indirectly, by the same shareholder, in line with the rule under Article L. 233-3 of the French Commercial Code. The exemption applies only if the entities formed part of the same group prior to the transaction, not if they become part of the same group during the transaction.

We would urge the Government to consider amending its approach to internal reorganisations to bring the UK regime more in line with that in other jurisdictions. This would likely reduce the number of notifications under the NSI Act significantly, thereby allowing the ISU to focus its resources on transactions which are more likely to raise substantive national security concerns.

25. Have you had to notify an internal reorganisation under the NSI Act and, if so, what impact did it have on your organisation?

The inclusion of internal re-organisations in the mandatory regime means that clients need to conduct (sometimes significant) due diligence to analyse whether an NSI Act filing requirement is triggered. As such, the NSI Act process can add significant time and expense to the re-organisation process. This is often in a context where no other regulatory requirement is triggered.

This can also mean that clients need to raise questions of/engage with third parties. As an example, one of the member firms represented on the Joint Working Group recently advised a client on the following proposed internal re-organisation of a portfolio company involved in the energy sector:

- The portfolio company wanted to transfer the entire interests in two wholly-

owned subsidiaries from Company A to Company B.

- Company B is (indirectly) wholly-owned by Company A.
- Company A is jointly controlled by our client and a third party shareholder.

This proposed internal re-organisation meant the client has had to answer a number of due diligence questions itself, but also raise questions with: (a) the portfolio company's group, and (b) the third party shareholder which jointly controls the portfolio company.

The experience of another one of the member firms represented on the Joint Working Group is that to date more than ten of the internal reorganisations it has advised on involving the transfer of UK shares have fallen within the scope of the NSI Act and have required the filing of a mandatory notification. In that firm's experience, there are two main impacts related to the notification process: time and cost.

- *Time*: the time and resource required for the data-gathering, review and analysis process to assess and confirm the need to file, and then for the preparation and submission of the notification is substantial. This can involve many stakeholders within a client's organisation, as well as legal advisers. In the context of an internal reorganisation, where stakeholders are trying to focus on delivery of the reorganisation across the business' many workstreams, this process is a drain on (already stretched) resource and also a distraction. Particularly for reorganisations where there is a desire to align effective (or "go live") dates of particular steps across multiple jurisdictions or workstreams, the additional work and time required for the UK notification process and the timelines for obtaining clearance, can cause material delay and uncertainty for project timetables which does not seem reasonable in the context of an entirely internal reorganisation.

- *Cost*: the financial cost associated with the notification process comprises a significant additional legal fee in respect of the analysis of the reorganisation and the preparation and submission of the filing, as well as the internal resourcing cost to the client organisation. In the experience of the firm, the work required to pull together the relevant data, information and materials for the submission typically involves multiple stakeholders within the business and imposes a significant burden on the internal team.

The appointment of liquidators, official receivers, and special administrators

26. Are liquidators, official receivers, or special administrators likely to use their temporary control of shares in solvent entities to influence the policies of those solvent entities and, if so, how?

The Joint Working Group endorses the response provided to this question by the CLLS Insolvency Law Committee and the CLLS Financial Law Committee.

27. Are there other circumstances which give temporary control over entities in financial distress where complying with mandatory notification requirements presents challenges? If so, what are the circumstances and has this happened to

your organisation?

The Joint Working Group endorses the response provided to this question by the CLLS Insolvency Law Committee and the CLLS Financial Law Committee.

28. **Have you had to notify the appointment of a liquidator, receiver or special administrator under the NSI Act and, if so, what effect did it have on the insolvency process and your organisation?**

    The Joint Working Group endorses the response provided to this question by the CLLS Insolvency Law Committee and the CLLS Financial Law Committee.

Scots law share pledges

29. **Are lenders holding shares under Scots law share pledges likely to use their temporary holding of those shares in solvent entities to influence those solvent entities against the wishes of the borrower? If so, can you give examples of when this has happened or might happen?**

    No particular comments.

30. **Have you had to notify the appointment of a Scots law share pledge under the NSI Act and, if so, what effect did it have on the lending or borrowing process?**

    No particular comments.

Public bodies

31. **Do you have views on whether certain public bodies should be exempt from mandatory notification? How would you characterise these public bodies?**

    The Joint Working Group agrees that this would be a sensible reform. We recall that a guiding principle in the design of the NSI Act was that it should not regulate areas in which there are other, more proportionate mechanisms to address national security concerns. The Government's exercise of its powers to oversee public bodies would be a more proportionate way of addressing national security concerns in transactions that they may undertake. There is already a narrow definition of “public bodies” in the Critical Suppliers to Government area of the Notifiable Acquisition Regulations which may serve as a useful starting point for defining “public body”.

Automatic Enforcement Provisions

32. **Has the inclusion of Automatic Enforcement Provisions under mandatory notification affected your ability to access loans, or to enforce such provisions?**

    The Joint Working Group endorses the response provided to this question by the CLLS Financial Law Committee.

33. **Have you reflected NSI mandatory notification requirements in the terms within lending agreements, either as part of new agreements or through updating**

existing agreements? If so, how?

The Joint Working Group endorses the response provided to this question by the CLLS Financial Law Committee.

34. Do you have existing Automatic Enforcement Provisions or similar agreements which cover security over entities in the 17 mandatory areas and do not account for NSI mandatory notification requirements if they were to arise?

The Joint Working Group endorses the response provided to this question by the CLLS Financial Law Committee.

Activities/areas defined under mandatory notification

Through questions 35-39, the Government is particularly interested in feedback on the following mandatory areas:

In line with our comments above, the Joint Working Group believes that the voluntary regime is a powerful element of the NSI Act. The Secretary of State's ability to call in a transaction for review for up to 5 years post-closing means that parties are incentivised to make a filing if they consider that there is a national security concern associated with their transaction. The Joint Working Group therefore urges the Government to consider refining the scope of some of the mandatory sectors (in particular those noted as being broad or wide-ranging below) and using the engagement with the voluntary regime to ensure that national security concerns are addressed.

- Clarifying the scope of the Advanced Materials area

  The Advanced Materials area is expansive and extremely difficult for market participants, even those with detailed technical knowledge of the relevant areas, to understand in practice. In the experience of member firms represented by the Joint Working Group, their clients often find it very difficult to ascertain whether activities they undertake are within the scope of the area. It can be very burdensome to identify whether a filing requirement is triggered (both for the legal advisers drafting relevant due diligence questions and for clients responding to these often very technical questions).

  Particular examples include:

  - Relevant activities currently include “owning, creating, supplying or exploiting intellectual property”. It is not clear if the mere ownership or exploitation of IP would represent carrying on activities in the UK. For example, if a company conducts its activities entirely in the United States, but exports goods to the UK, which rely on its IP (whether branding or technical) it is theoretically exploiting that IP in the UK. Is this intended to capture mere sales? If so, this would be an extremely expansive approach relative to the foreign direct investment screening regimes in other jurisdictions.

  - The critical materials section covers a broad range of materials without any guidance as to how these relate to the relevant activities, and appear to have an unexpectedly wide application. For example, one relevant activity is “recycling or re-using”, and one critical material is graphite. Would a general purpose recycling company that recycles pencils by

extracting the graphite and providing it to a specialist graphite recovery services provider fall within this area.

- Refining the scope of the Artificial Intelligence (AI) area

  As with the Advanced Materials area, the scope of the AI sector is very broad and it is therefore often difficult to exclude a mandatory filing where a company makes reference to AI on their website. In particular, the Joint Working Group believe it would be useful to have further clarity on the definition of "artificial intelligence".

  The Joint Working Group, alongside the AI Committee of the CLLS, have therefore set out their views on the Artificial Intelligence sensitive sector below.

  Definition of "artificial intelligence"

  By capturing "technology enabling the programming or training of a device or software to…", the definition of "artificial intelligence" in Schedule 3 of the Notifiable Acquisition Regulations has the potential to capture any technologies enabling the use of artificial intelligence (including various aspects of general computing technologies and services, as well as ancillary technologies) rather than being targeted towards artificial intelligence itself. This creates an overlap with a number of other mandatory areas.

  The Joint Working Group believes it would be helpful to clarify what it means for "artificial intelligence" to "perceive environments" – in particular, is the intention to limit the Schedule to the observation of physical environments or is intended to cover data regarding a virtual environment?

  Furthermore, by not referring to any concept of autonomy and merely referring to "cognitive abilities" (a broad concept which would involve any form of problem solving or reasoning) and the ability to "make recommendations, predictions or decisions" the definition captures functionality which already exists in deterministic systems (i.e. systems which follow explicitly-programmed rules) and is not unique to artificial intelligence (albeit the Joint Working Group acknowledges that there is no universally-accepted definition of AI). By contrast, the OECD definition of artificial intelligence, and the Government's White Paper on AI, both refer to artificial intelligence "inferring" patterns, outputs etc to capture the idea that the relevant software is not merely following explicitly-programmed rules (and the Government's White Paper on AI also refers to autonomy as a key characteristic of artificial intelligence).

  At the same time, through the definitions being limited to software that "interprets data" and makes "recommendations, predictions or decisions" the definition is arguably not capturing artificial intelligence technologies that are doing more than just that (for example, because they are generating new outputs or because they are inferring information from submitted data). Limb (iii) of the definition could therefore be made more generic to refer to generating output (and including a non-exhaustive list of what those outputs might be).

  The Joint Working Group would welcome the Government's consideration as to whether the definition used by the Notifiable Acquisition Regulations could be revised to align more closely to the OECD definition, recently adopted by the incoming EU AI Act. Given that international investors and UK businesses operating in Europe will already be looking at how to manage the governance of their AI activities in light of the EU AI Act, there may be value in aligning the definition used in the Notifiable Acquisition Regulations and/or providing guidance as to why

that definition diverges from the emerging international standard, so as to provide greater certainty as to the in-scope technologies. The Government's White Paper on AI might be an alternative source for the Government to consider in adapting the definition of "artificial intelligence" used in the Notifiable Acquisition Regulations. The Joint Working Group also believes that any new definition should be accompanied by guidance, given the lack of consensus on what artificial intelligence technologies are (and are not).

Relevant activities and purposes

The relevant activities currently include "research into artificial intelligence" and "developing or producing goods, software or technology that use artificial intelligence", in each case for one of three purposes (see our observations on these purposes below). Whereas the terms "development" and "production" are defined in clause 3 of the Regulations, there is no definition of "research". In relation to the definition of "development" as applied to artificial intelligence (and because the relevant activities are agnostic as to whether the entity in question develops its own AI models, or integrates off the shelf AI models), the way in which businesses use third party-provided artificial intelligence systems, e.g. by tailoring, or implementing retrieval augmented generation within, third party-provided artificial intelligence systems, means that that the in-scope activities potentially extend the scope of the mandatory notification regime to a broad range of businesses that could raise no conceivable national security threat.

The relevant purposes currently include (in addition to advanced robotics and cyber security) "the identification or tracking of objects, people or events". There are no definitions for "identification" or "tracking" and, coupled with the expansive nature of the "artificial intelligence" definition, this purpose is arguably capable of capturing any technologies capable of identifying an image of a human as that of a human (as opposed to say that of an animal) and technologies such as cookies (which track an individual's use of a website or application). The current guidance provided with respect to examples of "identification" does not assist with narrowing down this purpose – for example, in respect of the identification of objects in particular, any artificial intelligence system capable of ingesting images will be carrying out "image classification" and some of these systems could be entirely benign and incapable of dual use.

Similarly, although the guidance to the Regulations clarifies that "event identification" includes activities captured in real time, and tracking and processing, it is not clear whether artificial intelligence solutions that digest historic information originally captured in "real time" (for example for the purposes of creating a timeline of events) are intended to be captured.

The Joint Working Group would welcome further guidance from the Government in relation to the definition of "research" and the purpose of "identification or tracking of objects, people or events".

- Expanding the scope of the Communications area

The Joint Working Group suggests that the Government may wish to consider clarifying, and where necessary removing, duplication where an entity is potentially caught under both the Communications area (by carrying on activities that are "associated facilities" for the purposes of the Communications Act 2023) and the Data Infrastructure area.

Additionally, the Joint Working Group believes it would be helpful to have further guidance on whether the "associated facility" limb can be triggered in paragraph 3 of Schedule 5 of the Notifiable Acquisition Regulations by entities that are themselves public electronic

communications networks/services ("PECN/S"). Specifically, it is not clear whether entities that are PECN/S (but generating less than £50 million of turnover in the UK) can also be providing "associated facilities" to other PECN/S such that they are captured by the mandatory regime. In the context of the Communications Act 2003, associated facilities are treated as a third and separate category from PECN and PECS. As such, entities that are PECN/S are not also considered to be associated facilities.

However, the Joint Working Group does not believe that expanding the scope of the Communications sector by reducing the threshold of UK turnover would be helpful. The current thresholds are sufficient to capture any strategically significant operators. Lowering them would most likely bring into scope mobile virtual network operators (MVNOs) which do not have any strategic significance and would therefore take up considerable amounts of time for the ISU with little benefit.

- Clarifying and expanding the Data Infrastructure area

In the experience of member firms represented by the Joint Working Group, the Data Infrastructure area is often very difficult for market participants to understand and apply in practice. A range of issues require further guidance:

"Infrastructure" is not defined

The Joint Working Group understands this as requiring more than the mere ancillary storage and processing of data, such as the provision of services that have data storage or processing as a primary function (such as a data centre). This causes significant uncertainty for enterprise software providers, which offer software-as-a-service and may store or process data in that context. For example, an accounting or payroll information system provided as-a-service may involve the storage or processing of data on cloud servers. It is unclear whether this would comprise the provision of "infrastructure" even though such cloud servers may be provided by third parties such as Amazon AWS or Azure.

In this regard, the approach taken in Australia could be a helpful template for potential amendments to this section or further guidance. The explanatory memorandum to amendments that introduced a "critical data processing or storage" sector into the Australian foreign investment screening legislation provides the following guidance:

> "*The definition does not cover instances where data storage or processing is secondary to, an enabler for, or simply a by-product of, the primary service being offered – for example, accounting services. In a scenario where a business has shared business critical data with a SaaS provider, but only for the purposes of the SaaS provider providing its primary service (such as running the business' payroll), the SaaS provider is not to be considered a critical infrastructure asset*."

Difficulty in identifying customers

In the experience of member firms represented by the Joint Working Group, parties that do not directly own or operate data infrastructure, but nonetheless fall within the scope of the area, are frequently unable to confirm whether or not such data infrastructure has public sector customers. For example, a party that provides specialist or technical services to a third-party data centre will typically not be in a position to identify the customers of the third party data centre. As a practical matter and given confidentiality arrangements in place between data

centre operators and their customers, such parties are often unable to assess whether they fall within the area or not. Similarly, an investor in such a party would face even greater difficulty.

We understand that the reference to public sector authorities is to those authorities per se and not other bodies sponsored by them. For example, a contract with the Home Office would be within scope of paragraph (a) of the definition of “relevant data infrastructure”, whereas a contract with the Independent Office for Police Conduct, which is sponsored by the Home Office, would not. The Joint Working Group would welcome guidance on this topic.

We refer also to discussion below in respect of the Defence area for comments on the reference to sub-contractors.

Addressing duplication

Noting that the Government is considering removing duplication where an entity is already covered by the Critical Suppliers to Government area, we suggest that the Government may wish to consider removing potential duplication where an entity involved in data infrastructure is also covered under the Communications area (particularly given the proposed expansion of the Data Infrastructure area to capture "colocation data centres", which is an umbrella term and so some data centres meeting the definition may already be captured as an 'associated facility' under the Communications area).

- Refining and clarifying the Defence area

The Joint Working Group would welcome guidance on a number of aspects of the definition of the Defence area, which is frequently difficult for market participants to understand and apply in practice. Specifically:

- As noted above, the scope of the "Defence" sector appears to be materially wider under the Government's guidance than under the Notifiable Acquisition Regulations (e.g. the guidance notes that the obligation to notify extends to contractors or subcontractors who provide goods or services without clear ‘military’ applications, such as catering or cleaning).

- The guidance also notes that "contracts which provide access to defence facilities may still give rise to potential national security risks". However, it is unclear what level of access (and indeed if any access) would give rise to a notification requirement.

- The scope of this sector could be refined/clarified by adding an additional limb, for example that the contractor/sub-contractor (or its employees) have a certain level of security clearance or other security standard as a result of the contract.

- While Schedule 10 of the Notifiable Acquisition Regulations applies to both goods and services, the language used is most applicable to goods and not services (e.g. development and production). As such, it is difficult to interpret the Schedule in the context of, and understand how it is applied to, services.

Contractors/ Sub-contractors

The definition captures sub-contractors to government contractors. This presents a number of issues:

- Sub-contractors will not always know whether goods or services supplied via a prime contractor are necessary for UK defence or national security purposes and do not have a practical means of obtaining that information. This is further complicated where companies supply products to pan-European industrial companies acting in the defence industry. We would welcome guidance on what steps might reasonably be expected to be taken in this regard and submit that this should be based on whether a qualifying entity actually knows (or ought reasonably to know) that goods or services supplied by it are for a defence or national security purpose in the UK.

- Absent further guidance, the meaning of "sub-contractors" is unclear. The Joint Working Group considers this to refer to contractual arrangements that provide for part of a prime contractor's specific work package to be delivered by the sub-contractor, and to exclude non-specific supply arrangements such as goods and services supplied via a distributor, or third-party reseller (whether value-added or otherwise). Confirmation of this interpretation by the Government would be welcome.

- Further guidance is needed for software providers, which often conduct sales through third party resellers, but require end users or customers to enter into end user licence agreement (EULA) terms. The Joint Working Group understands that the supply occurs by the reseller selling the software, and the EULA simply governs the use of the software by the end user or customer and is not a sub-contracting relationship. Confirmation of this interpretation by the Government would be welcome.

- The definition refers to the "application of goods or services". It is unclear what this means. For example, does it refer to the installation of equipment even where it is not supplied, and how does it apply to services? Would an entity be considered to be carrying on activities in the UK if it made available software updates to end users of its software where those end users are in the UK? Further guidance on the intended meaning of the word "application" in this setting would be welcome.

The meaning of goods and services

In the Joint Working Group's experience, the issues surrounding the meaning of goods and services comes up regularly and appears to be an area where the NSI Act regime extends too far, such that it has become standard practice to consider whether even the most mundane products or services are supplied to UK defence customers so as to ensure that defence notifications are not missed.

In practice, the Joint Working Group sees no utility in including suppliers of everyday goods and services with no form of defence-specific customisation within the scope of mandatory notification. By scoping down this concept, it would be possible to remove from scope acquisitions of pure distributors and "off the shelf" suppliers, as well as foreign-to-foreign transactions where the only UK element is the supply of an individual component to the UK defence ecosystem.

- Updating the Energy area

The Joint Working Group would suggest the following refinements to the Energy sensitive sector:

- A de minimis/materiality threshold applied to the generation capacity of targets in energy transactions involving acquirers with an existing portfolio of more than 1GW of generation capacity/available generated capacity or customer load. This is because such acquirers are currently captured by the Energy sector for any acquisition of an entity with a generating asset (regardless of how small that asset's generation capacity is). We note that the Government is likely to be comfortable with these types of acquirers, in any event, given the acquirer already holds a material amount of UK capacity within its portfolio.
- The generation capacity threshold of 100MW in paragraph 4(6)(a) is very low vs. the UK's overall generation capacity. We would suggest increasing this threshold to capture a more material amount.
- It is not clear why qualifying entities that are subject to a licence exemption under the Electricity Act 1989 are captured in paragraph 3(d)(i). The reason for the exemption is because they are small (and therefore not of a material size). The same point applies for licence exempt activities under paragraphs 3(c) and 3(e).
- We would welcome further guidance on the interaction between paragraph 3(g) and paragraph 4(10), given that the activities defined within "downstream oil activity" appear to be much wider than the activities which bring a qualifying entity into scope under paragraph 3(g).
- The Joint Working Group agrees that it makes sense to include specific reference to Multi-Purpose Interconnector (MPI) activities and more particularly, to the holding of a MPI Licence under Section 6 (1)(ea), or an exemption from the prohibition under Section 4(1)(da), in each case of the Electricity Act 1989 (EA89) (as prospectively amended by Part VII of the Energy Act 2023). Since MPI operators would no longer need to hold a transmission licence or interconnector licence once these provisions of Part VII of the Energy Act 2023 are in force, failure to make the proposed change would mean that transactions involving MPI operators would fall outside the mandatory notification provisions.

- Expanding and clarifying the Suppliers to the Emergency Services area

  In a number of places, the Suppliers to the Emergency Services area definition refers to the functions of an authority or the prevention or detection of crime. We would welcome further guidance on the meaning of these terms and whether they are intended to limit goods and services captured by the definition to certain “core” goods and services. For example, the supply of standard off the shelf laptops to a fire authority is presumably necessary as part of the wider administration of the authority, but is not necessarily used directly in fulfilment of its functions in the way that water pumps supplied to the authority may be.

  Additionally, the scope of this sector may act as a disincentive for parties to contract with the emergency services in certain instances – particularly where the value of a contract is small. We have had experience of parties voicing that they intend to exit a contract/not enter into a contract with emergency services because it would bring them within the scope of the mandatory regime and the contract is not sufficiently material to justify that cost. The Government could consider adding a materiality threshold to this sector to ensure that small-scale activities are not captured.

  As with other areas discussed above, guidance would be welcome on the meaning of “supplies directly” in paragraph 2 of Schedule 15 of the Notifiable Acquisition Regulations.

- Clarifying the Synthetic Biology area

In the experience of member firms represented by the Joint Working Group, both lawyers and technical experts alike have significant difficulty understanding what activities fall within the Synthetic Biology area.

In particular, the exception in paragraph 6 of Schedule 16 of the Notifiable Acquisition Regulations provides what appears to be an exception for activities relating to human medicine production. A large number of businesses involved in synthetic biology would likely consider that their activities relate to the development of human medicines. It is unclear if this wide exception is intended or if the Government interprets the reference in paragraph 6 to "the ownership, ownership of intellectual property or development" and "that employ synthetic biology at any stage of the development or production" limit the exception.

For example, it is not clear whether research would be excluded, or whether medicines that use synthetic biology as the means to achieve an effect (e.g., medicines that insert a new gene) are excluded on the basis that the point of application is different to "development or production", which might relate to gene therapy being used to produce genes that are in turn used to develop cells that produce a medication.

- Clarifying the treatment of the academia

  No particular comments.

- Additional sectors

  No particular comments.

- Creating and updating a Semiconductors area

  No particular comments.

- Creating and updating a Critical Minerals area

  No particular comments.

35. Do you understand what activities might bring an entity into scope of mandatory notification requirements, as set out in the Notifiable Acquisition Regulations?

As you can see from the above responses, some sectors are much clearer than others, therefore greater clarity would be welcomed for all sectors but particularly those identified above.

36. Are there activities specified in the Notifiable Acquisition Regulations that you do not think should be included? If so, what activities?

See prior responses.

37. Are there activities not included in the Notifiable Acquisition Regulations that you think should be included? If so, what activities?

We do not have any suggestions for activities to be added to the Notifiable Acquisitions

Regulations.

38. Are there areas of the Notifiable Acquisition Regulations that would benefit from additional guidance? If so, what areas and what guidance?

See prior responses.

39. Are there areas of the Notifiable Acquisition Regulations that would benefit from drafting changes to improve clarity on the activities covered, either by changing drafting within areas of the Regulations or by carving out new areas? If so, what areas?

- Cryptographic authentication

We would welcome further guidance as to the meaning of paragraph 2(b) which refers to a product that "employs cryptography" in performing authentication as a primary function. We understand this to require the use of cryptography as means of determining whether a user, process or defence, or information, is authenticated (such as through public key encryption) and not to the ancillary use of cryptography in authenticating a user (for example, storing biometric data in an encrypted database for comparison against biometric data presented by a user to authenticate the user). The latter would capture an unreasonable range of routine products, such as products that require an email and password login to authenticate a user, and store the email and password hash in an encrypted database.

F. OPERATION OF THE NSI ACT

Providing named senior contacts for engagement post call-in.

40. Are there any other changes you would like the Government to consider to the operation of the NSI Act?

The Joint Working Group would welcome the Government's consideration of the following:

- Engagement with the ISU: Parties should have the ability to meaningfully engage with the ISU before submitting a filing (particularly in complex cases), including by having the option to have one or more calls with the ISU prior to submission.

- Guidance: There are three types of guidance that would be helpful for the ISU to provide (noting that, generally, the introduction of a formal guidance process may assist with both of these points and give parties greater clarity/certainty):

    - Meaningful informal advice on whether a transaction is within scope of the mandatory regime. While this is already offered by the ISU, in our experience the ISU's responses to questions about this can simply refer to the guidance, appear to be template/stock responses, and/or suggest the parties seek legal advice (even in cases where we request guidance on behalf of clients as their legal adviser).

    - Guidance on whether a transaction is likely to be problematic/raise substantive concerns. It is not clear to us that the existing informal guidance offered by the ISU would cover such substantive questions (and we understand that guidance of this nature is offered by authorities in other jurisdictions).

    - Introduction of more general FAQs, case studies and/or guidance notes, including in particular on reasons for filing rejections to address frustrations of members of the Joint Working Group and consequently their clients around the increase in rejected applications and inconsistent approaches to accepting or rejecting applications. There have been instances of identical structure charts being accepted in the case of one filing and rejected for another which serves only to create confusion and undermine confidence in the approach being adopted. Additional guidance would therefore help advisers in ensuring that filings are complete and include all necessary information. More broadly, case studies illustrating reasons why particular decisions are made in the context of anonymised example scenarios (e.g. why a transaction in one scenario may be blocked, whereas in a similar but differentiated scenario a transaction may be cleared subject to remedies being imposed) would be very helpful, as could FAQs and guidance notes on this.

- Consolidation of all guidance by way of links into a single source. The Joint Working Group appreciates all of the guidance published to date by the ISU and the consolidation of this guidance into a single source would assist advisers and applicants in their preparation of their filings.

Notification forms

41. If you have completed a notification form, how much time did this take?

The amount of time taken in the preparation of notification forms varies widely between transactions, having regard to their complexity, and the availability of parties and information. Often, transactions are kept confidential until public announcement, which limits access to sources of information necessary to complete notifications. In the experience of member firms represented by the Joint Working Group, transaction parties often provide for notifications to be prepared and submitted within 10 to 15 business days of transaction documents being signed (and the transactions being publicly announced). This timetable typically assumes that significant information collection has occurred prior to signing in order to assess whether a mandatory notification is required or a voluntary notification is advisable, in practice this can often take much longer than initially anticipated due to constraints mentioned above in terms of pre-announcement information gathering.

42. Would you prefer that the forms ask for more information if that reduces the likelihood that the Government asks for additional information during the review or assessment process?

Given that the majority of notifications made under the NSI Act do not result in a call-in, we do not recommend that further information be sought. Presently, significant time and effort is expended by parties collecting information for notifications. Absent a requirement for that information during the initial review period, we do not consider it efficient to provide further information that may or may not be required for the Government review following a call-in.

However, as much of the content in a mandatory notification is the same as a voluntary notification, we would urge the Government to consider utilising a single form with an additional question as to whether the notification is made on a mandatory or voluntary basis. We would also propose that a third option be added to cater for situations in which it is unclear to the notifying party whether the notification is mandatory or not, so that the ISU may accept it on the relevant basis without the need for the re-submission of largely the same content on a different form if the ISU's view differs from the notifying party's view.

NSI Notification Service (the 'portal')

43. What, if any, functional improvements would make submitting a notification on the NSI Notification Service easier?

The Joint Working Group acknowledges the ongoing improvements to the NSI Notification Service. Future improvements could include:

- Potential for text formatting within notifications forms, rather than plain text.
- Ability to download files from submitted notifications.
- Ability to print / save copies of notifications in a more intelligible format.

- Removal of requirement to include specific dates in the portal, for instance in the "other UK regulatory approvals" section of the portal. This date is often incorrect as the parties have no indication of when approval will be issued. The introduction of a free text box could fix this.

- Ongoing refinements to "firewall" issues in which certain (unknown) combinations of characters trigger errors.

- Two factor authentication by email rather than SMS, to allow firms to use centralised email accounts, which are often necessary to ensure timely responses and communication where multiple lawyers are working on a notification.

- An indication on final form saved / printed notifications as to whether they were made on a voluntary or mandatory basis (or on the basis of this not being clear – assuming the proposed change in approach outlined above were to be adopted).

- Upon a submitted notification being returned for being incomplete, an ability to update just the relevant sections of the notification and/or respond to the query raised via the portal (rather than via email when the full notification is re-submitted). We believe this would allow parties to direct the ISU's attention to specific changes and provide clarification where certain information requested may not be applicable or available thereby increasing efficiency for the benefit of all involved in the process.

Classified Material

44. Do you understand what kind of information would be classified at SECRET and TOP SECRET and how to provide that information to the ISU if necessary?

We would welcome guidance on the Government's preferred means of providing classified information as there is no clear and accepted process for this currently. For example, the Government could provide confirmation that the provision of the contact details of an appropriate security cleared representative of a qualifying entity, whom the ISU can contact in relation to classified material would be appropriate in these circumstances.

45. If you are a legal advisor submitting a notification form on behalf of a client, do you check the classification of material provided in the form with your client before submitting?

We would not expect clients or other parties to a transaction to provide information that would require security clearances to legal advisers (who would not routinely hold such clearances), and do not request such information. As legal advisers do not routinely hold security clearances, they are not in a position to assess whether or not information provided may be classified and rely on their clients to make this assessment.

However, this presents significant complications for legal advisers in assessing the risk associated with particular transactions and advising clients on the preparation of notifications. To allow parties and their legal advisers to better assess risks and prepare notifications, we would welcome the Government's views on whether it would be appropriate for legal advisers to seek security clearances in any context.

Further feedback

46. Is there any further feedback you would like to provide?

See prior responses.