



Consultation Response

Call for Evidence – National Security and Investment Act

January 2024



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Banking, Company & Insolvency Law and Competition Law sub-committees welcome the opportunity to consider and respond to the Cabinet Office Call for Evidence – National Security and Investment Act¹.

We have the following comments to put forward for consideration.

Consultation Questions

Respondent Information

1. What type of organisation do you work for?

Please tick any that apply:

- **Other, please specify**

The Law Society of Scotland. The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

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

- **Other, please specify**

¹ [Call for Evidence - National Security and Investment Act - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/call-for-evidence-national-security-and-investment-act)

Legal and regulatory

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

- **Not Applicable**

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

- **UK**
- **Elsewhere (please specify)**

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. We have members in Scotland and internationally.

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.

- **No**

Questions 6-8 are not applicable.

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- Policy Team**
- **Email- Policy@lawscot.org.uk**
- **Organisation name- Law Society of Scotland**

How the NSI Act works and how it is likely to be used

We have no comments in response to this section of the call for evidence.

Outward Direct Investment (ODI)

We have no comments in response to this section of the call for evidence.

Economy-wide mandatory notification requirements

We have no comments in response to this section of the call for evidence.

Internal reorganisations

We have no comments in response to this section of the call for evidence.

The appointment of liquidators, official receivers and special administrators

We have no comments in response to this section of the call for evidence.

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?

It is highly unusual for lenders to use their temporary holding of shares in solvent entities to influence those solvent entities. Indeed, lenders will actively seek to avoid doing so to reduce the risk that the solvent entity would be considered a “subsidiary” of the lender for the purposes of the Companies Act 2006 and/or that the lender might be found to be acting as a “shadow director” of the solvent entity. It is market practice for shares pledges to state that dividends will be paid to the pledgor, and that voting rights in respect of the shares will be exercisable by the pledgor prior to some form of trigger event.

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?

Our members have indicated that some notifications have been made in relation to Scots law shares pledges. However, by far and away the biggest effect of the NSI Act on the lending and borrowing process in Scotland has been that lenders are unwilling to take shares pledges over Scottish companies where there is a risk that an NSI notification will require to be made. This reduces the access to finance in respect of Scottish companies, and clearly disadvantages Scottish companies compared to English companies. An article on this subject has appeared in the Edinburgh Law Review, entitled “The Legislative Assault on the Scottish Subsidiary” ((2022) 26 Edinburgh Law Review 117).

Where notifications have been made, they have added considerable cost and complexity to transactions, once more disadvantaging Scottish finance. Complexities also arise when Scots law share pledges are released, as this will (if in the NSI Act areas) require an NSI notification to be made in relation to the transfer of the shares held by the lender under the shares pledge to the original pledgors. This creates additional cost and risk for both the pledgor (who may not obtain title to their shares back) and the lender (who may be saddled with title to shares that they have no rights in respect of), and is entirely unnecessary. We consider it to be vital that the UK Government starts to take concerns of Scottish corporate finance seriously. The language used in the NSI Act – copied from the PSC regime – actively harms access to finance in Scotland. We feel strongly that the creation and release of Scottish share pledges should be excluded from the scope of the NSI Act as a matter of priority.

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?

We are supportive of exemptions for certain public bodies. However, the parameters of any exemptions must take into account devolved bodies (particularly devolved economic development agencies).

Automatic Enforcement Provisions

We have no comments in response to this section of the call for evidence.

Activities/ areas defined under notification

We have no comments in response to this section of the call for evidence.

Notification forms

We have no comments in response to this section of the call for evidence.

NS Notification Service (the 'portal')

We have no comments in response to this section of the call for evidence.

Classified Material

We have no comments in response to this section of the call for evidence.

Further feedback

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

No

For further information, please contact:

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