# Written evidence submitted by the Law Society of England and Wales (NSIB02)

# Parliamentary Briefing

## National Security and Investment Bill

House of Commons committee stage

*The Law Society of England and Wales is the independent professional body that works globally to support and represent 200,000 solicitors, promoting the highest professional standards and the rule of law.*

### 1. Introduction

This briefing outlines the Law Society's views on the National Security and Investment Bill ahead of the Bill's committee stage in the House of Commons.


**Summary**

- Overall, the Law Society supports the National Security and Investment Bill, its clear intention to control foreign investments that may have national security implications, and the need for safeguards.
- We have significant concerns regarding part 1 (chapters 2, 3 and 4) and part 3 of the Bill and how the regime will operate in practice.
- The Law Society would welcome the opportunity to work with Parliament and the Government to promote investor confidence in England and Wales.
- The Bill could lead to a significant number of "cautionary" voluntary applications by acquirers nervous about protecting the integrity of their acquisitions.


### 2. The Law Society's views on the Bill

Overall, the Law Society supports the National Security and Investment Bill, its clear intention to control foreign investments that may have national security implications, and the need for safeguards.

While the overarching principle and intentions of the Bill are sensible, we have concerns regarding part 1 (chapters 2, 3 and 4), part 2 and part 3 which could create significant additional administrative burdens and uncertainty for investors. We hope that these issues

can be addressed during the Bill's passage through Parliament to ensure that strategic UK economic interests are protected while not discouraging legitimate foreign investment and business efficiency.

The UK is and seeks to continue to be an open and international trading centre. In a worst-case scenario the uncertainty and extra administrative burdens created by the regime could undermine foreign investment, especially in our technology and manufacturing sectors.

## 3. Concerns regarding part 1 of the Bill

### 3.1 Overview

National security should be defined within the Bill to help provide clarity and understanding in decision making. There is no meaningful guidance on this term in the Bill nor in the associated documentation. As a minimum it needs to be made clear that national security is distinct from "national interest". Other regimes that use the expression "national security" – such as the UK Enterprise Act 2002 – might provide some useful guidance as to how to define the term.[1] We would welcome an amendment to the Bill, providing a clear definition of national security.

We appreciate that there will never be an entirely conclusive definition given the nature of the potential threats, but there is a need for a base level of confidence as to what might be considered an issue of national security.

There is a potential risk that a Secretary of State could become exposed to political influence (for example from electoral or industrial purposes). Having a clearer definition of national security should help to protect the Secretary of State from such pressures and allay fears that the regime could be used to undermine the legitimate benefits of foreign investment in the UK.

**Recommendation:** The Bill should be amended to include a clear definition of "national security", that will help provide confidence as to what is considered an issue of national security. This will provide a clear distinction between issues of national security and issues of national interest.

### 3.2 Time limit for call-in notice

Clause 2 sets out a time limit on the Secretary of State serving a call-in notice in relation to a trigger that has occurred. The time limit is five months from the trigger event or six months from the Secretary of State becoming aware of the trigger event. We have two concerns with this provision:

i. Clause 2(2) does not explicitly say whether the time limit expires on the earlier of those two time periods or the later. We think the legislation does suggest that it must be the earlier date, but it would be beneficial for this to be stated more clearly.

ii. The time limits apply only to a call-in notice given in relation to a trigger event that has actually occurred (i.e. under what is currently clause 1.1(a)). This provision gives

[1] Australia's foreign investment regime defines national security as being "defence, security, international relations or law enforcement interests", with "international relations" meaning "political, military and economic relations with foreign persons and international organisations.

parties involved in acquisitions no comfort that a voluntary notification (set out in clause 18 and explained below) will result in finality on the matter, as they would then need to proceed to complete the transaction before any time limits start to run.

### 3.3 Definition of qualifying entities and assets (clause 7)

Under clause 7(3), an overseas entity is a qualifying entity if (among other things) it carries on activities in the UK. It would be useful to have further guidance on the meaning of this term, as is the case under the Bribery Act and the Modern Slavery Act.

The UK nexus test set out in clause 7 is ambivalent. In our view, section 7 defines '*qualifying entities and assets*' in very broad terms. Under 7.1 and 7.2 any good or service supplied to the UK could be considered a qualifying entity, regardless of whether it is connected with a potential target risk.

Clause 7.6 provides that a qualifying asset includes land or movable property when '*used in connection with the supply of goods or services to persons in the United Kingdom.*' This provision could inadvertently cover UK businesses that buy, procure or use technological products or services supplied by third party providers. In this scenario:

- A UK company that buys in a foreign AI technology to help deliver its business objectives could be covered.

- A UK company that uses a foreign computer software (for example for a database) could be covered.

This situation could complicate further if a UK business plans to purchase another UK company covered in the scenarios mentioned above. Even though it is a UK-to-UK transaction, under the UK nexus set out in section 7 these type of deals would be covered by the regime.

As officers of the court, solicitors will have a duty to flag this up as a risk to corporate clients, which means that such companies are likely to seek a voluntary judgment from the Secretary of State for certainty. This judgment is likely to slow down business, or if the deal goes ahead and the ruling is made after it is completed it would have significant consequences for the organisation in terms of cost and outcomes.

This possible application of the regime to acquisitions by domestic acquirers is unusual compared with other jurisdictions where governments have national security powers.

In our view concerns relating to national security and domestic investment are likely to be able to be dealt with under existing regulations – for example, confiscation proceedings under the Proceeds of Crime Act 2002 or the director disqualification regime.

Other concerns on clause 7.6 and 11 are:

- There does not appear to be a monetary threshold on the value of a trigger event. Generally, a person is not to be regarded as acquiring control of a qualifying asset if the person is an individual and is acquiring wholly or mainly outside of their trade, business or craft (cl. 11(1)). However, this does not apply to acquisitions of land (cl. 11(2)(a)).

- Inadvertently, residential house purchases could create a trigger event. This would be justified if there is some kind of national security risk, but it could also cover properties in proximity to defence or communications infrastructure, such as a house next to a data centre or a 5G mast. This provision could prompt a number of voluntary notifications for residential purposes.

### 3.4 Mandatory notifications (clauses 13 and 15)

Clause 13 of the Bill states that a notifiable acquisition completed without the approval of the Secretary of State is void. This raises the question of how this affects a third party who deals in good faith with the acquirer of a business and is not on notice that the transaction is void. It also raises the question of what happens where the resolutions of the qualifying entity have been passed using votes purportedly held by the acquirer, but which subsequently are found to be held by the previous owner (on the basis the acquisition is void). It is unclear whether those resolutions could be impugned.

Clause 15.3 indicates that if the Secretary of State does validate such an acquisition, the acquisition will not be treated as void. This causes difficulties for third parties dealing with the acquirers on the basis that the transaction has been void who then find out that it is not void after all. The same point above applies in relation to voting rights, if the transaction is deemed as void.

### 3.5 Voluntary notifications (clause 18)

The procedure for a voluntary notification and a decision by the Government, set out in clause 18, appears to be intended to give parties an opportunity to force the Government to decide, within 30 working days, whether to investigate an acquisition so that they can get certainty that it will not be challenged later.

We have a number of concerns about this procedure:

i. The Secretary of State must decide whether to accept or reject a voluntary notification '*as soon as reasonably practicable*' (clause 18.5). Likewise, the Secretary of State must notify each relevant person '*as soon as practicable*' (clause 18.8 a). In both cases, these provisions do not define a clear time period or set out a default position if the decision of the Business Secretary takes a long time. The use of the term "practicable", rather than "possible", creates uncertainty and implies a degree of delay may be acceptable.

**Recommendation:** For investor certainty, we believe that there should be a time limit and a default position that if the Secretary of State does not notify the person who made the notification the notice it is deemed accepted (thus triggering the 30 working days). The same points apply to mandatory notices (clause 14).

ii. The Secretary of State has a further 30 working days ("review period") to decide whether to serve a call-in notice or notify the parties that no further action will be taken. Clause 18(9) specifically states that the review period '*does not affect the operation of the time-limits in subsections (2) and (4) of section 2'.* This means that the Secretary of State could fail to make a decision within 30 working days but would still have up to

6 months from becoming aware of the trigger, or 5 years from the date of the trigger, to serve a call-in notice. In our view this is a procedural anomaly and defeats the point of making a voluntary notification.[2]

**Recommendation:** The Bill should provide that, if the Secretary of State has not made a decision by the end of the review period, it is deemed to have confirmed that no further action will be taken.

iii. Clause 18.8(b) allows the Secretary of State to inform the parties, after considering a voluntary notification, that no further action will be taken. However, the Bill does not seem to prevent the Secretary of State explicitly from subsequently serving a call-in notice, notwithstanding that the Secretary of State confirms that no action will be taken, provided it does so within the time limits set out in clause 2 (1).

**Recommendation:** For the voluntary notification procedure to give transaction parties some clarity it needs to deliver an authoritative decision on the risk of a call-in.

## 4. Other observations

### 4.1 Filings volumes

The estimated volume of filings stated in the impact assessment (1,000-1,830 transactions being notified per year) is, in our view, an under-estimate. This is because there is likely to be a very large number of voluntary filings and requests for informal guidance, especially when the regime is new and businesses are accustoming themselves to its requirements.

We therefore have some concerns that there may be insufficient resource to deal with the number of requests, which could lead to delays and burdens for businesses.

**Recommendation:** Given the likely large volume of voluntary filings and requests for informal guidance, the Government should confirm whether it has considered the impact large numbers of filings may have on the new regime's ability to dispense with these filings in a timely manner.

### 4.2 The seriousness of enforcement

There is a risk that deals that should have been notified and cleared but have not due to delays in the investigation process automatically become void. This would lead to the incredibly complicated situation where a completed transaction would need to be undone, as if it had never happened. In our view it would be practically impossible to unwind a takeover of a listed company.

This new risk is likely to mean that the parties involved in transactions that are potentially in-scope will take a safety-first approach and either seek informal guidance or make a voluntary

[2] The wording quoted above does not appear at the end of clause 14(8), which imposes a similar 30-working day period in relation to mandatory notifications.

notification. It is important that the stated timeframes for advice and decisions are met no matter what the demand is otherwise investment into the UK could slow.

We would propose that takeovers of listed companies should be exempted from the "void" provisions of the Bill. This should not harm the purpose of the Bill as these takeovers would be conducted in the public domain. The Government would therefore be aware of them at an early stage and be able to make a judgement as to whether to investigate them.

There are certain trigger events that are almost impossible for companies to judge as to whether they are relevant to the transaction or not. For example, it would not be possible to predict whether or not a real estate transaction would be subject to the proposed regime, unless a register of sensitive land existed so that potential investors could discover whether this might be a trigger matter.

**Recommendation:** The Government should consider excepting the takeovers of listed companies from the "void" provisions of the Bill. This would not harm the purpose of the Bill as these take place in the public domain and the government would already be aware of them. This would avoid the risk of incredibly complex transitions needing to be undone, which may well not be possible.

### 4.3 Powers of the Secretary of State

Part 3 of the Bill gives the Secretary of State quasi-judicial powers by allowing them to act as the key decision-maker for all decisions under the new regime. The regime should set out what are standard due process rights for investors, including rights to be made aware of the nature of the Government's concerns and to be able to respond effectively to those concerns. There are also concerns regarding the Secretary of State's retrospective powers to unwind deals, which could affect services as well as goods.

Opportunities for parties to make representations during the review process appear to be limited. While parties can challenge the decisions of the Secretary of State on appeal in the High Court, this is not an ideal safeguard for businesses. The Government should allow more opportunities for investors to challenge and make representations at an early stage during the investigation process.

The review process should be transparent, so it is clear how national security is being judged and what considerations and evidence are being used to make decisions. We would ask that the Government commit to consulting fully on how the review process will work in practice.

**Recommendation:** The Government should commit to consulting fully on how the review process will operate, and that it will be underpinned by evidence-based decision making. The review process should also aim to be as transparent as possible.

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