

## UK National Security & Investment Act: First Experiences

13 July 2022

The UK Department for Business, Energy and Industrial Strategy (BEIS) has published its first Annual Report on the UK's new National Security and Investment Act (the Act).<sup>1</sup> As the Act only came into force on 4 January 2022, the Annual Report covers the first three-month period of the regime to 31 March 2022 (the Report). We estimate that Kirkland has advised on approximately 10% of all filings made under the Act to date. This update sets out some key learnings from the Report and our experience so far.

- *Defence sector most frequently in scope.* According to the Report, nearly 35% of all filings concerned activities in the 'Defence' sector (which captures any direct or indirect supply to the UK Ministry of Defence). Over 20% of filings concerned activities relating to 'Military and Dual Use' goods (typically items subject to export control legislation) or where the target was considered a 'Critical Supplier to Government' (typically where a company has a government contract that requires a level of security clearance). Unsurprisingly, Defence, Military and Dual Use and Critical Suppliers to Government are also the areas most often 'called-in' for a more detailed review. Given the broad application of the Act to target businesses involved in the defence sector, we carefully diligence trigger points under the Act for transactions involving such businesses. We can rule out notification requirements under some of the other 17 high-risk sectors more quickly based on confirmatory questions addressed to the target business.
- *Number of reviews at the lower end of expectations.* A total of 222 filings were made in the period to 31 March 2022. Whilst it is hard to draw conclusions based on the short period covered by the Report, if a similar number of filings were made over the remainder of the year, the Government will receive significantly fewer filings than its top-end prediction of 1,830 (and in fact fewer than 1,000 filings, which is below even the bottom of its estimated range). This is despite M&A activity

remaining high during the period covered by the Report and BEIS reviewing a wide range of transaction structures under the Act, including internal restructurings and fund to fund transfers. Only 17 transactions were 'called-in' for a more detailed review (approximately 7.7% of all filings). The regime has not therefore become a hurdle to a disproportionate number of deals, as once feared.

- *Few voluntary filings have been made.* Of the 222 filings that were submitted, only 23 were made under the voluntary procedure. This suggests the voluntary process will be used sparingly with parties primarily seeking approval only where a deal falls within scope of one or more of the 17 high-risk sectors that triggers a mandatory filing requirement. It seems that practitioners have quickly become used to advising merging parties to proceed without submitting voluntary filings on a precautionary basis. BEIS has also rejected filings submitted on a mandatory basis, which were not considered to fall within the scope of the 17 high-risk sectors.
- *Review periods have been adhered to and process is reasonably predictable.* The vast majority of transactions were cleared within the first 30 working day period, with the Government taking, on average, three working days to 'accept' a filing once submitted and start the formal review period. Where a transaction was 'called-in', that typically happened on working day 23 (i.e., before the end of the 30 working day review period). And of those transactions that were called-in – which starts a further 30 working day review period – approval was typically issued around working day 24 of this further review period (again, a good time before the end of the time period available). We have also found the Government to be sympathetic to timing considerations of the parties in situations where critical needs arise (for instance, in distressed deals and restructuring transactions).
- *No remedies/ conditions have been imposed – yet.* To date, no transactions have been approved subject to conditions (a 'final order'). However, it is likely only a matter of time before this occurs. The Government has recently announced that it has called-in two high-profile transactions for an in-depth review – Nexperia's acquisition of Newport Wafer Fab<sup>2</sup> and the acquisition by Altice of 6% of share in BT (taking its total shareholding to 18%)<sup>3</sup>, both of which could see conditions imposed.

Overall, our experience to date with the Act and the Government body within BEIS tasked with overseeing the reviews (the Investment Security Unit) has been positive. Along with other practitioners, we have called for the process to be more transparent – and in particular for a specific case officer to be assigned to each filing so that contact can be made and updates obtained throughout the review process. We have also suggested that the Government guidance explaining the activities that fall in/out of scope of the 17 high-risk sectors be updated to reflect its latest learning and experience to ensure that approval is only sought where necessary. The Government

has recently sought feedback from practitioners, and we hope to see such improvements made in the near future.

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1. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1083295/E02757792-nsi-annual-report-2022.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1083295/E02757792-nsi-annual-report-2022.pdf) ↩

2. <https://www.gov.uk/government/news/newport-wafer-fab-acquisition-called-in-for-national-security-assessment> ↩

3. <https://www.gov.uk/government/news/bt-acquisition-called-in-for-national-security-assessment> ↩

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