TO WHAT EXTENT HAS THE UK GOVERNMENT ACHIEVED ITS AIM OF PROVIDING CERTAINTY TO BUSINESSES IN RELATION TO THE NATIONAL SECURITY AND INVESTMENT ACT 2021?

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Abstract: The National Security and Investment Act 2021 gave the UK Government sweeping powers to intervene in mergers and acquisitions in a broad range of scenarios. Because of this, the UK Government, when it announced plans for the Act, set out its aim to provide sufficient certainty to businesses so that the Act does not have a detrimental impact on investment in the UK. However, complaints about a lack of certainty about the Act amongst businesses and investors have persisted. This paper explores the two main concerns about the Act's uncertainty - the lack of a 'national security' definition and the unclear definitions of the 17 mandatory notifiable sectors - and demonstrates that claims of a lack of certainty in these areas are largely unfounded and therefore, the Government has largely succeeded in its aim of providing certainty to businesses in relation to the Act.

A. INTRODUCTION

1. *Context*

The National Security and Investment Act 2021 ('the Act') was enacted to empower the UK Government to intervene in acquisitions that they deem to pose a threat to national security. In doing so, however, concerns arose as to both the scope of the powers being granted to the Government and the detrimental impact on investment in the UK, with the Act being described as 'the most draconian piece of legislation levied against businesses in the last 30 years.'[2] The National Security and Investment regime ('NSI regime') established by the Act replaces the powers granted by Enterprise Act 2002, which allow the Secretary of State to issue a notice to the Competition and Markets Authority to investigate certain transactions that gave rise to public interest considerations.[3] However, there were concerns that these powers were ineffective and failed to address subsequent technological developments.[4] Using these powers, there had only been 12 national security investigations into acquisitions[5] – in comparison, it was estimated that there would be up to 1,830 notifications annually under the

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[2] Tim Matthews, 'National Security and Investment Bill is a draconian attack on business' *The Times* (London, 18 February 2021) <https://www.thetimes.co.uk/article/national-security-and-investment-bill-is-a-draconian-attack-on-business-2l633qdjc> accessed 25 January 2024.

[3] S.42 Enterprise Act 2002.

[4] House of Commons Library, 'Briefing Paper: National Security and Investment Bill 2019-21' (*parliament.uk*, 18 January 2021) <https://researchbriefings.files.parliament.uk/documents/CBP-8784/CBP-8784.pdf> accessed 15 February 2024, p.4.

[5] ibid, p.5.

new NSI regime.[6] Moreover, the OECD noted that around the mid-2010s, many advanced economies began to update their screening regimes as a result of technological developments and concerns about investment from State-controlled entities and non-transparent economies[7] – the UK's screening regime had not been updated since 2002, so it is clear that an update was required.

2. *Key provisions*

S.1(1) grants the Secretary of State the power to issue a "call-in notice" if he "reasonably suspects that—

(a) a trigger event has taken place in relation to a qualifying entity or qualifying asset, and the event has given rise to or may give rise to a risk to national security, or

(b) arrangements are in progress or contemplation which, if carried into effect, will result in a trigger event taking place in relation to a qualifying entity or qualifying asset, and the event may give rise to a risk to national security.

A qualifying entity is one which comes within 17 sectors defined by subsequent regulations.[8] Acquisitions of qualifying entities are subject to mandatory notification to the Secretary of State (s.14(1)). Completing a notifiable acquisition without approval is a criminal offence (s.32), and the acquisition is void (s.13(1)). A voluntary notification can also be made if the requirements for mandatory notification are not met (s.18). While the acquisition is being assessed, the Secretary of State can issue an interim order if he reasonably considers that this is necessary and proportionate (s.25(1)). Once the assessment is completed, the Secretary of State can either submit a final notification (s.26(2)), approving the acquisition, or a final order if he:

(a) is satisfied, on the balance of probabilities, that—

(i) a trigger event has taken place or that arrangements are in progress or contemplation which, if carried into effect, will result in a trigger event, and

(ii) a risk to national security has arisen from the trigger event or would arise from the trigger event if carried into effect, and

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[6] Department for Business, Energy and Industrial Strategy, 'National Security and Investment Bill Impact Assessment' (gov.uk, 9 November 2020) <https://assets.publishing.service.gov.uk/media/5faad8ed8fa8f56da59d41a0/nsi-impact-assessment-beis.pdf> accessed 7 February 2024, p.22.

[7] OECD Secretariat, 'Acquisition- and ownership-related policies to safeguard essential security interests: Current and emerging trends, observed designs, and policy practice in 62 economies' (*oecd.org*, 22 May 2020) <https://www.oecd.org/investment/OECD-Acquisition-ownership-policies-security-May2020.pdf> accessed 15 February 2024, p.6-7.

[8] The National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021.

(b) reasonably considers that the provisions of the order are necessary and proportionate for the purpose of preventing, remedying or mitigating the risk.[9]

It is apparent that the powers granted in the Act can have a far-reaching and significant impact. Reaction to the NSI regime since it has come into effect has been largely positive, with the process of submitting a notification being described as 'straightforward'[10] and the Government's response being described as 'proportionate and reasonable' by practitioners.[11] The first full-year Annual Report on the NSI regime showed that 866 notifications were made that year, with 65 of these being reviewed, and 15 final orders being made.[12] This is slightly below what the Impact Assessment had predicted.

3. *The relevance of business certainty*

When plans for a National Security and Investment Bill were announced in the Queen's Speech, the Government said the purpose of this Bill was to:

- Strengthen the Government's powers to scrutinise and intervene in business transactions (takeovers and mergers) to protect national security.
- Provide businesses and investors with the certainty and transparency they need to do business in the UK.[13]

It is apparent from the provisions of the Act that it achieves the first stated purpose here. However, there have been strong concerns, both during the passage of the Act through Parliament and afterwards, as to the extent to which businesses have been provided with sufficient certainty in relation to the Act and the NSI regime established by it. The Government's Impact Assessment found that 'national security regimes do not play a major role in informing the investment decision-making process, provided that the regime is clear and predictable'[14] – this means that it is vital that the NSI regime is clear and predictable, and therefore certain, if it is not to have a detrimental impact on investment in the UK. The

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[9] National Security and Investment Act, s.26(3)
[10] DRD Partnership, 'Prising Open the Black Box: Six months of the National Security and Investment Act in practice' (*drdpartnership.com*, 4 July 2022) <https://www.drdpartnership.com/wp-content/uploads/2022/07/Prising-Open-the-Black-Box.pdf> accessed 17 January 2024, p.3.
[11] ibid., p.13.
[12] Cabinet Office, 'National Security and Investment Act 2021: Annual Report 2023' (*gov.uk*, 11 July 2023) <https://www.gov.uk/government/publications/national-security-and-investment-act-2021-annual-report-2023> accessed 25 January 2024, p.4.
[13] Prime Minister's Office, 'Queen's Speech December 2019 – background briefing notes' (*gov.uk*, 19 December 2019) <https://www.gov.uk/government/publications/queens-speech-december-2019-background-briefing-notes> accessed 15 February 2024, p.104.
[14] Department for Business, Energy and Industrial Strategy, 'National Security and Investment Bill Impact Assessment' (gov.uk, 9 November 2020) <https://assets.publishing.service.gov.uk/media/5faad8ed8fa8f56da59d41a0/nsi-impact-assessment-beis.pdf> accessed 7 February 2024, p.12.

Government has taken several steps to address these concerns – extensive guidance has been published[15] and the Investment Security Unit ('the ISU') was established to focus solely on administering the NSI regime, and it has been praised for its engagement with stakeholders.[16] S.3 of the Act requires the Secretary of State to publish a statement setting out how he expects to use the call-in power. In this statement, the Secretary of State provided assurances that the power will be used 'solely to safeguard the UK's national security'[17] and also set out the three risk factors ('target risk', 'acquirer risk', and 'control risk') he will consider when deciding whether to call-in an acquisition.[18] In spite of all these measures, however, two major concerns have persisted.

The first is the lack of a 'national security' definition in the Act. Some are concerned that this would allow the Government to use the regime to address 'wider industrial policy concerns'[19], and law firms like Allen & Overy have expressed concerns about the fact that this could give the Government significant flexibility in relation to the powers granted to them in the Act.[20] Furthermore, concerns were raised about this by a number of parliamentarians, including Lord Reid[21], Lord Lloyd[22], and Bob Seely MP[23], during the Act's passage through Parliament. The second concern relates to the supposed uncertainty created by some of 17 sector definitions, which have been described as 'not entirely clear' and 'highly complicated'.[24] A report found that this was the most frequently mentioned issue with the NSI regime,[25] and this was also criticised during the Act's passage through Parliament.[26]

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[15] Cabinet Office, 'Check if you need to tell the government about an acquisition that could harm the UK's national security' (*gov.uk*, 20 July 2021) <https://www.gov.uk/guidance/national-security-and-investment-act-guidance-on-acquisition> accessed 16 February 2024.
[16] DRD Partnership, 'Prising Open the Black Box: Six months of the National Security and Investment Act in practice' (*drdpartnership.com*, 4 July 2022) <https://www.drdpartnership.com/wp-content/uploads/2022/07/Prising-Open-the-Black-Box.pdf> accessed 17 January 2024, p.3.
[17] Cabinet Office, 'National Security and Investment Act 2021: Statement for the purposes of section 3' (*gov.uk*, 2 November 2021) <https://www.gov.uk/government/publications/national-security-and-investment-statement-about-exercise-of-the-call-in-power/national-security-and-investment-act-2021-statement-for-the-purposes-of-section-3> accessed 13 February 2024.
[18] ibid.
[19] Paul Henty, 'National Security and Investment Act 2021: Protecting the family silver or stifling investment in UK plc?' (2022) 11(1) Compliance & Risk Journal 12.
[20] Allen & Overy, 'National Security and Investment Bill: a new frontier for scrutiny of investment in the UK' (*jdsupra.com*, 12 November 2020) <https://www.jdsupra.com/legalnews/national-security-and-investment-bill-a-76304/> accessed 15 February 2024, p.1-2.
[21] HL Deb 4 February 2021, vol 809, col 2345.
[22] HL Deb 4 February 2021, vol 809, col 2348.
[23] HC Deb 17 November 2020, vol 684, col 205.
[24] Paul Henty, 'National Security and Investment Act 2021: Protecting the family silver or stifling investment in UK plc?' (2022) 11(1) Compliance & Risk Journal 12, 13.
[25] DRD Partnership, 'Prising Open the Black Box: Six months of the National Security and Investment Act in practice' (*drdpartnership.com*, 4 July 2022) <https://www.drdpartnership.com/wp-content/uploads/2022/07/Prising-Open-the-Black-Box.pdf> accessed 17 January 2024, p.7.

This essay will demonstrate that both concerns are wrong, and in doing so, demonstrate that the UK Government has, to a great extent, succeeded in its aim of providing certainty to businesses in relation to the National Security and Investment Act 2021. It will demonstrate that it is impossible to provide a definition of 'national security' that provides additional certainty to businesses while at the same time retaining enough flexibility for the NSI regime to be effective. Furthermore, it will also show that any issues with the 17 sector definitions are in fact minor and can easily be rectified, with the definitions being largely certain. Most complaints about the sector definitions are due to disappointment amongst businesses that they have fallen within the broad scope of the sectors. Therefore, the UK Government has largely succeeded in its aim of providing certainty to businesses in relation to the National Security and Investment Act 2021.

B. THE LACK OF A 'NATIONAL SECURITY' DEFINITION

1. *The detrimental impact on business certainty*

At first glance, it may seem strange that, although the Act is concerned with protecting the UK's national security, the concept of 'national security' is not defined anywhere in the Act. This was a recurring theme in debates during the Act's passage through Parliament. The Government have claimed that this is longstanding government policy to ensure that national security powers are sufficiently flexible to protect the nation'.[27] However, this flexibility may come at the cost of providing certainty to businesses – it is very difficult for acquirers to know whether their acquisitions will make it through the screening process if they do not know what their acquisitions are being checked for. Furthermore, concerns were raised by parliamentarians like Lord Clement-Jones[28] and Sir Iain Duncan Smith[29] about how the lack of a 'national security' definition may further expand the scope of an Act that is already very broad. It was argued that, with the Act leaving the exercise of far-reaching powers entirely in the discretion of the Secretary of State, if no definition of 'national security' is provided, then there is no restraint on what the Secretary of State may exercise these powers for. In other words, the Secretary of State would be able to expand the concept of 'national security' to

[26] HL Deb 4 February 2021, vol 809, col 2339.
[27] Cabinet Office & Department for Business, Energy & Industrial Strategy, 'Notice, National Security and Investment Act 2021: Statement for the purposes of section 3' (*gov.uk,* 2 November 2021) <https://www.gov.uk/government/publications/national-security-and-investment-statement-about-exercise-of-the-call-in-power/national-security-and-investment-act-2021-statement-for-the-purposes-of-section-3> accessed 13 February 2024.
[28] HL Deb 4 February 2021, vol 809, col 2338.
[29] HC Deb 17 November 2020, vol 684, col 219.

encompass whatever acquisitions he wants to intervene in. Although it is, of course, unlikely that the Secretary of State would do this in reality – the signal that this would send to businesses would have a significant chilling effect on investment in the UK – it would nonetheless be poor legislative drafting if the Secretary of State were legally allowed to do this. Therefore, the detrimental impact that the lack of a 'national security' definition might have on business certainty in relation to the Act is apparent.

However, it should also be noted that defining 'national security' is no simple task. For the NSI regime to be effective, the Secretary of State must be afforded enough flexibility to intervene when and where necessary to protect the UK's national security.[30] A rigid definition contained within legislation would therefore be problematic – it would restrain the Secretary of State's ability to respond to new threats to national security, and it would open up the possibility of the Secretary of State's decisions being challenged via litigation, with aggrieved parties being able to argue that the reasons given by the Secretary of State for intervening in the acquisition are not within the scope of the 'national security' definition. On the other hand, if the definition is too broad, then it risks being redundant, telling us nothing that we do not already know and therefore doing nothing to provide businesses with further certainty (as explained below). Therefore, defining 'national security' in a way that provides further certainty to businesses, without making the Secretary of State's powers subject to such rigid limitations that it may harm national security, seems to be an impossible task, suggesting the Government was right not to include a definition of 'national security' in the Act.

2. *The difficulties with defining 'national security' – the Rehman[31] case*

Rehman concerned an individual being deported on the grounds that his deportation would be 'conducive to the public good as being in the interests of national security'.[32] Although this case was specifically about the meaning of national security for the purposes of s.15(3) Immigration Act 1971, the House of Lords explored the meaning of this concept more generally. Rehman argued that the activities he was being accused of threatened the security of other nations, not the UK, so the Secretary of State could not show that he was a threat to the UK's national security.

The Special Immigration Appeals Commission upheld Rehman's appeal, providing the following explanation of 'national security':

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[30] National Security and Investment Bill Deb 24 November 2020, col 38.
[31] *Secretary of State for the Home Department v Rehman (AP)* [2001] UKHL 47.
[32] s.15(3) Immigration Act 1971.

> a person may be said to offend against national security if he engages in, promotes or encourages violent activity which is targeted at the United Kingdom, its system of government or its people.[33]

The Commission had emphasised the fact that 'national security' should be 'construed narrowly',[34] but framing the concept of 'national security' in this way is far too narrow, and fails to understand how aggressors threaten the UK's national security in the modern day. To limit threats to national security to only 'violent activity' is an outdated and uninformed understanding of how the UK's national security can be harmed. One might argue that the most pressing threats to the UK's national security today are threats like cyberattacks[35] and espionage – neither of which can be seen as 'violent activity'. In the Impact Assessment for the National Security and Investment Bill, an example of a threat to the UK's national security that would come within the scope of the Act was an IT company that supplies services to airports being acquired by a hostile actor, with the consequences of the new owner deciding to stop providing the services to airports deemed to be a threat to national security.[36] The fact that this example was included in the Impact Assessment demonstrates that this is exactly the kind of situation the Government is trying to prevent through the Act, but there is obviously no 'violent activity' here. It should be noted that this definition was provided by the SIAC, which is solely concerned with immigration law, so it is unreasonable to expect them to consider the impact of foreign investment on national security when developing a definition, but nevertheless this demonstrates that it is difficult to formulate a definition of 'national security' in a way that is broad enough to encompass all current and future threats to national security. While the vast majority of threats to national security may have been through 'violent activity' in 2001, today it is clear that 'violent activity' does not encompass all of the most pressing threats to the UK's national security. When formulating a definition of 'national security', one cannot truly know what threats will arise in the future, making it difficult to comprehensively define the concept in a way that will encompass those future

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[33] *Secretary of State for the Home Department v Rehman (AP)* [2001] UKHL 47, [2].
[34] ibid.
[35] Foreign, Commonwealth & Development Office, 'UK exposes attempted Russia cyber interference in politics and democratic processes' (gov.uk, 7 December 2023) <https://www.gov.uk/government/news/uk-exposes-attempted-russian-cyber-interference-in-politics-and-democratic-processes#:~:text=Following%20a%20National%20Crime%20Agency,intended%20to%20undermine%20UK%20organisations> accessed 20 February 2024.
[36] Department for Business, Energy and Industrial Strategy, 'National Security and Investment Bill Impact Assessment' (gov.uk, 9 November 2020) <https://assets.publishing.service.gov.uk/media/5faad8ed8fa8f56da59d41a0/nsi-impact-assessment-beis.pdf> accessed 7 February 2024, p.18.

threats. The SIAC's definition of 'national security' was far too narrow and demonstrates the difficulties in formulating a definition of the concept that is not too restrictive.

Lord Hoffmann took a different approach. His Lordship framed national security in this way:

> What is meant by "national security" is a question of construction and therefore a question of law within the jurisdiction of the Commission, subject to appeal. But there is no difficulty about what "national security" means. It is the security of the United Kingdom and its people. On the other hand, the question of whether something is "in the interests" of national security is not a question of law. It is a matter of judgement and policy.[37]

For reasons that will be discussed below, the final aspect of Lord Hoffmann's statement here, that determining what is in the interests of national security is a matter of policy and should be left to the Government, is the right approach to take. However, the rest of Lord Hoffmann's statement achieves nothing in terms of providing certainty about the concept. Defining 'national security' as 'the security of the United Kingdom and its people' tells us nothing – it is merely rephrasing the words 'national security'. It tells us nothing about the concept that we cannot determine from the words 'national security' – it is obvious that this would involve the security of the nation. This further demonstrates the impossibility of finding an adequate definition of national security – the SIAC's definition was too restrictive, but a definition like Lord Hoffmann's, which is evidently very broad, tells us nothing and appears to be pointless. By distinguishing between the meaning of 'national security', which Lord Hoffmann says is a question of law, and whether something is 'in the interests' of national security, which Lord Hoffmann says is a policy matter for the Government, His Lordship has avoided providing us with any substantive or useful information about what 'national security' means. A definition like this, therefore, would do nothing in terms of providing certainty to businesses. Reflecting on the definitions provided by the SIAC and Lord Hoffmann, it is clear that finding the right balance between being broad enough to allow the Government to respond to a wide range of threats to national security and narrow enough to say something that provides certainty when defining 'national security' is an impossible task.

Lord Slynn's view most closely reflects the approach taken in the National Security and Investment Act. Although it does little to define 'national security' and thereby provide

[37] *Secretary of State for the Home Department v Rehman (AP)* [2001] UKHL 47, [56].

further certainty about the concept, the flaws in the definitions provided by the SIAC and Lord Hoffmann demonstrate that this is the right approach to take. His Lordship emphasised the important role played by the Secretary of State in assessing risks to national security:

> I do not accept that this risk [to national security] has to be the result of "a direct threat" to the United Kingdom… To require the matters in question to be capable of resulting "directly" in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state… need to be protected… There is a very large element of policy in this which is, as I have said, primarily for the Secretary of State.[38]

Lord Slynn does not attempt to define the concept of national security here. Instead, he recognises that when it comes to matters of national security, deference to the executive is the most appropriate approach. The various approaches taken in *Rehman* demonstrate that defining national security is complex because it is a fluid and ever-changing concept – as threats to the UK's national security evolve, so too must the Government's ability to respond to these threats, and a codified definition would restrict their ability to do so. While a broad definition of national security could have been included in the Act, in practice a definition that did not restrict the Secretary of State's discretion too much would achieve nothing in terms of providing further certainty, because it would do nothing more than stating the obvious. Therefore, although the deferential approach outlined by Lord Slynn and subsequently taken by the National Security and Investment Act may appear to grant the Secretary of State far-reaching powers with few limitations, the attempts to define national security in *Rehman* illustrate that this is an impossible task and the approach taken by the Act is the only viable approach. It is evident that the executive is the best placed institution to frame the concept of 'national security'.

3. *Definitions proposed during the Act's progression through Parliament*

The lack of a 'national security' definition was a recurring theme throughout the Parliamentary debates on the Act, and some definitions were suggested during the amendment process. The Government did not accept any of these amendments, sticking to their position that this would restrain their ability to act when necessary, but it could be argued that these proposed definitions would have provided greater certainty regarding the Act.

[38] ibid, [15]-[17].

Chi Onwurah MP, who represented the Opposition in the Public Bill Committee, proposed a new clause to the Bill which was described as a 'National Security Definition':

> When assessing a risk to national security, the Secretary of State may have regard to factors including, but not restricted to—
>
> (a) whether the trigger event risks enabling a hostile actor to gain control of a crucial supply chain, obtain access to sensitive sites, corrupt processes or systems, conduct espionage, exert inappropriate leverage or engage in any other action which may undermine national security;
>
> (b) whether the trigger event adversely impacts the UK's capability and capacity to maintain economic security;
>
> (c) the potential impact of the trigger event on the UK's defence capabilities and interests;
>
> (d) the potential impact of the trigger event on the transfer of sensitive data, technology or know-how outside of the UK;
>
> (e) the characteristics of the acquirer, including its jurisdiction of incorporation and proximity to any state;
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> (f) the potential impact of the trigger event on the security of the UK's critical national infrastructure;
>
> (g) whether the acquirer in respect of a trigger event has a history of compliance with UK and other applicable law;
>
> (h) the potential impact of the trigger event on the UK's international interests and obligations, including with respect to the protection of human rights and climate risk; and
>
> (i) the potential of the trigger event to involve or facilitate illicit activities, including terrorism, organised crime and money laundering.[39]

It is easy to see how a factor-based approach to defining 'national security' like this could provide greater certainty to businesses as to what considerations are involved in a national security assessment – in theory, an acquirer could consider the effect of their acquisition on these 9 factors, and this will give them a good indication of whether their transaction will be approved by the Secretary of State. However, there is a fundamental flaw in this proposed clause. The clause says that the Secretary of State 'may have regard to' these factors – there is no obligation for these factors to form part of the Secretary of State's

[39] National Security and Investment Bill Deb 10 December 2020, col 337.

thinking when assessing a national security risk – and moreover, the Secretary of State is 'not restricted to' these 9 factors. This renders the entire clause pointless – there is no requirement for the Secretary of State to consider any of these factors, and they can choose to ignore these factors entirely when making assessments, so this clause would do nothing to provide further certainty. It is easy to see why the phrase 'but not restricted to' was included in the proposed clause – if it were not, the Secretary of State's ability to consider new developments in threats to the UK's national security would be restricted – but the effect of this, combined with the fact that the Secretary of State is not obliged to consider the listed factors, is that the definition can be ignored entirely, meaning it does not provide any further certainty as to the meaning of 'national security' for the purposes of the Act.

During Report Stage in the House of Commons, members of the Foreign Affairs Committee proposed this clause (a 'Framework for understanding national security'):

> When assessing a risk to national security for the purposes of this Act, the Secretary of State must have regard to factors including, but not restricted to—
>
> (a) the potential impact of the trigger event on the UK's defence capabilities and interests;
>
> (b) whether the trigger event risks enabling a hostile actor to—
>
> (i) gain control or significant influence of a part of a critical supply chain, critical national infrastructure, or natural resource;
>
> (ii) conduct espionage via or exert undue leverage over the target entity;
>
> (iii) obtain access to sensitive sites or to corrupt processes or systems;
>
> (c) the characteristics of the acquirer, including whether it is effectively directly or indirectly under the control, or subject to the direction, of a foreign government;
>
> (d) whether the trigger event adversely impacts the UK's capability and capacity to maintain security of supply or strategic capability in sectors critical to the UK's economy or creates a situation of significant economic dependency;
>
> (e) the potential impact of the trigger event on the transfer of sensitive data, technology or potentially sensitive intellectual property in strategically important sectors, outside of the UK;
>
> (f) the potential impact of the trigger event on the UK's international interests and obligations, including compliance with UK legislation on modern slavery and compliance with the UN Genocide Convention;

(g) the potential of the trigger event to involve or facilitate significant illicit or subversive activities, including terrorism, organised crime, money laundering and tax evasion; and

(h) whether the trigger event may adversely impact the safety and security of UK citizens or the UK[40]

This is a stronger and more useful definition than the one proposed by Chi Onwurah MP – rather than listing factors that the Secretary of State 'may' consider, the proposed clause states that they 'must' consider these factors. This creates a baseline of considerations that the Secretary of State must take into account when assessing a risk to national security and gives businesses some indication of what kind of factors the Secretary of State will be considering, thereby creating some level of certainty. For example, if a sovereign wealth fund is acquiring a UK-based business, they know that under subsection (c), their relationship with their government will be assessed. However, it is fairly obvious that the factors listed in this proposed clause would be considered by the Secretary of State when assessing a potential risk to national security – nobody would be surprised to know that any of these considerations would form part of assessing a potential risk to national security; this clause tells us nothing that we do not already know. Furthermore, if the Secretary of State was limited to considering only these factors when making an assessment, then this would provide significant certainty, but, as with the Opposition's proposed clause, this clause also says that the Secretary of State is 'not restricted to' considering only these factors. It has been explained above why this phrase is needed to provide the Secretary of State with enough flexibility, but the fact that the Secretary of State can consider other factors, combined with the fact that the listed factors do not tell us anything that is not obvious, means that this proposed definition also does nothing in terms of providing businesses with further certainty.

4. *Defining 'national security' – an impossible task*

Having explored various approaches to defining 'national security', it is clear that none of them are adequate, demonstrating the impossibility of defining 'national security' in a way that provides businesses with more certainty about how the powers created in the Act will be used. A 'national security' definition must be broad enough to provide the Secretary of State with enough flexibility to respond to unforeseen threats to the UK's national security, while also providing enough detail and information so that the definition is actually useful and explains the aspects of national security that are unclear. Doing both simultaneously seems

[40] HC Deb 20 January 2021, vol 687, cols 988-989.

impossible. Therefore, although initially it may seem that the Government has undermined its efforts to provide businesses with sufficient certainty in relation to the Act by failing to define 'national security', it is unrealistic to expect the Government to define 'national security' adequately. The approach taken in the Act, whereby the scope of, and limitations on, the powers created by the Act are left entirely to the Secretary of State's discretion (assuming Parliament approves the s.3 statement)[41] is the correct approach to take, even if it is imperfect. Alternative arrangements, such as the s.3 statement[42] and consultation with the Investment Security Unit, are sufficient to provide businesses with certainty in relation to how the Secretary of State will exercise their call-in powers. This approach is more effective and helpful than either a pointless or an inflexible definition of national security.

C. HOW CERTAIN ARE THE DEFINITIONS OF THE MANDATORY NOTIFIABLE SECTORS?

1. *The significance of the mandatory notifiable sectors*

S.14 of the Act outlines the mandatory notification procedure, whereby an acquirer is required to submit a notification to the ISU when they gain control of an entity in what the Act describes as a 'notifiable acquisition'. S.6(1) empowers the Secretary of State to make regulations outlining what constitutes a 'notifiable acquisition', and this was done with The National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021 ('the Regulations'), which specified 17 sectors which are subject to the mandatory notification regime.

The significant impact that the mandatory notification regime can have on businesses means that it is essential for the Government to ensure that they provide businesses with certainty as to the scope and nature of this regime. Failing to notify the Secretary of State about a notifiable acquisition is a criminal offence punishable by up to 12 months' imprisonment and/or a fine[43] and a notifiable acquisition that is completed without the approval of the Secretary of State is void.[44] Therefore, with such severe consequences for failing to comply, it is essential for businesses to know with certainty whether they are required to make a notification or not. As well as this, if there is doubt or uncertainty as to whether a business needs to make a notification, then lawyers may advise their clients to err on the side of caution and make a notification anyway, potentially leading to the ISU being

[41] s.4 National Security and Investment Act 2021.
[42] Cabinet Office & Department for Business, Energy & Industrial Strategy, 'Notice, National Security and Investment Act 2021: Statement for the purposes of section 3' (gov.uk, 2 November 2021).
[43] S.39(1) National Security and Investment Act 2021.
[44] S.13(1) National Security and Investment Act 2021.

overwhelmed with notifications and a backlog developing, which would make it difficult to comply with the timelines set out in the Act.[45] Therefore, providing certainty to businesses as to the scope of the mandatory notifiable sectors is vital, and the definitions of these sectors must be watertight. However, in DRD Partnership's research into the practical impact of the Act in its first six months of operation, the most frequent issue raised with them was the difficulty in using the sector definitions in the Regulations to ascertain whether a target's activities fell within a mandatory notifiable sector.[46] The sector definitions that had caused the most difficulty were those for defence, computer hardware, pharmaceuticals (N.B. pharmaceuticals is not one of the sectors included in the Regulations; presumably this means synthetic biology) and artificial intelligence.[47]

It is clear then, that the definitions of the 17 sectors have been one of the most significant areas of uncertainty for businesses in relation to the Act. This section will assess whether the four sector definitions that were deemed to be the most problematic are legally certain or not. To do so, a criteria for assessing whether the definitions are legally certain must be laid out. Lord Bingham, writing extra-judicially in his book 'The Rule of Law', provides as the first of his eight principles of the rule of law that: 'The law must be accessible and so far as possible intelligible, clear and predictable'.[48] This statement finds support in both UK and ECHR case law. In *Sunday Times v United Kingdom*[49], the ECHR stated that 'the law must be adequately accessible… a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'. Lord Diplock in *Fothergill v Monarch Airlines Ltd*[50] stated that 'the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly available.' His Lordship also stated in *Black-Clawson International Ltd v Papierwerke Waldhof Aschaffenburg AG*[51] that 'a citizen, before committing himself to any course of action, should be able to know in advance what are the legal principles which flow from it'. Flowing from

[45] S.23 National Security and Investment Act 2021.
[46] DRD Partnership, 'Prising Open the Black Box: Six months of the National Security and Investment Act in practice' (*drdpartnership.com*, 4 July 2022) <https://www.drdpartnership.com/wp-content/uploads/2022/07/Prising-Open-the-Black-Box.pdf> accessed 17 January 2024, p.7.
[47] ibid.
[48] Tom Bingham, *The Rule of Law* (1st edn, Penguin 2010), p.37.
[49] (1979) 2 EHRR 245, 271.
[50] [1981] AC 251, 279.
[51] [1975] AC 591, 638.

these statements, the following criteria will be used for assessing whether the sector definitions in the Regulations are legally certain:

- Are they sufficiently precise?
- Are they ascertainable and clear?
- Do they provide predictability?

While an in-depth analysis of all 17 sector definitions would be beyond the scope of this essay, applying these criteria to the 13 definitions that were not highlighted as being particularly problematic shows that there are no major issues in terms of legal certainty with those definitions. The rest of this section will explore whether the other 4 sector definitions are legally certain.

2. *Defence*

a) *Is it sufficiently precise?*

Schedule 10 of the Regulations defines the 'Defence' sector for the purposes of the NSI regime. Para.3 outlines two conditions, of which an entity must meet one to come within the scope of the definition – these are (a) that the entity is a government contractor or sub-contractor which provides goods or services for 'defence or national security purposes' or (b) that the entity 'has been notified by or on behalf of the Secretary of State of information, documents or other articles of a classified nature which the entity or an employee of the entity may hold or receive' in relation to defence or national security purposes. These conditions are perfectly precise – an entity would know, and would most likely have documentary evidence, of whether they are government contractors or sub-contractors under the Official Secrets Act definition or of having been notified about holding classified information. It is significant that the entity must have been notified about holding classified information, and holding classified information alone is not enough – this provides an additional layer of certainty and precision, ensuring that there is no doubt or ambiguity as to whether an entity meets this condition – they either have been notified or they have not.

Para.1 lays out how 'defence' and 'government contractor' should be interpreted for the purposes of this Schedule, and it does so by using the definitions given to these terms in ss.2(4) and (12) Official Secrets Act 1989. For a sector definition to be precise, it is right that any terms that could be open to ambiguity are specifically defined, and using long-standing statutory definitions to do this is the right approach – these are tried and tested definitions, so businesses in the defence sector will be used to them and there will be no confusion as to what they mean. However, a key issue with the precision of this sector definition is the fact

that, while all other potentially ambiguous terms in schedule 10 have been defined, 'national security purposes' is not. This might cause issues – a government contractor might struggle to know with certainty if it provides goods or services for 'defence or national security purposes' if it does not know what 'national security purposes' means. This concern was also raised during the consultation on the sector definitions, showing that businesses are concerned about the confusion this may cause, but the government did not address this concern.[52] However, while this may lead to some ambiguity, it is long-standing government policy not to define 'national security' and, as explained above, it is not possible to produce an adequately certain definition of the concept. Therefore, while 'national security purposes' not being defined in schedule 10 may lead to some ambiguity, the Government cannot reasonably be expected to have defined this. Overall, therefore, it is clear that this definition is sufficiently precise.

b) *Is it ascertainable and clear?*

The Government's response to the consultation on the sector definitions noted that '[r]espondents were generally of the view that the definition is clear and comprehensive'.[53] This demonstrates that businesses have no issues with the intelligibility and clarity of this definition. Schedule 10 is set out in a simple, short, and easy-to-understand way – there are two comprehensively set out conditions and, with the exception of 'national security purposes', any ambiguous terms are given definitions. Therefore, it is undeniable that, with adequate legal advice, a business would be able to ascertain whether it comes within this sector definition and what the result of that would be. Schedule 10 is undoubtedly intelligible and clear, and businesses can easily ascertain whether they come under this definition.

c) *Does it provide predictability?*

As explained above, a business can know with complete certainty, especially with legal advice, if it is a government contractor or sub-contractor, or if it has been notified that it holds classified information, so in this respect the definition does provide predictability. Even if 'national security purposes' is not defined, it ought to be fairly obvious to an entity if the goods and services they provide are for defence or national security purposes, and furthermore it is difficult to see what classified information one can hold that would not be

[52] Department for Business, Energy & Industrial Strategy, 'National Security and Investment: Sectors in Scope of the Mandatory Regime: Government Response to the consultation on mandatory notification in specific sectors under the National Security and Investment Bill' (*gov.uk*, 1 March 2021) <https://assets.publishing.service.gov.uk/media/603d4003d3bf7f02168eabdc/nsi-scope-of-mandatory-regime-gov-response.pdf> accessed 15 February 2024, p.67.
[53] ibid.

linked to defence or national security purposes. In the consultation it was pointed out that this definition is very broad and could include, for example, contractors who provide catering and cleaning services in defence facilities, but the Government was clear that this was intended.[54] One might argue that this broad scope limits the extent to which this definition can provide predictability – someone acquiring a cleaning company would never expect nor predict that this must be notified under the NSI regime. However, in an area as sensitive and vital to the UK's national security as defence (a report on the political sensitivity of each of the 17 sectors ranked defence as one of the most sensitive sectors)[55] it is easy to see why the definition must have such broad scope. Moreover, being subject to additional scrutiny would not come as a surprise to any individual or business that works in defence facilities; they would no doubt understand the sensitivity of working in this area. Therefore, although this definition has broad application, it does provide predictability, nonetheless.

d) *Conclusion*

Overall, it is clear that the sector definition for defence is sufficiently certain, and any aspects that might be slightly surprising or confusing are entirely justified. Despite this analysis, DRD Partnership's research still found that this definition was causing difficulties for businesses in practice. The reason for this might be because 'national security purposes' is undefined or because it applies to businesses who are not ordinarily assumed to be part of the defence sector. However, 'national security' being undefined is a thread that runs throughout the NSI regime and the Government's approach to national security more generally, and although this definition does have a broad application, this is neither unjustified nor unexpected when it comes to providing goods or services relating to defence.

3. *Computing Hardware*

a) *Is it sufficiently precise?*

Schedule 6 defines the computing hardware sector for the purposes of the NSI regime. Para.3 sets out an exhaustive list of the activities that an entity would carry out to come within the scope of this sector definition. The activities are laid out in a sufficiently precise manner – by reading para.3, it would be simple to determine precisely whether an entity engages in any of the listed activities. For example, it is easy to determine, especially with appropriate legal advice, if you own, create, supply or exploit intellectual property in one of the five areas

[54] ibid.

[55] DRD Partnership, 'The Hand of Politics on Business: A political risk analysis of the UK National Security and Investment Act 2021' (*drdpartnership.com*, 4 January 2022) <https://www.drdpartnership.com/wp-content/uploads/2021/12/The-Hand-of-Politics-on-Business_-Political-Risk-Analysis-of-the-National-Security-and-Investment-Act_DRD-Partnership-1.pdf> accessed 25 January 2024, p.12.

listed in para.3(a). Any ambiguous terms in para.3 are explained in para.1, so there is no question as to the precision of this sector definition – it is sufficiently precise.

b) *Is it ascertainable and clear?*

Schedule 6 uses simple, albeit technical, language that anyone familiar with the computing hardware sector would be able to understand. The only terms used in para.3 that could be ambiguous are, for the most part, explained clearly in para.1. 'Fabrication', 'packaging', and 'roots of trust' are clearly explained in para.1 and it is easy to ascertain what these terms mean using their para.1 definitions. However, there is some confusion when it comes to the definition given to 'computer processing unit', which is problematic because this term is integral to the sector definition laid out in schedule 6 – it is used in all three activities laid out in para.3. During the consultation, respondents pointed out that 'computer processing unit' was not a commonly used term and there was a risk that using this term instead of 'central processing unit', the term which businesses are more accustomed to using, could cause confusion.[56] The Government accepted this point and attempted to resolve it by providing six sub-terms to explain what 'computer processing unit' means, of which one is 'central processing unit'.[57] While this does make the term clearer and ensures that businesses are aware what the difference between the two is – a 'central processing unit' is merely one type of 'computer processing unit' – one might argue that it would have been simpler and clearer to replace 'computer processing unit' with 'central processing unit' in the definition. However, the fact that the Government provided five additional sub-terms beyond 'central processing unit' suggests that 'central processing unit' is too narrow a term to encompass all the hardware that the Government intended to come under this sector definition. The Government's chosen approach provides clarity while also ensuring that the scope of the sector does not become too narrow, and it is still easy to ascertain whether a business carries out activities involving any of the six listed sub-terms. Therefore, schedule 6 is undoubtedly clear and it is easy to ascertain whether a business comes within the scope of this definition.

c) *Does it provide predictability?*

Although para.3 is precise and clear, it also has a very broad application, and it is not always easy to see where the national security implications arise – this is perhaps why business

[56] Department for Business, Energy & Industrial Strategy, 'National Security and Investment: Sectors in Scope of the Mandatory Regime: Government Response to the consultation on mandatory notification in specific sectors under the National Security and Investment Bill' (*gov.uk*, 1 March 2021) <https://assets.publishing.service.gov.uk/media/603d4003d3bf7f02168eabdc/nsi-scope-of-mandatory-regime-gov-response.pdf> accessed 15 February 2024, p.41.
[57] ibid.

concerns have arisen as to this sector definition. For example, para.3(a)(ii) states that owning, creating, supplying or exploiting intellectual property relating to the 'architectural, logical or physical designs' of computer processing units comes within the scope of this definition. However, it is difficult to see how the design of hardware that is available to the general public, meaning anyone can determine the physical design of these products, can give rise to national security considerations. In its response to the consultation, the Government explained that the focus of this definition is 'preventing the loss of intellectual property within the supply chain to hostile actors'.[58] This justifies to some extent the breadth of para.3 – using the example above, it is possible to envisage a scenario whereby a hostile actor acquires the intellectual property to the design of hardware that is integral to technology that is vital for the UK's defence systems, and if they refuse to continue providing that hardware, the Government will be unable to replace it, having a detrimental impact on the UK's national security. While the possibility of something of this kind happening may seem remote, in matters of national security it is sensible to err on the side of caution, and so the breadth of para.3 is justified. Moreover, with adequate legal advice, an acquirer of an entity that comes under the scope of this definition would undoubtedly be able to predict that the entity would come within the scope of this definition – its clarity and precision counterbalances its breadth. Therefore, although this definition has broad application, this is justified, and its clarity and precision provide sufficient predictability anyway.

d) *Conclusion*

Schedule 6 is sufficiently certain, even though it is very broad. Its breadth must be the reason for discontent amongst businesses about this definition, but there is no question as to the definition being legally certain.

4. *Synthetic Biology*

a) *Is it sufficiently precise?*

Schedule 16 defines synthetic biology for the purposes of the NSI regime. This definition is longer and more complex than the two definitions discussed above, and while this has detrimental impacts on the definition's clarity, it aids the definition's precision. Each of the terms used in the definition are explained with such precision that there is no ambiguity as to what they mean, with the exception of the meaning of 'synthetic biology'. The terms explained in para.1 – 'basic scientific research', 'medicine', and 'services' – are relatively straightforward but the fact that they are precisely defined ensures that there is no ambiguity

[58] ibid.

as to what they can mean, providing further certainty. While the activities listed in para.2 are short in comparison, they are very basic and so no additional explanation is needed for them to be precise. Therefore, para.1 is sufficiently precise.

Para.3 defines synthetic biology as 'the process of applying engineering principles to biology to design, redesign or make biological components or systems that do not exist in the natural world'. This is vague – a number of ambiguous terms in this definition are left unexplained. This could lead to certainty, for example as to what constitutes 'engineering principles' or what 'biological components or systems' means. The definition of 'synthetic biology' that was consulted on was criticised as being different from established definitions and very broad,[59] and as such the definition was subsequently revised. However, it is clear that the revised definition has not gone far enough to address these concerns; it remains imprecise. Accompanying the para.3 definition, para.4 sets out a non-exhaustive list of activities that come under that definition. While this undoubtedly provides more certainty for the six activities listed, it creates even more uncertainty for activities that are not listed but might come under the para.3 definition – if an activity appears to come under the para.3 definition but does not seem similar to any of the activities listed in para.4, there will be confusion as to whether a notification needs to be submitted. While this confusion can be resolved through contacting the ISU, it is evident that the legal definition is imprecise.

b) *Is it ascertainable and clear?*

Para.2, which sets out the activities that bring an entity within the scope of the sector definition, is, in isolation, perfectly clear. It sets out five activities and, aside from the concerns mentioned above as to the meaning of 'synthetic biology', it is easy for an entity to ascertain whether it engages in those activities. However, issues relating to the clarity of the definition arise when the exceptions to para.2 listed in paras.5 and 6 are considered. Para.5 lists 7 general exceptions to the activities listed in para.2 – it is not difficult to ascertain whether an entity falls within one of these exceptions, and the para.5 exceptions themselves are fairly clear. Para.6 is more problematic – para.6(1)-(2) outlines exceptions to para.2 for medicines and immunomodulatory approaches, but confusingly para.6(3) sets out circumstances in which the para.6 exceptions do not apply – in other words, it outlines exceptions to the exceptions. While an acquirer could still ascertain, with appropriate legal advice, whether an entity falls within the scope of this definition or not, it is evident that the way in which the definition is laid out is unclear and messy. Perhaps the reason this definition

[59] ibid, p.91.

is so unclear is because this definition was subject to the most significant changes following the consultation – the Government intended to include a broader 'engineering biology' sector in the Regulations, but this definition was criticised heavily in the consultation[60] and the Government subsequently narrowed the sector down to synthetic biology. It appears that trying to address these concerns while also trying to keep the definition broad enough to encompass any potential national security concerns has resulted in a messy and unclear definition, and the Secretary of State should simplify this definition when the Regulations are reviewed (as required by Regulation 4). Therefore, while an acquirer can, with appropriate legal advice, ascertain whether an entity falls within the scope of this sector definition, it is unclear and should be simplified.

c) *Does it provide predictability?*

The imprecision of the definition of synthetic biology in para.3 has a detrimental impact on the predictability provided by schedule 16. The fact that, as explained above, a business might not be able to determine if its activities come under the para.3 definition if they are not listed in para.4 means that it is difficult to reasonably foresee whether an acquirer is committing an offence by failing to notify the Secretary of State of the acquisition of that business. In practice, acquirers will err on the side of caution where they are unsure, and there is always the option of contacting the ISU for further clarity. However, this does not change the fact that the schedule 16 definition is not certain enough to provide businesses with sufficient predictability in all cases.

d) *Conclusion*

It is easy to see why businesses have struggled with this sector definition. The meaning of synthetic biology laid out in para.3 is imprecise and uncertain, and para.4, as a non-exhaustive list, does not do enough to resolve this. Furthermore, the exceptions to para.2 laid out in paras.5 and 6 have made the definition unclear and overly complicated. The Secretary of State should revise this definition by providing a more precise meaning of synthetic biology and simplifying the exceptions to the activities included within the scope of the definition.

5. *Artificial Intelligence*

a) *Is it sufficiently precise?*

[60] ibid.

Schedule 3 defines artificial intelligence for the purposes of the NSI regime. This sector definition has been described as being 'so wide as to be nearly meaningless'[61], so there are clearly concerns about the precision of this definition, and it is easy to see why. Para.2, which outlines the activities that bring an entity within the scope of this definition, is sufficiently precise – there can be no ambiguity as to what any of these activities entail. Para.1 defines any potentially ambiguous terms in schedule 3, including artificial intelligence – while the other definitions in para.1 are precise and unambiguous, the artificial intelligence definition is problematic:

> "artificial intelligence" means technology enabling the programming or training of a device or software to—
>
> (i) Perceive environments through the use of data;
>
> (ii) Interpret data using automated processing designed to approximate cognitive abilities; and
>
> (iii) Make recommendations, predictions or decisions; with a view to achieving a specific objective;

(ii) is sufficiently precise and entirely unproblematic – the only ambiguous term here is 'cognitive abilities', and this is defined later in para.1. However, (i) is more vague – it is unclear what perceiving environments means, and this term should have been defined later on in para.1. (iii) is also completely vague and unspecific and adds nothing worthwhile to the definition. Therefore, it is easy to see why this definition has been described as 'nearly meaningless'. During the consultation, this sector definition was criticised as lacking clarity and being too broad,[62] and the Government responded to this by focusing the definition on these three terms – it is evident, however, that this was insufficient in alleviating those concerns. In comparison, the definition for artificial intelligence in the EU's AI Act[63] is much more precise, using technical and specific language that leaves no room for ambiguity – when reviewing the Regulations, the Secretary of State should move towards an artificial intelligence definition similar to this.

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[61] DRD Partnership, 'Prising Open the Black Box: Six months of the National Security and Investment Act in practice' (*drdpartnership.com*, 4 July 2022) <https://www.drdpartnership.com/wp-content/uploads/2022/07/Prising-Open-the-Black-Box.pdf> accessed 17 January 2024, p.7.

[62] Department for Business, Energy & Industrial Strategy, 'National Security and Investment: Sectors in Scope of the Mandatory Regime: Government Response to the consultation on mandatory notification in specific sectors under the National Security and Investment Bill' (*gov.uk*, 1 March 2021) <https://assets.publishing.service.gov.uk/media/603d4003d3bf7f02168eabdc/nsi-scope-of-mandatory-regime-gov-response.pdf> accessed 15 February 2024, p.22.

[63] Commission, 'Proposal for a Regulation of The European Parliament and of The Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts' COM (2021) 206 final, Art.3(1), Annex I.

b) *Is it ascertainable and clear?*

The ambiguity of the 'artificial intelligence' definition is the only issue with how ascertainable schedule 3 is – it is, of course, difficult to ascertain whether an entity carries out activities within the scope of the definition if the most integral term to the definition is unclear and imprecise. Aside from this, however, schedule 3 is clear, coherently setting out what activities come within the scope of this definition.

c) *Does it provide predictability?*

Para.2 sets out the activities that bring an entity into the sector. However, it must be noted that the activity set out in para.2(1)(b) – 'developing or producing goods, software or technology that use artificial intelligence' – is very broad, and this may harm the predictability of the sector definition because it brings activities which have no foreseeable national security implications into the mandatory notification regime. An immense number of businesses are producing goods or technology that use AI, and it is unreasonable to subject all of these entities to mandatory notification where there are no reasonably foreseeable national security implications. This would be unnecessarily harmful to investment in the UK. Para.2 would benefit from an exemption like the one in schedule 8 para.2(c) (cryptographic authentication definition), which exempts products that use cryptographic authentication technology but are made available to general consumers. This would ensure that schedule 3 provides more predictability by ensuring that only products which would have reasonably foreseeable national security implications come within the scope of the sector definition.

d) *Conclusion*

There are two key flaws in schedule 3 which limit the certainty provided by the artificial intelligence sector definition, but both can be easily rectified. The definition of 'artificial intelligence' given in para.1 is too vague and imprecise and should be replaced with a definition similar to the one used in the EU's AI Act. Furthermore, para.2(1)(b) expands the scope of the definition significantly to include activities that have no reasonably foreseeable national security implications – this should be rectified by adding an exemption to para.2 for products that use artificial intelligence which are made available to general consumers.

6. *Conclusion*

It would be wrong to say that the Regulations have no problems with respect to providing certainty to businesses. It is clear that some concerns exist, however these are, in the context of the whole NSI regime, minor issues that can easily be rectified. Of the four sector definitions that DRD Partnership found to be problematic, two – defence and computing

hardware – are sufficiently certain. The only concerns that may exist with these two definitions are their broad scope, which would explain why businesses have complained about them – they do not want to come within the scope of the mandatory notifiable sector, because this imposes additional obligations and the possibility that an acquirer would be prevented from investing in that business. However, this does not mean that those definitions are uncertain. Notwithstanding this, it is evident that there are problems with the certainty of the synthetic biology and artificial intelligence definitions. However, these problems can easily be rectified when the Secretary of State reviews the Regulations. Moreover, only two of the 17 sector definitions having notable problems with their certainty is not a major flaw in the Government's attempts to provide certainty to businesses in relation to the Act; rather, it demonstrates that they have largely succeeded in doing so.

D. CONCLUSION

In conclusion, it is evident that concerns about the lack of certainty surrounding the NSI regime are overstated, and as such, the Government has largely succeeded in its aim of providing certainty to businesses in relation to the National Security and Investment Act. While many have criticised the lack of a 'national security' definition in the Act, doing so in an effective way is impossible – *Rehman* demonstrates that it is difficult to define 'national security' in a way that provides enough detail to enhance certainty while at the same time ensuring that no threats to national security are excluded and the Secretary of State has sufficient flexibility to respond to unforeseen threats. Furthermore, definitions proposed as amendments to the Act recognised the need for flexibility, but in allowing for this flexibility they fail to provide additional certainty. Of the four sector definitions criticised as being the most uncertain, two of them are sufficiently certain, and while the other two – synthetic biology and artificial intelligence – have some flaws, these can and should easily be rectified when the Secretary of State reviews the Regulations. 15 of the 17 sector definitions being perfectly certain shows that the Government largely succeeded in providing certainty in these sector definitions. Therefore, it is clear that the UK Government has largely succeeded in its aim of providing certainty to businesses in relation to the National Security and Investment Act 2021.