Neutral Citation Number: [2025] EWHC 1922 (Admin)

Case No: AC-2024-LON-003985

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2025

Before :

LORD JUSTICE EDIS AND MR JUSTICE BUTCHER

- -

Between :

THE KING
On the application of
FTDI HOLDING LIMITED **Claimant**

- and -

CHANCELLOR OF THE DUCHY OF LANCASTER IN THE CABINET OFFICE **Defendant**

- and -

FUTURE TECHNOLOGY DEVICES INTERNATIONAL LIMITED
Interested Party

- -
- -

James McClelland KC and Yaaser Vanderman (instructed by **Katten Muchin Rosenman UK LLP**) for the **Claimant**
Stephen Cragg KC and Alexander Jamieson (instructed by the **Special Advocates' Support Office**) as Special Advocates

Sir James Eadie KC, David Blundell KC, Richard O'Brien KC, Karl Laird and Jonathan Worboys (instructed by **Government Legal Department**) for the **Defendant**

The **Interested Party** did not appear and was not represented

Hearing dates: 6-9 May 2025

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Approved Judgment

This judgment was handed down remotely at 10:00am on 25th July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Butcher:

1. The Court has heard 'rolled up' applications for permission to proceed with an application for judicial review, and for judicial review, brought by the Claimant ('FTDIHL') against the Defendant ('CDL'). FTDIHL's Claim Form was filed on 3 December 2024. A differently constituted Divisional Court heard an application by FTDIHL for interim relief on 16 January 2025. Interim Relief was refused, but the Court directed a 'rolled up' hearing, which was to be expedited. That came before the Court on 6-9 May 2025.

2. By its Claim Form FTDIHL seeks to challenge an order of CDL dated 5 November 2024 (the 'Final Order'), whereby CDL ordered FTDIHL to divest itself of its interest in Future Technology Devices International Ltd ('FTDI'). The Final Order was made under the National Security and Investment Act 2021 ('NSIA').

NSIA

3. NSIA was granted Royal Assent on 29 April 2021, and its key provisions came into force on 4 January 2022. The long title to NSIA states that it is '[a]n Act to make provision for the making of orders in connection with national security risk arising from the acquisition of control over certain types of entities and assets; and for connected purposes'.

4. Section 1 of NSIA provides in part:

> '1 **Call-in notice for national security purposes**
>
> (1) The Secretary of State may give a notice if the Secretary of State 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 …
>
> (3) A notice under subsection (1) is referred to in this Act as a call-in notice.
>
> (4) If the Secretary of State decides to give a call-in notice, the notice must be given to –
>
> (a) the acquirer,
>
> (b) if the trigger event relates to a qualifying entity, the entity, and
>
> (c) such other persons as the Secretary of State considers appropriate.
>
> (5) The call-in notice must include a description of the trigger event to which it relates and state the names of the persons to whom the notice is given.
>
> …'

5. Section 2 of NSIA makes 'Further provision about call-in notices'. It provides, so far as relevant:

> '(1) No more than one call-in notice may be given in relation to each trigger event.
>
> (2) Subject to subsections (3) and (4), a call-in notice given on the grounds mentioned in section 1(1)(a)-
>
> (a) may not be given after the end of the period of 6 months beginning with the day on which the Secretary of State became aware of the trigger event, and
>
> (b) may not be given after the end of the period of 5 years beginning with the day on which the trigger event took place.
>
> …
>
> (4) In relation to a trigger event taking place during the period beginning with 12 November 2020 and ending with the day before commencement day, a call-in notice given on the grounds mentioned in section 1(1)(a)-
>
> (a) if the Secretary of State became aware of the trigger event before commencement day, may not be given after the end of the period of 6 months beginning with commencement day,
>
> (b) if the Secretary of State became aware of the trigger event on or after commencement day –
>
> (i) may not be given after the end of the period of 6 months beginning with the day on which the Secretary of State became aware of the trigger event, and
>
> (ii) may not be given after the end of the period of 5 years beginning with commencement day.
>
> (5) In this section "commencement day" means [4 January 2022].'

6. Chapter 2 of NSIA sets out provisions in relation to its interpretation. Section 5 of NSIA provides in part:

> '**Meaning of "trigger event" and "acquirer"**
>
> (1) For the purposes of this Act, a "trigger event" takes place when-
>
> (a) a person gains control of a qualifying entity, as set out in section 8,
>
> …
>
> (2) In this Act "acquirer" means the person who gains the control referred to in subsection (1) …'

7. Section 7 of NSIA defines a 'qualifying entity' for the purposes of the Act. It provides, in part:

> '(2) A "qualifying entity" is … any entity, whether or not a legal person, that is not an individual, and includes a company, a limited liability partnership, any other body corporate, a partnership, an unincorporated association and a trust.
>
> …'

8. Section 8 of NSIA defines what is meant by the gaining of control of a qualifying entity. It provides in part:

> '(1) For the purposes of this Act, a person gains control of a qualifying entity if the person acquires a right or interest in, or in relation to, the entity and as a result one or more of the cases described in this section arises.
>
> (2) The first case is where the percentage of the shares that the person holds in the entity increases –
>
> (a) from 25% or less to more than 25%,
>
> (b) from 50% or less to more than 50%, or
>
> (c) from less than 75% to 75% or more.
>
> (3) In subsection (2), the reference to holding a percentage of shares is –
>
> (a) in the case of an entity that has a share capital, to holding shares comprised in the issued share capital of the entity of a nominal value (in aggregate) of that percentage of the share capital …'

9. Chapter 4 of the Act deals with 'Procedure'. Amongst others, it contains, in section 19, provisions as to the Secretary of State's power to require information. That section provides in part:

> '(1) The Secretary of State may give a notice to a person … to require the person to provide any information in relation to the exercise of the Secretary of State's functions under this Act which –
>
> (a) is specified or described in the notice, or falls within a category of information specified or described in the notice, and
>
> (b) is within that person's possession or power.
>
> (2) The Secretary of State is not to require the provision of information under this section except where the requirement to provide information is proportionate to the use to which the information is to be put in the carrying out of the Secretary of State's functions under this Act.
>
> (3) A notice under subsection (1) is referred to in this Act as an information notice.

…'

10. Section 23 of NSIA defines 'assessment period' in relation to a call-in notice. It provides in part:

> '(2) The assessment period begins with the day on which the call-in notice is given to the acquirer.
>
> (3) In this section-
>
> (a) "the initial period" is the period of 30 working days beginning with the day mentioned in subjection (2),
>
> (b) "the additional period" is the period of 45 working days beginning with the first working day after the day on which the initial period ends,
>
> (c) a "voluntary period" is such period of working days, beginning with the first working day after the day on which the additional period (or the previous voluntary period) ends, as may be agreed in writing between the Secretary of State and the acquirer.
>
> (4) The assessment period ends at the end of the initial period unless, before the end of the initial period, the Secretary of State gives an additional period notice to each person to whom the call-in notice was given …
>
> (5) If an additional period notice is given, the assessment period ends at the end of the additional period unless, before the end of the additional period, a voluntary period is agreed.
>
> (6) If a voluntary period is agreed, the assessment period ends at the end of the voluntary period, or at the end of any further voluntary period which is agreed.
>
> …'

11. Section 26 of NSIA makes provision for final orders. It provides in part:

> '(1) The Secretary of State must, before the end of the assessment period in relation to a call-in notice –
>
> (a) make a final order, or
>
> (b) give a final notification to each person to whom the call-in notice was given.
>
> (2) In this section –
>
> (a) a "final notification" is a notification that no further action in relation to the call-in notice is to be taken under this Act,
>
> (b) a "final order" is an order under subsection (3).

> (3) The Secretary of State may, during the assessment period, make a final order if the Secretary of State –
>
> (a) is satisfied, on the balance of probabilities, that –
>
> (i) a trigger event has taken place …, and
>
> (ii) a risk to national security has arisen from the trigger event …, and
>
> (b) reasonably considers that the provisions of the order are necessary and proportionate for the purpose of preventing, remedying or mitigating the risk.
>
> (4) Before making a final order the Secretary of State must consider any representations made to the Secretary of State.
>
> (5) A final order may include –
>
> (a) provision requiring a person, or description of person, to do, or not to do, particular things,
>
> (b) provision for the appointment of a person to conduct or supervise the conduct of activities on such terms and with such powers as may be specified or described in the order,
>
> (c) provision requiring a person, or description of person, not to disclose the contents of the order except to the extent specified in the order,
>
> (d) consequential, supplementary or incidental provision.'

12. Supplementary provisions in relation to orders under the NSIA are stated in section 28. It provides in part:

> '(4) Subject to subsection (5), each order … or explanatory material accompanying the order must –
>
> (a) state the date on which the order … comes into force or how that date is to be determined,
>
> (b) state each person, or description of person, who is required to comply with the order,
>
> (c) describe the trigger event and entity or asset concerned,
>
> (d) state the reasons for making or varying the order,
>
> (e) state the possible consequences of not complying with the order,
>
> (f) provide information about –
>
> (i) how to apply to the Secretary of State for an order to be varied or revoked, and

> (ii) the procedure for judicial review …
>
> (5) The Secretary of State may exclude from the copy of an order served on any person within subsection (2), or from any explanatory material accompanying the order, anything the disclosure of which the Secretary of State considers -
>
> (a) would be likely to prejudice the commercial interest of any person, or
>
> (b) would be contrary to the interest of national security.'

13. Under section 33 of NSIA it is provided that a person commits an offence if, without reasonable excuse that person fails to comply with a requirement to which that person is subject under an order under the Act. Under section 39, on conviction on indictment, a person may be imprisoned for up to five years for an offence under section 33. By sections 40-41 the Secretary of State is given the power to impose monetary penalties for the commission of an offence under section 33, which may be for the higher of 5% of the total value of the turnover of the business and £10 million.

14. Section 49 of NSIA lays down the procedure for judicial review of certain decisions under the Act, including under Part 2 of the Act (which includes section 26). Under subsection (4) it is provided:

> '(4) The court may entertain proceedings for a claim to which this section applies only if the claim form is filed before the end of the period of 28 days beginning with the day after the day on which the grounds to make the claim first arose, unless the court considers that exceptional circumstances apply.'

15. Section 53 of NSIA empowers the Secretary of State to make provision by regulation for the procedure to be followed when a provision of the Act requires or allows a document to be given or served, and in particular '(a) as to the manner in which a document must be given or served, (b) as to the address to which a document must be sent, (c) requiring, or allowing, a document to be sent electronically, (d) for treating a document as having been given, received or served on a date or at a time determined in accordance with the regulations…'

16. Under section 65 of NSIA, and as a consequence of the Secretaries of State for Energy Security and Net Zero, for Science, Innovation and Technology, for Business and Trade, and for Culture, Media and Sport and the Transfer of Functions (National Security and Investment Act 2021 etc) Order 2023/424, 'Secretary of State' is defined as including the CDL.

17. Regulations made under NSIA include The National Security and Investment Act 2021 (Procedure for Service) Regulations 2021 (SI 2021/1267) ('the Service Regulations'). By Reg. 3 it is provided that:

> '3. **Service of documents by the Secretary of State**
>
> (1) A document required or allowed by the Act to be given to a person by the Secretary of State must be given –

> (a) by sending it by email to that person's email address (or the email address of their representative), as provided for in regulation 4, or
>
> …
>
> (3) A document sent by email in accordance with paragraph (1)(a) is to be treated as having been given immediately after it is sent.
>
> …
>
> (5) When giving a document under this regulation, the Secretary of State must mark it as being for the attention of the person to whom it is required or allowed to be given under the Act.
>
> (6) Where the person referred to in paragraph (5) is a body corporate or unincorporate, the document being given to that person must additionally be marked as being for the attention of an officer or member of that body (as the case may be) whom the Secretary of State considers to be appropriate.'

18. Reg. 4 provides:

> '**4. Address for service by email under regulation 3(1)(a)**
>
> (1) For the purposes of regulation 3(1)(a), a person's email address (or the email address of their representative) is the email address provided by that person to the Secretary of State in connection with the giving of documents under the Act.
>
> (2) Where an email address as referred to in paragraph (1) has not been provided, a person's email address is –
>
> (a) in the case of an individual, an email address published for the time being by that person as an email address for contacting that person, or
>
> (b) in the case of a body corporate or unincorporate, the general email address published for the time being by that body.
>
> (3) Where an email address as referred to in paragraphs (1) and (2) has not been provided or published (as the case may be), or if the Secretary of State has reason to believe that such an address is unsuitable or inadequate, a person's email address is any email address by means of which the Secretary of State reasonably believes that the document will come to the attention of that person (or their representative).'

The Factual Background

19. FTDI was founded in 1992 and registered in Glasgow by Fred Dart. It remains a UK registered company that develops semiconductor devices and related cables and software devices, all of which focus on USB connectivity. Since the early 2010s, the management of FTDI, as well as research and development, has taken place in Singapore. It operates what has been called a 'fabless' model,

meaning that it is not a manufacturer (or fabricator) of the products it designs. That is outsourced to third party foundries and assembly houses in Taiwan, South Korea, Japan and the USA. FTDI has offices for customer sales and support in the UK, the USA and China. FTDI's products are in widespread use across a range of systems.

20. Until 7 December 2021, FTDI was owned by Stoneyford Investments Ltd (96.5%), Dormwood Ltd (2.5%) and John C McCrossan (1%). Stoneyford Investments Ltd is 100% owned by the C Dart Family Trust. From 7 December 2021 onwards, FTDI has been directly owned by Stoneyford Investments Ltd (19.8%) and by FTDIHL (80.2%). FTDIHL is a UK registered holding company which was established for the sole purpose of acquiring a stake in FTDI. The sale occurred because FTDI's founders wanted to diversify their assets; and was negotiated following an international marketing exercise administered by Barclays Capital.

21. FTDIHL is owned, via two other SPVs (one a Hong Kong, one a Chinese company), by five Chinese funds, each bearing a name commencing 'Dongguan Jianguang'. The general partner of the five funds is Beijing Jianguang Asset Management Co Ltd ('JAC Capital'), a Chinese state-backed private equity company. JAC Capital itself owns a small stake in each of the funds. The full corporate structure is set out in the diagram which appears at Annex 1 to this judgment.

22. The acquisition by FTDIHL of a more than 75% shareholding in FTDI on 7 December 2021 was a 'trigger event' for the purposes of NSIA, although the Act was not at that point in force.

23. The evidence reveals that concerns within government about an acquisition of FTDI were first raised by officials in DCMS's Economic Security Unit in or around July 2022. Those concerns did not, at that point, relate to the acquisition of FTDI by FTDIHL which had, in fact, occurred in December 2021. The focus at that stage was, instead, on what was understood to be an acquisition or planned acquisition of FTDI by a Chinese company called Electric Connector Technology Co Ltd ('ECT'). DCMS officials raised this with officials in the Investment Security Unit (or 'ISU'), which is the group responsible for administering NSIA on a day-to-day basis, which works out of the Cabinet Office and is answerable to CDL.

24. ISU opened what was called a 'Market Monitoring' (or 'MM') case, which is where a transaction, not notified by the parties, has been identified as being of interest through ISU's procedures for monitoring the market. ISU proceeded to collate information on the transaction.

25. Consistent with ISU's approach to MM cases, Information Notices were prepared and sent to FTDI. The first was served on 8 November 2022. In relevant part, this stated:

> 'The Secretary of State … has become aware of an investment into [FTDI] by [ECT].

> In order to further consider whether a trigger event under the Act has occurred, the Secretary of State requires further information and hereby gives you notice that you are required to provide to the Secretary of State any information within your possession or power regarding the following ("the information sought"):
>
> 1. List the name and nationality of all shareholders (including exact percentage shareholding and ultimate beneficial owner) in FTDI prior to, and following, investment by ECT.
>
> 2. Provide a list of FTDI's board members, both prior to and after investment by ECT.
>
> 3. List the terms and conditions of ECT's investment in FTDI, including value of transaction.
>
> 4. Explain whether and how any of ECT's shareholding in FTDI grants them voting rights that enable them to secure or prevent the passage of any class of resolution governing the affairs of FTDI.
>
> 5. How similar, or substitutable, are technologies in the FTDI portfolio with competitors in the market? What are the unique selling points of technologies in the FTDI portfolio?
>
> 6. In what ways is the use of FTDI hardware technically dependent on software usage? Are users of FTDI hardware able to remove their dependency on FTDI software?
>
> 7. How is FTDI's IP protected when its products are integrated with those of third parties, does this involve the use of specific software updates or bespoke hardware solutions?'

26. On 16 November 2022, FTDI responded to that Information Notice, saying that they:

> '… have confirmed with our shareholders that they are currently communicating with ECT in relation to the transfer of their shares of FTDI. However, the ECT's potential investment is currently in the negotiation stage and no terms and conditions have been finalized. There is a high possibility of termination of the ECT's potential investment, we expect that it will still take two weeks to determine to proceed with the ECT's potential investment.'

27. On 29 November 2022, FTDI wrote to ISU saying:

> 'Please be informed that the management confirm the ECT deal has failed and no longer proceeding, we therefore has no further information to submit on this matters (sic).'

28. On 9 December 2022, ISU served a further Information Notice on FTDI, which asked FTDI to:

> '1. Provide formal confirmation confirming the acquisition is no longer proceeding?
>
> 2. Provide any board documentation that confirms the acquisition is not going ahead?'

29. On 15 December 2022, FTDI provided ISU with Board Resolution Minutes and a public announcement showing that the ECT transaction was not proceeding. This apparently led to the MM case being closed.

30. On 23 May 2023 Ms Jacqui Ward, the Director of ISU, became aware that FTDIHL might have acquired FTDI. From that point, ISU conducted due diligence to determine whether such an acquisition had taken place, when it had taken place, and the identity of the previous owners of FTDI. Further Information Notices were sent on 10 July, 31 July and 22 September 2023.

31. On 20 November 2023, the then Deputy Prime Minister and Secretary of State in the Cabinet Office, the Rt Hon Sir Oliver Dowden MP, received written advice from ISU about a call in decision in relation to FTDIHL's acquisition of FTDI. He was provided with a submission analysing the acquisition with reference to the provisions of NSIA, and recommending that he call in the transaction. He reviewed the advice and decided to call in the transaction. A Call-In Notice under s. 1 NSIA was sent by email to FTDI on 22 November 2023.

32. The Call-In Notice was addressed to FTDI only, and was sent only to FTDI email addresses. The covering email stated:

> 'We kindly request that you communicate the Secretary of State's decision, along with the call-in letter, to [FTDIHL]. We would be grateful if you could confirm when you have done so and provide us with their contact details.'

33. FTDI forwarded the Call-In Notice to FTDIHL on 23 November 2023. On 1 December 2023, FTDI responded to the ISU email confirming that it had circulated the Call-In Notice to FTDIHL and provided contact details for FTDIHL.

34. Thereafter, further requests for information were made by ISU and responded to by FTDI from November 2023 to February 2024. A face-to-face meeting between FTDI, representatives of FTDIHL and the ISU was held on 16 April 2024. Video conferences were also held on 11 December 2023, 25 March 2024, 8 April 2024, 24 May 2024, 3 September 2024 and 29 October 2024.

35. On 23 May 2024, the ISU issued a request for representations ('First Request for Representations') and made an interim order under s. 25(1) of NSIA preventing FTDI and FTDIHL from taking steps that might frustrate any final order and requiring the submission of compliance statements. The ISU's letter contained, inter alia, the following:

> 'The Secretary of State is considering whether to make a Final Order under section 26(3) of the Act to put in place remedies which are necessary and proportionate to prevent, remedy or mitigate national security risks.
>
> The national security risk which arises from the transaction relates to:
>
> i. UK-developed semiconductor research, technology and associated intellectual property being transferred to China, and deployed in ways that are contrary to UK national security'.

That was the only risk to national security identified at that stage.

36. FTDIHL and FTDI submitted representations on 5 July 2024, including a package of suggested measures, which they believed would address any concerns which the Secretary of State might have. Amongst other things, complaint was made that insufficient information as to the gist of the Secretary of State's concerns had been provided for the process to be a fair one.

37. A meeting was held on 30 July 2024 between officials from the ISU, the Department for Science and Technology, and from other government departments. At or as a consequence of that meeting ISU developed a concern that the risk to Critical National Infrastructure ('CNI') involved in the acquisition could not be mitigated without the need to invoke powers under the NSIA. It was agreed by officials in ISU that a new request for representations should be sent to the parties to give them an opportunity to make representations on the risk to CNI.

38. On 30 August 2024, ISU issued a second request for representations ('Second Request for Representations'). That letter identified the national security risk which was said to arise from the transaction as relating to:

> 'i. UK-developed semiconductor technology and associated intellectual property being transferred to China, and deployed in ways that are contrary to UK national security.
>
> ii. The ownership of FTDI, and its control by JAC Capital, could be used to disrupt [CNI] which use FTDI products. For further information on [CNI] please refer to the website of the National Protective Security Authority [link given].' [That link identified 13 broad sectors of CNI].

39. In their representations in response, dated 11 October 2024, FTDI and FTDIHL made a number of points. One, made in paragraph 13, was as follows:

> '… we have not been able to identify any aspect of the UK's [CNI] which relies on products produced by FTDI. In relation to this concern, we have conducted a review of FTDI's relationship with the UK's [CNI]. Further to this we have attempted to analyse these issues despite the ISU failing to articulate what aspect of the UK's [CNI] is of concern. Please note that if the ISU were to identify a particular [CNI] concern, it is important that the gist of this is provided to FTDI to enable an in-depth analysis to be

undertaken and an appropriately tailored response to be provided to the ISU. Please note that this is essential to a party's right of defence.'

40. In paragraph 21 of the 11 October 2024 representations, it was stated that, even if FTDI products were used in CNI, FTDI believed that its products and/or current ownership structure could not be used to disrupt that CNI. The following points were made: (1) that FTDI has very few UK customers; (2) that FTDI does not have control over the end location of its products; (3) that FTDI does not retain control over its products or have the ability to manipulate them once sold; and (4) that FTDI does not have a significant market share and similar products with the same functionality are available from multiple suppliers at similar prices.

41. On 2 October 2024, a director-level board took place within government, with attendees from the relevant departments, to discuss and agree on the recommended approach to remedy what ISU had identified as the risks in the present case. The evidence of Ms Newland, Deputy Director of the ISU, is that at that meeting there was broad agreement that the ISU should recommend to CDL that he order a divestment of the entirety of FTDIHL's shareholding in FTDI, and that alternative measures short of divestment would be inadequate. There was a dissenting view from HMT.

42. On 29 October 2024, ISU submitted final written advice to CDL, who by now was Rt Hon Pat McFadden MP. The documentation provided to CDL included: (a) the Submission; (b) an Investment Security Risk Assessment (or 'ISRA'); (c) a Diplomatic Assessment; (d) an Economic Assessment; (e) a Remedies Assessment; (f) a Summary of Representations; (g) a Representations Analysis; (h) letters from other government departments. The ISU's recommendation was that CDL agree to issue a final order, requiring a divestment of FTDIHL's entire 80.2% shareholding in FTDI.

43. The Remedies Assessment document made it clear that the recommendation for divestment was based only on the risk posed to CNI. It stated, in part:

'**National Security Risk Summary**

Risk 1: The ownership of FTDI, and its control by the Chinese state-backed private equity company JAC Capital, could be used to disrupt [CNI] which use FTDI products.

Risk 2: UK-developed semiconductor technology and associated intellectual property being transferred and deployed in ways that are contrary to UK national security. ISU considers that the use of a final order to prevent, remedy or mitigate Risk 2 would be neither necessary nor proportionate. The remedies in this paper are assessed solely in relation to Risk 1.

Recommendation

> That you agree to make a final order under [NSIA], imposing Remedy A requiring divestment, to prevent, remedy or mitigate the national security risk arising from this trigger event (Risk 1 in the ISRA)'.

44. On 5 November 2024, CDL reviewed the submission and held a meeting with ISU officials. He agreed with the ISU recommendation and signed the Final Order. This was then issued and notice of it was given on gov.uk. On 6 November 2024 ISU wrote to FTDI and FTDIHL about the Final Order.

45. The Final Order identified the national security risks in the same way as they had been stated in ISU's letter of 30 August 2024, quoted above. The Final Order provided, in paragraph 8, that FTDIHL should divest its entire shareholding in FTDI in accordance with the process and deadlines set out in the Order. These included that FTDIHL should provide a draft Disposal Plan, including an indicative valuation of FTDI and a list of its assets, by 17 December 2024 (later extended to 17 January 2025). Other provisions of the Final Order related to the provision of compliance statements, the appointment of a monitoring trustee and the appointment of a divestiture trustee.

The Present Proceedings

46. As I have said, the Claim Form in the present proceedings was issued on 3 December 2024, challenging the Final Order. On 12 December 2024, CDL made an application for a declaration under s. 6 Justice and Security Act 2013 ('the 2013 Act'), submitting both OPEN and CLOSED material in support of that application. On 16 December 2024 Chamberlain J ordered that these proceedings were ones in which a closed material application might be made to the Court. On 18 December 2024, CDL made an application under s. 8 of the 2013 Act. On 15 January 2025, and after CDL had agreed to make further disclosure of material in OPEN, Chamberlain J granted permission to CDL, under s. 8 of the 2013 Act, to withhold sensitive material from FTDIHL, FTDI and their legal representatives.

47. Case Management Directions were given by the Divisional Court after the hearing on 16 January 2025. These included provisions for CDL to file and serve OPEN and CLOSED versions of his Detailed Grounds for contesting the claim and OPEN and CLOSED evidence; for the Claimant to file an OPEN Skeleton Argument, and for the Special Advocates to file a CLOSED Skeleton Argument; and for CDL to serve OPEN and CLOSED Skeleton Arguments.

48. The hearing between 6th and 9th May 2025 was largely OPEN. There were certain portions which were CLOSED, during which the Court was addressed and assisted by the Special Advocates, in the absence of FTDI and FTDIHL and their representatives.

49. FTDIHL challenges the Final Order on six grounds. They are, in the order and with the numbering with which they appear in the Re-Amended Statement of Facts and Grounds as follows:

    (1) Ground 1A: That the Final Order was ultra vires because the Call-In Notice was not served within time.

(2) Ground 1B: That the Final Order was unlawful because the Secretary of State was aware of the Trigger Event more than six months before the Call-In Notice was sent to FTDI.

(3) Ground 2: That the process of decision-making leading up to the Final Order breached the common law and Article 6 ECHR requirements of procedural fairness.

(4) Ground 3: That no or no sufficient reasons were given for the making of the Final Order.

(5) Ground 4: That the Final Order breached Article 1 of Protocol 1 ('A1P1') to ECHR.

(6) Ground 5: That the Final Order was irrational and/or unreasonable.

Procedural Applications

50. At the outset of the hearing, there were four procedural applications outstanding.

51. The first two were applications by FTDIHL to adduce further witness evidence. These applications were unopposed, and the Court granted them.

52. The third was an application by FTDIHL to cross-examine two of CDL's witnesses, namely Ms Shakara Lemonious and Mr Jack Irwin. That application was opposed. As the Court indicated after argument on the point, the application was granted, and reasons for that decision would be provided with the judgments on the substantive issues. Cross-examination of Ms Lemonious and Mr Irwin accordingly took place, submissions were made by both parties on the effect of those witnesses' evidence, and the Court has taken that evidence, including that given in cross-examination, into account.

53. In brief, the reasons why Edis LJ and I decided that cross-examination should be permitted are as follows:

(1) We recognised that orders for cross-examination of witnesses in Judicial Review proceedings are rare. The purpose of cross-examination is usually to help resolve issues of primary fact. Typically, however, courts hearing Judicial Review claims do not have to resolve issues of primary fact because the focus is on the procedure adopted before the decision was made, on whether the decision-maker identified and answered the right question(s), approached his task in a logically acceptable way, gave adequate and intelligible reasons, and reached a decision open to him on the evidence. Even in the atypical case where the Court does have to resolve an issue of primary fact, there is no rule or default position that the Court should order cross-examination when and if it has to decide disputed questions of fact. There are other means and techniques available to the Court, including testing matters by reference to the contemporaneous documentation and other written evidence, which permit it in many cases to resolve issues of fact without cross-examination.

(2) The test as to whether cross-examination should be permitted was helpfully summarised by Burnton LJ in R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2012] EWHC 2115 (Admin), at [14] as follows:

> '… the Court retains a discretion to order or to permit cross-examination, and it should do so if cross examination is necessary if the claim is to be determined, and is seen to be determined, fairly and justly.'

(3) In the present case, the evidence of the witnesses concerned is principally relevant to Ground 1B, and in particular to the issue of what was the state of 'awareness' of the 'Secretary of State' as to the 'trigger event' during 2022. While there is a legal issue as to whose awareness counts as that of the Secretary of State for the purposes of NSIA, there is also a factual question as to what was known by officials within and supporting the ISU during that period which will be germane if FTDIHL's case on the legal question is accepted.

(4) We concluded that it was necessary in order for the claim to be, and be seen to be, fairly determined that the two witnesses should be cross-examined. The issue to be addressed with them was as to the state of their own knowledge; that is to say, not just a question of fact, but a question of fact of a particular kind, of the sort where cross-examination may be of particular usefulness. Further, the evidence in relation to their knowledge is potentially important to a central part of FTDIHL's challenge to the Final Order, namely Ground 1B. The application to cross-examine was, moreover, an appropriately limited and targeted one.

(5) In those circumstances, cross-examination should be permitted given that the application to cross-examine had been made at an appropriate stage, and the possibility of cross-examination had been allowed for in the timetable for the hearing.

54. The fourth application was to extend time for a challenge to the Call-In Notice. The reason for this application was that, though FTDIHL contends that its challenge is, and is properly, to the Final Order, CDL had contended that it was the decision to give the Call-In Notice which FTDIHL should have challenged, that a challenge to the Call-In Notice was out of time, and that in the absence of a challenge to the Call-In Notice there could be no successful challenge to the Final Order.

55. At the hearing CDL indicated that he would not pursue the point that the challenge was out of time, while not conceding the point that the challenge should have been to the Call-In Notice for other purposes. It is accordingly not necessary to express any view as to the merits of the point. I will however record that, in any event, we considered that there were exceptional circumstances which would have justified an extension of time in which to challenge the Call-In Notice, should such a challenge have been necessary. At the time that FTDIHL and FTDI received the Call-In Notice they did not know what degree of knowledge there had been within ISU as to the 'trigger event'

during 2022. That, coupled with the seriousness of the case to FTDIHL and the absence of prejudice to CDL by any extension of time, led us to conclude that the present was one of those cases in which an extension would have been appropriate in the interests of justice.

Permission to proceed with application for JR

56. This was a 'rolled up' hearing. The court accordingly needs to resolve the issue of permission to apply for judicial review. I consider that permission should be granted for FTDIHL to bring an application for judicial review on all the grounds contained in its Re-Amended Statement of Facts and Grounds. I will proceed, accordingly, to consider their substantive merits.

The Grounds of Challenge

57. I will take those Grounds of challenge in the order in which they were addressed by Mr McClelland KC orally, which is somewhat different from that of the Re-Amended Statement of Facts and Grounds, but which makes them, in my view, easier of comprehension.

Ground 1B

The parties' cases

58. FTDIHL's case in relation to this Ground is that CDL was 'aware' of the relevant 'Trigger Event' before 23 May 2023, and that the Final Order was therefore unlawful, having been made in breach of the mandatory procedure under NSIA.

59. This argument is based on the following. The relevant 'Trigger Event' in this case was FTDIHL's acquisition of a >75% shareholding in FTDI. There is no dispute that FTDI is a 'qualifying entity' within s. 7 NSIA. By the acquisition of more than 75% of its shares, FTDIHL 'gained control' of FTDI, as is provided by s. 8(1) NSIA. That acquisition was therefore a 'trigger event' for the purposes of s. 5(1)(a) NSIA, and occurred on 7 December 2021. By reason of the knowledge acquired by officials within and cooperating with ISU during 2022, the 'Secretary of State', was 'aware' of this 'trigger event' during 2022 and in any event before 23 May 2023. S. 2(4)(b)(i) NSIA provides that a Call-In Notice may not be given more than 6 months after the Secretary of State 'became aware of the trigger event'. In the circumstances, the Call-In Notice of 22 November 2023 was given outside the period prescribed by the NSIA and was unlawful.

60. The CDL denied that there was any relevant awareness of the 'trigger event' before 23 May 2023. His case was that, as the CDL had himself taken the Call-In decision personally, it was only his awareness which was relevant, and he had no personal awareness of the 'trigger event' until 20 November 2023. Or, even if the relevant awareness was not confined to the CDL's personal awareness, there was no awareness on the part of any relevant official before 23 May 2023.

61. The merits of this Ground thus depend, as already mentioned, both on who was aware of what and when, and on whose awareness counts as that of the 'Secretary of State'. It is convenient to address those two issues in that order, and then express my conclusions on this Ground.

Who was aware of what and when in 2022?

62. There was both OPEN and some CLOSED evidence as to what was known by officials during the course of 2022 which might be argued to constitute a relevant awareness of the 'trigger event'. There were witness statements from Amy Newland, Deputy Director of the ISU, from Steven Adcock, and from Jack Irwin and Shakara Lemonious on which they were cross-examined. There was documentary evidence as to what had occurred. I have given a very brief description of what that evidence indicated above. In more detail, I find that the position was as follows.

63. The Department for International Trade ('DIT') had commissioned a report from a private external consultancy firm in or before July 2022, and DIT had shared the report with DCMS. By an email of 3 August 2022 Mr Hugo Carpenter of DCMS had drawn the attention of Mr George Crundwell of the ISU's Risk ID Team to the fact that there was to be, or might have already been, an acquisition of FTDI by ECT. Mr Carpenter's email said, in part:

> '… [FTDI] are being acquired or have been acquired by [ECT], based in Shenzhen. The DIT sheet only states 'Electric Connector Technology Co have announced they plan to acquire the relevant equity and shares of FTDI'. Pretty sure this should be a mandatory notification'.

64. Mr Carpenter's email was forwarded by Mr Crundwell to Mr Adcock on 4 August 2022. On 10 August 2022 Mr Adcock asked a colleague in ISU, Mr Riten Patel at the MM team to create a MM case. Some initial MM due diligence was then carried out on the putative FTDI/ECT transaction, which obtained some information on ECT. On 16 August 2022 the FTDI/ECT transaction was moved to triage; and on 18 August 2022 a MM case was created and Ms Shakara Lemonious, at the time a Higher Executive Officer in the Risk ID team, was allocated as the case worker.

65. During the course of her investigation into whether there had been or would be an acquisition of FTDI by ECT, Ms Lemonious looked at various pieces of information. One check which she did was to review the Companies House pages for both FTDI and ECT, and recorded her findings in the ISU's Risk ID Case Management System (or 'CMS'). The 'People' page for FTDI identified FTDIHL as the one person with significant control of FTDI, with the nature of that control being Ownership of 75% or more of the shares, Ownership of 75% or more of the voting rights, and the Right to appoint or remove directors. This information was stated to have been 'Notified on 7 December 2021'. The same page identified Ms Cathy Dart as having ceased to be a person with significant control of FTDI on 7 December 2021. Another entry identified there as being 5 current officers, gave their names, nationalities (2 Chinese, 2 Singaporean and 1 American) and countries of residence (4 China, 1 Singapore); and stated that all five had been appointed on 7 December 2021. Ms Lemonious carried out

other checks and identified that the shareholders of FTDI were FTDIHL with 80.2% and Stoneyford Investments Ltd with 19.8%.

66. After Ms Lemonious had completed version 1 of her transaction summary within ISU's CMS, she requested input from other government departments. DCMS was sent the transaction summary on 16 September 2022, and was asked to provide a return by 17 October 2022. Mr Irwin was asked to prepare DCMS's response. At the time Mr Irwin was a policy advisor (Band B) at DCMS in the Semiconductor Team within the Economic Security Unit (or 'ESU'). Mr Irwin's responsibilities included the development of semiconductor strategy and input concerning NSIA. Mr Irwin has strong Mandarin language skills.

67. Mr Irwin looked at a number of Chinese language news sources. One article indicated that the Jianguang Guanglian fund had received an investment from ECT and established a limited partnership with JAC; and that only a month later, Jianguang Guanglian and other funds under JAC management 'jointly established Feite Holdings, and Feite Holdings acquired 80.2% of FTDI's equity for US$414.14 million through [FTDIHL], a wholly-owned British grandson company'. The article went on to suggest that ECT had then also, subsequently, acquired the remaining 19.8% of the equity.

68. The DCMS response, once prepared by Mr Irwin, was seen and approved by Mr Robert Fleck, Head of the Semiconductor Sector Team at the ESU. On 18 October 2022 it was submitted on the CMS. This response included that: 'news reporting indicates that a Chinese electronics firm, [ECT], will or have already invested in UK-based [FTDI]. These sources report that ECT will acquire both shareholdings held by FTDI's holding company (80.20%) and also the remaining shareholding in FTDI owned by Stoneyford Investments, a Guernsey registered company. This represents a 100% acquisition of FTDI.' The response also included the statement that 'as of December 2021' FTDI was owned as to 80.2% by [FTDIHL] (UK registered) and 19.8% by Stoneyford Ltd. I accept the inference drawn in Mr Payne's Fourth OPEN witness statement that the reference to December 2021 must have been derived from a source which linked that date to FTDIHL's acquisition of significant control over FTDI.

69. On 20 October 2022, Mr Irwin emailed Ms Lemonious to say that DCMS considered there to be a potential for risk, and therefore an Information Notice should be sent to FTDI. Mr Irwin then drafted a list of questions which, after approval from Mr Fleck, he sent to Ms Lemonious. On 4 November 2022, Mr Irwin saw an article which stated that 'Feite holdings (sic), a wholly-owed subsidiary of jiangguangguangpeng, acquired 80.20% equity of ftdi with domestic self owned funds of US $364 million and overseas bank M&A loans of US $50 million, totaling US $414 million.' He sent this article to Ms Lemonious, who updated CMS referring to 'an 80.2% acquisition of FTDI by Feite holdings', and saying that an Information Notice would be sent to gather more information on the ECT transaction. The first Information Notice was served, as I have set out above, on 8 November 2022, and FTDI's initial response was received on 16 November 2022. In light of that response, Ms Lemonious told Mr Irwin on 18 November 2022 that there was a high possibility that the transaction would not proceed, and after FTDI's response of 29

November 2022 she emailed Mr Irwin saying that FTDI had stated that the transaction would not be going ahead.

70. On 30 November 2022, Mr Irwin wrote to Ms Lemonious asking whether FTDI was saying that ECT was neither acquiring nor had acquired either the 19.8% Stoneyford Investment or the 80.2% FTDIHL stake in FTDI. As he says in his witness statement, his concern was that ECT had not gone ahead with one of those transactions, but had acquired or intended to acquire another shareholding; and that it was not clear to him what had happened or was going to happen. On 1 December 2022, Ms Lemonious stated that her understanding was that the transaction which would not be taking place was ECT's acquisition of 19.8% of FTDI's shares. Mr Irwin followed this up on 2 December 2022, asking whether there had been confirmation that ECT had not already acquired a stake in FTDI through Feite. Ms Lemonious's response was that her understanding was that 'it's all the shares in FTDI', ie, that ECT had not acquired/was not acquiring any shares in FTDI. Mr Irwin came to the same conclusion, which he expressed in an email to Mr Benjamin Walden on 2 December 2022. He was uncertain as to who the UBO of FTDI was. He also recommended that an eye should be kept out for developments in relation to FTDI/ECT.

71. In overview, Mr Irwin saw evidence which indicated that FTDIHL had acquired an 80.2% holding in FTDI in December 2021. While he will, at the time, have understood that that was what the evidence indicated, such a transaction was not what he was focussed on. His concern was to investigate whether ECT had acquired or was about to acquire a shareholding in FTDI. Accordingly he did not give thought to whether FTDIHL's acquisition of control in December 2021 was itself a potentially significant 'trigger event', and did not realise that it might be. Once he had gained sufficient assurance that ECT had neither already acquired nor was about to acquire a stake in FTDI, he considered that the matter could rest.

72. In Ms Lemonious's case, she saw material which would have indicated, to anyone who thought about it, that there had been an acquisition of significant control of FTDI by FTDIHL, which had involved FTDIHL moving from having less than 75% of the shares in FTDI to having more than 75%, in December 2021. I accept her evidence, however, that she was focusing on whether there had been an acquisition of a stake in FTDI by ECT; that she was not looking for dates; and that she did not realise that there had been an acquisition of significant control by FTDIHL in December 2021.

73. At least some of Ms Lemonious's superiors within ISU, and in particular Mr Adcock, read the information which she entered onto CMS. It appears that they had no greater understanding or consciousness of whether there had been a 'trigger event' by reason of the acquisition of control by FTDIHL than had Ms Lemonious.

74. There is no dispute that on 23 May 2023 Ms Jacqui Ward, head of the ISU, became aware of the 'trigger event' of the acquisition of FTDI by FTDIHL. Nor is there any dispute that the CDL was personally aware of that 'trigger event' only on or very shortly after 20 November 2023.

Whose awareness is that of the Secretary of State?

75. FTDIHL contended that the issue of whose awareness counted as that of the 'Secretary of State' for the purposes of s. 2(4)(b)(i) was a matter of statutory construction, and that the draftsman of the Act must have intended to capture the 'awareness' of those actually tasked with carrying out the CDL's investigative functions. That would comprise officials in the ISU, and also officials in other government departments to the extent that they undertook the investigative functions pursuant to NSIA.

76. CDL's argument was that only his personal awareness was relevant in this case, because Sir Oliver Dowden had taken the Call-In decision himself. CDL recognised and accepted the principle in Carltona Ltd v Comrs of Works [1943] 2 All ER 560, to the effect that ministerial powers are commonly delegable and that, where this is the case and delegation occurs, the decision of an authorised official falls to be treated as the decision of the minister. CDL sought, however, to draw a distinction between cases which have recognised and given effect to the Carltona principle, and others which have decided that there is no collective knowledge within a government department. Reference was made, in particular, to R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154, especially at [26], [37] and [74]; R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3) [2018] 1 WLR 973, especially at [47] per Lord Mance; and Revenue and Customs Commissioners v Tooth [2021] 1 WLR 2811, especially at [70]. The approach demonstrated in Tooth, namely that there is no doctrine of collective knowledge and the focus is on the knowledge of the actual decision maker, was one which was applicable here, especially given: (a) the nature of the decision, which was one which affected vital national interests; (b) the need for clarity and certainty as to whose knowledge is relevant; (c) the impracticalities which would be entailed if the knowledge of even junior officials was relevant; and (d) the fact that there is a safeguard provided for in the NSIA against undue delay in the five year limit provided for by s. 2(4)(b)(ii), as well as by the requirement that the Secretary of State should not abuse the process.

77. In my judgment, the issue currently under consideration is one of the proper construction of s. 2(4) NSIA, and of whose awareness counts as that of the Secretary of State. I consider it clear that the relevant awareness is not intended to be confined either to the personal knowledge of the Secretary of State himself or to that of the person who ultimately takes the Call-In decision. This is because:

(1) The relevant awareness is intended to be the start of an assessment period of up to six months, ending with either the service of a Call-In Notice, or there being no further possibility of a Call-In Notice. The timing of the start of that period cannot depend on who it is who ultimately makes the Call-In decision. For one thing, there may never be a Call-In decision, but that cannot mean that there is no awareness under s. 2(4)(b)(i). For another, the Secretary of State, and the personnel in the department, may change from time to time. What this means is that the identity of the person who will make any Call-In decision may change. But the period of six months cannot

be supposed to depend on such matters, with the result that it is prolonged with changes of personnel.

(2) This is supported by the terms of s. 19 NSIA. That section provides that the 'Secretary of State' may give Information Notices 'in relation to the exercise of the Secretary of State's functions under this Act', which include the issue of Call-In Notices. This cannot be read as requiring that the Information Notices be issued by the Secretary of State personally, or by the individual who ultimately makes the decision to issue the Call-In Notice. Given that what is involved in an Information Notice is a process of information-gathering, it is not to be expected that the giving of an Information Notice should necessarily be decided upon either by the Secretary of State himself, or by an official of the grade who might ultimately take any decision to issue a Call-In Notice in lieu of the Secretary of State. Moreover, the personnel responsible for issuing relevant Information Notices may well change during the period in which investigations are being carried out, and different Information Notices in relation to the same transaction may be issued by different officials. 'Secretary of State' for the purposes of s. 19 NSIA must embrace those charged with conducting investigations into 'trigger events' affecting qualifying entities or assets. The same interpretation should be given to 'Secretary of State' within s. 2(4)(b).

(3) Similarly with the mandatory notification procedure under s. 14 NSIA and voluntary notifications under s. 18 NSIA. These sections require or permit notification of acquisitions to the 'Secretary of State'. As will have been obvious at the time of the passage of the NSIA, this might involve a large number of notifications, and in fact 906 notifications were received under NSIA in 2023-4, and 847 were reviewed. It cannot have been intended that these should be received, or reviewed, personally by the Secretary of State, or by any particular official(s) who might ultimately make Call-In decisions or decisions on final notifications or orders. What must have been intended is that these notifications should be received and reviewed by various officials who had been charged with the function of investigation of potentially relevant events.

78. Consistently with this, the stance of CDL before the present challenge was that there was 'awareness' on the part of the CDL when the ISU was aware of a 'trigger event'. Thus, the Information Notices of 10 July 2023, 31 July 2023 and 22 September 2023 stated that the 'Secretary of State has become aware of the acquisition of [FTDI] by [FTDIHL] in December 2021'. This was at a time when the CDL, who was ultimately the decision-maker, was not personally aware of that acquisition. The understanding of the ISU on the issue was spelled out in terms in the Ministerial Submission ('MinSub') of 20 November 2023, which stated:

> '… you have 6 months from the date on which you became aware of the trigger event to issue a call-in notice. The ISU became aware of this trigger event taking place on 23 May 2023. For the purposes of the Act, you are considered to have become aware of a trigger event when the ISU becomes aware…'

This was repeated in the pre-action protocol response of 2 December 2024. Putting on one side the question of the date on which the ISU became aware of the 'trigger event', I consider that to have been an accurate statement of the position under the NSIA.

79. The cases referred to by CDL in this context do not appear to me to be germane. R (National Association of Health Stores) concerns the issue of whether the knowledge of civil servants can be attributed to a decision-maker at the moment a decision-making power is exercised. That is not the relevant question here: s. 2(4)(b)(i) grants no power and calls for no decision-maker. Similarly, in R(Bancoult) (No. 3), Lord Mance at [47] made the point that where a minister made the decision himself, it was his own knowledge and motives which were relevant when there was a challenge to the decision on the basis of improper motivation on the part of one or more civil servants. The passages in the judgment of Lord Briggs and Lord Sales JJSC in Revenue and Customs Commissioners v Tooth on which CDL relies were not necessary for the decision in that case, and, more significantly, dealt with very different statutory provisions and context from those relevant here. S.29 Taxes Management Act 1970 tied the entitlement to make an assessment by the Board (or by an officer if the Board's power to make an assessment was delegated to an officer) to the Board's (or the officer's as the case may be) discovery that an assessment to tax was or had become insufficient. The statutory link with the state of knowledge of a particular individual or group was not displaced by a principle of collective knowledge within a department. This does not help with the proper construction of s. 2(4) NSIA.

80. The considerations identified by CDL in support of his construction of s. 2(4) equally do not assist him. The importance of the decision which may be made is neutral. Parliament clearly also regards it as important that any Call-In decision should be made within 6 months of awareness of the 'trigger event', doubtless in part precisely because of the potential importance of a Call-In. Clarity and certainty are not better served by an interpretation whereby the relevant knowledge will be that of a decision maker whose identity is not known until the decision comes to be made, as opposed to recognising that the relevant awareness is that of the group set up for the purpose of investigations under the NSIA, namely the ISU. There is no evidence that the interpretation of s. 2(4) which FTDIHL advances will be impractical or unworkable: and, as I have said, it appears to be the interpretation on which the ISU and the CDL have been working. That there is another, long stop provision in s. 2(4)(b)(ii) does not mean that proper effect should not be given to the safeguard against delay in s. 2(4)(b)(i) NSIA.

81. CDL makes a further submission on this part of the argument. This is that, even if it is right that the awareness of officials can count as that of the Secretary of State for the purposes of s. 2(4) NSIA, nevertheless it could only be the awareness of officials of appropriate grade and experience. Reference was made to R v Secretary of State for the Home Department ex p. Oladehinde [1991] 1 AC 254, esp at 303E/F where Lord Griffiths spoke of there being a proper authorisation of members of the immigration service to take decisions provided that 'the decisions are suitable to their grading and experience.'

82. I did not understand that principle to be in dispute. The question is as to its application. In the present case, s. 2(4)(b)(i) is not concerned with the taking of a particular decision; it is concerned with the acquisition of awareness. The ISU has been charged with the assessment of risk to national security, as the evidence of CDL indicates, and as was also recognised in R (L1T FM Holdings UK Ltd) v Chancellor of the Duchy of Lancaster [2024] EWHC 2963 (Admin) at [23]). One part of that role involves ISU being or ensuring that it is apprised of potentially relevant 'trigger events'. Further, I can see no sound basis for saying that, within ISU, Ms Lemonious was not of an appropriate grade and experience to make an assessment of whether a 'trigger event' had occurred. Ms Newland's account of the MM process in her Second Witness Statement indicates that it is for the assigned case worker, who is carrying out 'detailed due diligence' (paragraph 28), to provide an initial view on whether the transaction under consideration constitutes a 'trigger event' (paragraph 30). Ms Lemonious accepted in her cross-examination that part of her role when assigned as a case worker was to decide whether a 'trigger event' had occurred. Given the relatively straightforward definition of what a 'trigger event' is, that would not be a matter which necessarily required the involvement of a more senior official.

83. By contrast, in my view, the knowledge of officials in other government departments, even if they were consulted by ISU for the purposes of making assessments and taking decisions under NSIA, would not count as the awareness of the Secretary of State for the purposes of s. 2(4)(b)(i). As Ms Newland states in her Second Witness Statement (paragraph 16), the routine information gathering under the NSIA is performed by 'ISU officials acting on the Secretary of State's behalf'. Part of the exercise carried out by ISU can be to consult other government departments. This request for input is 'to inform its [viz ISU's] review of a transaction and its advice for the Secretary of State' (paragraph 31). Other government departments submit their responses to the ISU (paragraph 33), which then decides on what action to take, or to take no action (ibid.). From this it appears that it is ISU's appreciation of the position which is important, and other government departments are used as a resource to feed into that. I do not think that the knowledge of what may be a large number of people, in a range of different departments can be regarded as the relevant knowledge of the Secretary of State. The position can be tested by asking what would be the position if there was positive knowledge of a 'trigger event' within another government department, but it was never communicated to ISU. That, in my view, would not be awareness of the Secretary of State because it would be knowledge which never came to the body charged by him with acquiring and having the relevant knowledge for the purposes of NSIA.

84. Accordingly, in my judgment, and subject to the further question which I will turn to next, the knowledge of Ms Lemonious acquired in 2022 is potentially relevant to the question of whether the Secretary of State was then aware of the 'trigger event', but the knowledge of Mr Irwin, unless and until communicated to ISU, was not. I will however, also consider below whether, assuming that Mr Irwin's state of knowledge was relevant, it was sufficient to constitute 'awareness'.

Was there sufficient awareness?

85. There remains the question of whether what was known within ISU, or if relevant by Mr Irwin and within DCMS, during 2022 amounted to 'awareness' by CDL of the 'trigger event'. What constitutes relevant 'awareness'? The word is one which has a number of possible shades of meaning, and its proper interpretation depends on its context and the purpose of any statutory provision in which it appears. Here, the context in which the term appears, both in subss. 2(2) and 2(4) NSIA is one which limits the time in which the Secretary of State may serve a Call-In Notice, by reference to first 'awareness'. The statute specifically envisages that this 'awareness' may occur some time, indeed, some years, after the happening of the 'trigger event', as is clear from subss. 2(2)(b) and 2(4)(b). The purpose of subss 2(2) and 2(4) appears clear: it is to allow for a fixed period in which the Secretary of State can enquire into an acquisition, and take a decision on whether to issue a Call-In Notice. While that purpose reflects a concern by Parliament that there should not remain the possibility of an acquisition being interfered with under the Act for an excessively long period, the existence of a limit tied to 'awareness' of the Secretary of State, rather than to the occurrence of the 'trigger event' demonstrates that Parliament was also concerned to ensure that the Secretary of State should have a proper opportunity of investigating an acquisition on becoming aware of it. Thus, Parliament provided that, subject to the five year longstop, the Secretary of State should not lose the ability to operate the machinery of the Act while unaware of the acquisition. Given that the NSIA is concerned with countering risks to national security from acquisitions of qualifying entities, this is entirely comprehensible.

86. The context and purpose of the provisions in which the term 'became aware' occurs, which I have just described, strongly indicates, to my mind, that there is relevant 'awareness' only when it is known that there has been a 'trigger event' and that the acquisition which constitutes the 'trigger event' is one which may require investigation, and potentially the exercise of other powers under, the NSIA. A reading of the Act whereby it is sufficient to start the period of 6 months in subss 2(2) and 2(4) running that there should have been knowledge of the existence of a 'trigger event' without any appreciation that it might be of relevance to the potential exercise of powers under the NSIA would have most unfortunate and surely unintended consequences. Thus, given the wide definitions of 'gaining control', of 'qualifying entity' and of 'trigger event', it can be expected that there will be knowledge within government of a very large number of 'trigger events', in relation to the vast majority of which there is no question of the application of the NSIA. Even if the category of those who have potentially relevant knowledge is confined to ISU, the same is likely to apply, because the definition of 'trigger event' encompasses so broad a category of transactions. If knowledge of the occurrence of a 'trigger event', even without any realisation that it might be a 'trigger event' potentially relevant to the exercise of powers under NSIA, were sufficient to set the period of 6 months running, that might lead to the Secretary of State being left unable to take steps to protect national security in circumstances where it had not been realised that there was any possible need to do so. While the five-year backstop provision in NSIA indicates that Parliament intends that, after that significant period of time,

a transaction should no longer be capable of being interfered with under the Act, the provisions of subss. 2(2) and 2(4) also indicate, as I have said, that before that period elapses, the Secretary of State should be able to exercise those powers upon awareness.

87. Applying this understanding of relevant 'awareness' to the facts of the present case, I conclude that there was no 'awareness' on the part of the Secretary of State of the 'trigger event' during 2022. For reasons I have already given, I am of the view that whether there was such 'awareness' should be judged by the knowledge of Ms Lemonious and within ISU. Ms Lemonious did not, however, actually appreciate that there had been an acquisition by FTDIHL of FTDI in December 2021. Even more importantly, she was not looking into the acquisition of FTDI by FTDIHL, but was investigating what was understood to be an actual or potential acquisition of FTDI by ECT. Any acquisition of FTDI by FTDIHL was not seen by her, or others within ISU, as one potentially relevant to the exercise of powers under NSIA. In those circumstances the Secretary of State was not, in my view, 'aware' of the 'trigger event'. The same applies if, contrary to my view, Mr Irwin's knowledge was potentially relevant. He too was concentrated on an actual or prospective acquisition by ECT and did not appreciate that the acquisition of control by FTDIHL in December 2021 was one potentially relevant to the exercise of NSIA powers.

88. For those reasons I would reject Ground 1B.

Ground 1A

89. Ground 1A is a contention that, even taking the awareness of the 'trigger event' to have been 23 May 2023, the Call-In Notice was not served on FTDIHL in time. Under s. 1(4)(a) the Call-In Notice must be given to 'the acquirer', here FTDIHL. The Notice may not be given after the end of 6 months from awareness of the 'trigger event', and thus had to be given to FTDIHL by 22 November 2023. Instead, FTDIHL contends, notice was given to FTDI alone on the last day of the 6 month period, viz on 22 November 2023. It was forwarded to FTDIHL on 23 November 2023, but, even if that had constituted service, it was out of time. Accordingly the Final Order is ultra vires.

90. I consider that Ground 1A is ill-founded. Under reg. 3 of the Service Regulations a document may be 'given' to a person by sending it to an email address as provided for in reg. 4. No email address for FTDIHL had been provided or published for the purposes of reg. 4(1) and (2). FTDIHL's email address was accordingly, in accordance with reg. 4(3), 'any email address by means of which the Secretary of State reasonably believes that the document will come to the attention of that person (or their representative)'. The Secretary of State reasonably believed that by means of sending the Call-In Notice to FTDI email addresses it would come to the attention of FTDIHL, and the reasonableness of that belief is demonstrated by the fact that the Call-In Notice was indeed passed on to FTDIHL on 23 November 2023. By reason of reg. 3(2) of the Service Regulations, the Call-In Notice was to be 'treated as having been given immediately after it is sent', ie on 22 November 2023. It was thus in time.

91. FTDIHL argued that reg. 4(3) of the Service Regulations had not been available in this case, because it was 'a fall-back measure', 'no doubt intended to address cases in which a person seeks to avoid service by not providing [the Defendant] with their contact details.' This argument provides no basis for not giving reg. 4(3) effect in accordance with its terms.

92. FTDIHL made an alternative argument that, if reg. 4(3) of the Service Regulations did permit CDL to serve in the manner he did, it was ultra vires ss. 1 and 53 of NSIA. I could see no foundation for this. S. 53 confers a regulation-making power in terms which are wide enough to enable the terms of the Service Regulations, including reg. 4(3).

93. FTDIHL also argued that it 'appeared that [the Secretary of State] was not even attempting to serve [FTDIHL], since he ignored the mandatory statutory requirements for effective service'; and in particular the Call-In Notice was addressed only to FTDI and did not comply with the provisions in reg. 3(5) and 3(6) in relation to FTDIHL. I think it is clear that the Secretary of State was attempting to serve FTDIHL, from the covering email to FTDI, which I have quoted above, and from the nature and terms of the Call-In Notice itself, which included the statement that the Notice was 'in respect of the entirety of the acquisition'. I further consider that the covering email, with its request that the Call-In Notice be forwarded to FTDIHL was sufficient to comply with reg. 3(5). It is the case that no specific officer or member of FTDIHL was identified for the purpose of compliance with reg. 3(6), but that provision is clearly intended to ensure that the Call-In Notice comes to the attention of an appropriate person, and that purpose was fulfilled in this case by the request that FTDI, who could be expected to know the identity of the appropriate individual(s) at FTDIHL, should forward the Notice to FTDIHL. Insofar as there was non-compliance with reg. 3(6) I do not consider that it invalidates service on FTDIHL, given that there is no dispute that the Call-In Notice was promptly forwarded by FTDI and received by the relevant people at FTDIHL.

Ground 4

94. Ground 4 is a contention that the Final Order breached A1P1. As there was no significant dispute as to the legal framework, it is convenient to set that out first, before considering the case made by FTDIHL, and then my analysis of that case.

Legal Framework

95. By s. 6(1) Human Rights Act 1998 it is unlawful for a public authority to act in a way incompatible with a Convention right, that is to say one of the rights in the ECHR which are set out in Schedule 1 to that Act.

96. Those Convention rights include those in A1P1. A1P1 provides:

> 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

97. A1P1 encompasses three distinct rules, which were described in this way in Back v Finland (2004) 40 EHRR 118 (at [52]):

> 'The Court reiterates that Article 1 of Protocol No. 1 comprises three distinct rules. The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property. The second rule, contained in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third rule, stated in the second paragraph, recognises that Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule. Each of the two forms of interference defined must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised.'

98. In Axa General Insurance Ltd v HM Advocate [2011] UKSC 46, [2012] 1 AC 868 at [107] Lord Reed explained the three rules as follows:

> 'The first is a rule of a general nature, set out in the first sentence of the first paragraph, which enunciates the principle of the peaceful enjoyment of property ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions"). The second is the rule contained in the second sentence of the first paragraph, which covers deprivation of possessions and subjects it to certain conditions ("No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law"). The third rule, stated in the second paragraph, is an explicit recognition that states are entitled, amongst other things, to control the use of property in accordance with the public interest.'

99. There is a distinction between 'deprivation' of possessions and their 'control'. In R (British American Tobacco) v Secretary of State for Health [2016] EWHC 1169 (Admin), Green J summarised the then available case law on A1P1. At [783] he said:

> 'The two most important criteria for differentiating between an expropriation and a control of use are (a) whether the measure pursues a legitimate objective and (b) whether title transfers to the State. If the measure serves a legitimate end and title does not transfer to the State then, invariably, the measure is classified as control of use.'

100. In his judgment on the appeal to the Court of Appeal in the same case, Lewison LJ said ([2018] QB 149 at [96]):

> 'One part of the test for deprivation as opposed to control of use is whether, following the interference, the complainant has retained any meaningful use of the possession in question. If the answer to that question is "yes" then the interference is unlikely to amount to a de facto deprivation or expropriation … The rights may lose some of their substance, but provided that they do not disappear it is unlikely that the interference will be treated as a de facto expropriation.'

101. While there is a distinction between 'deprivation' and 'control', as was said by Lord Carnwath JSC in R (Mott) v Environment Agency [2018] UKSC 10, [2018] 1 WLR 1022 at [32], '… the distinction is neither clear-cut, nor crucial to the analysis.' In Axa General Insurance Lord Reed said, at [108]:

> '… Given that the second and third rules are only particular instances of interference with the right guaranteed by the first rule … the importance of classification should not be exaggerated. Although, where an interference is categorised as falling under the second or third rule, the Strasbourg court will usually consider the question of justification under reference to the language of those specific provisions of A1P1, the test is in substance the same, however the interference has been classified. If an interference has been established, it is then necessary to consider whether it constitutes a violation. It must be shown that the interference complies with the principle of lawfulness and pursues a legitimate aim by means that are reasonably proportionate to the aim sought to be achieved.'

102. In R (L1T Holdings) at [193] Farbey J stated:

> 'In particular, the question of whether the interference with property is proportionate to the aim of the interference is in substance the same, irrespective of whether or not the measure under scrutiny amounted to expropriation or merely control …'

103. The principle of proportionality has been analysed as having four limbs. This was summarised by Singh LJ in Dalston Projects Ltd v Secretary of State for Transport [2024] EWCA Civ 172, [2024] 1 WLR 3327 at [9]: as follows

> 'The question whether or not an act of a public authority is incompatible with a Convention right will often depend on whether it complies with the principle of proportionality. That principle has been explained in the authorities as having four limbs, as set out by Lord Reed JSC in Bank Mellat v HM Treasury (No. 2) [2013] UKSC 39; [2014] AC 700. It is necessary to determine: (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (2) whether the measure is rationally connected with the objective; (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (4) whether the measure's contribution to the objective outweighs the effects on the rights of those to whom it applies. The fourth limb is sometimes referred to as the

> "fair balance" issue or "proportionality stricto sensu", i.e. in the strict sense….'

104. In relation to the third limb, a summary of the guidance from authority is provided in R (FACT Ltd) v Environment Secretary [2020] EWCA Civ 649, [2020] 1 WLR 3876. At [80] the court said (citations omitted):

> 'This is an area where Defra's margin of appreciation or discretion is relevant. The main points arising from case law can be summarised as follows:
>
> (i) The decision-maker has a margin of appreciation or discretion which is highly fact and context specific …
>
> (ii) A measure will be disproportionate if "it is clear that the desired level of protection could be attained equally well by measures which were less restrictive"…
>
> (iii) The burden of proof lies with the decision-maker. It is not however to be applied mechanically. There is no duty on the decision-maker to prove positively that no other measure could be as effective …
>
> (iv) The decision-maker is not required "to consider every possibly alternative, including those that were never suggested by consultees" …
>
> (v) The mere assertion that some other measure is equivalent, and less intrusive is not sufficient … and equally the fact that some other measure can be envisaged is not enough …
>
> (vi) It is relevant that a measure is "general, simple, easily understood and readily managed and supervised"'.

105. In a case which involves a measure concerned with national security, a high degree of respect should be accorded to the assessments and decisions made by the Secretary of State.

106. Farbey J said the following in R (L1T) at [98]-[103], with which I respectfully agree, albeit it was, in part, said in response to a submission which was not made in the same terms in the present case:

> '[98] In interpreting and applying the provisions of [NSIA], the court will treat as axiomatic that Parliament has entrusted the assessment of risk to national security to the executive and not to the judiciary. The court will acknowledge and adhere to the constitutional boundary between judicial and executive power (R (Begum) v Special Immigration Appeals Commission [2021] UKSC 7, [2021] AC 765, para. 56, per Lord Reed PSC, citing Secretary of State for the Home Department v Rehman [2001] UKHL 47, [2003] 1 AC 153, para. 49 per Lord Hoffmann).
>
> [99] Mr Hickman submitted that the ISU had no relevant expertise such that, in considering the proportionality and reasonableness of imposing divestment, as opposed to a package of measures to which the Claimants

> would be willing to submit, the court was as well placed to take the decision as the Secretary of State and should show no deference to the Secretary of State's assessment.
>
> …
>
> [101] Mr Hickman's submissions rest on a number of misunderstandings. First, as I have indicated, the statutory question for the Secretary of State was whether "the provisions of the order are necessary and proportionate for the purpose of preventing, remedying or mitigating the risk to national security" (section 26(3)(b) of the NSIA). It is plain from the statutory language that the Secretary of State is entitled to take measures that he or she reasonably considers will prevent, remedy or mitigate the risk to national security. That question involves matters of judgment and policy which the court is not equipped to decide. (Begum, para. 56).
>
> [102] Secondly … as happened in the present case, the ISU is able to draw on the expertise of others in Government in order that the Secretary of State is provided with necessary and sufficient material when making decisions under the Act. … I am not persuaded that decisions by the Secretary of State that rely on consultations with OGDs should be regarded as demonstrating some lesser institutional competence.
>
> [103] Thirdly, the Secretary of State exercises powers under the Act in the interests of the safety of people in the United Kingdom. The potentially serious consequences of error mean that decisions "require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process." Decisions must be made by "persons whom the people have elected and whom they can remove" (Rehman, para. 62, per Lord Hoffmann, cited in Begum, para. 62 per Lord Reed). …'

FTDIHL's case on A1P1

107. FTDIHL contends that the Final Order in this case orders a 'deprivation' of its possessions, rather than merely a control on their use. That is disputed by CDL.

108. FTDIHL further contended that any interference with possession must be lawful. The principle of lawfulness is referred to in Back v Finland cited above. The Grand Chamber of the ECtHR reiterated in Vistiņš and Perepjolkins v Latvia (App. 71243/01) (25 October 2012), at [95] that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. Here, FTDIHL contends that, because of its Grounds 1, 2, 3 and 5, the Final Order was in breach of domestic law.

109. In relation to the four limbs of the proportionality assessment described in Dalston Projects and set out above, there was no dispute as to the first. FTDIHL accepted that the objective of the measure was sufficiently important to justify the limitation of an A1P1 right. The other three limbs were in issue. Thus:

(1) FTDIHL did not accept that the Final Order was rationally connected to the aim of protecting national security. Properly understood, the nature of the products sold by FTDI did not and cannot pose the alleged national security risk.

(2) FTDIHL did not accept that the Final Order constituted the striking of a fair balance and did not accept that there were no less intrusive measures which could have dealt with any risk to national security.

(3) In these regards FTDIHL relied on: (a) the fact that the measure is a deprivation or akin to it; (b) that FTDIHL is likely to suffer substantial loss by a forced sale of FTDI; (c) FTDIHL had acquired FTDI before NSIA came into force, and that the effect of the Final Order will be retrospectively to deprive FTDIHL of lawfully acquired possessions; (d) the process was unfair and defective for reasons canvassed under Grounds 2 and 3; (e) that the security risks either did not exist or were too remote to justify the draconian measure taken; and (f) any risk to national security could have been dealt with by the measures proposed by FTDIHL in response to the Second Request for Representations or further measures.

Analysis

110. As to the issue of whether the Final Order amounts to an order for control or for 'deprivation', like Farbey J in R (L1T), at [192], I have a great deal of sympathy with the contention that the type of order involved here does amount to a deprivation. However, like her in that case, I do not consider it necessary to decide this point. The assessment of proportionality is in substance the same whether the measure is classified as a measure of deprivation or of control. In determining whether it is proportionate, that assessment must take into account the actual nature of the measure; and it makes no material difference to this whether the measure is classified as expropriatory, or as imposing a very high degree of control.

111. In relation to the issue of lawfulness, I do not accept that the existence of any valid public law ground for challenging the decision made means that there is 'unlawfulness' for the purpose of the principle referred to in Vistiņš and Perepjolkins v Latvia and other cases, so as to mean that there is a breach of A1P1. Specifically, I do not consider that a breach of an obligation to set out fuller reasons in the Final Order or accompanying materials of itself amounts to 'unlawfulness' for these purposes. In any event, I consider that the remedy which the Court should grant for any such breach should be that which is appropriate for that failure, and that the fact that it might also have meant that there was a breach of A1P1 should make no difference to what the remedy is.

112. In relation to the proportionality assessment, and in particular the three limbs of the principle which are at issue, I proceed on the basis that the decision is one which the court must make for itself. It is not a question of judging the decision of CDL by a rationality standard: R (Lord Carlile of Berriew) v Secretary of State for the Home Department [2014] UKSC 60, [2015] AC 945, [67] and [137]; Dalston Projects at [17]-[18]. Nevertheless, in relation to each of the limbs of the proportionality assessment, the court should give weight to the

Secretary of State's view on the matter. It is the Secretary of State which has the institutional qualification and expertise, especially in relation to matters of evaluation of a risk, not the courts. Further, Parliament has given the primary responsibility for assessing both the nature of the risks to national security and for making an assessment of what is a proportionate response to such risks to the Secretary of State. S. 26(3)(b) NSIA requires the Secretary of State to consider whether an order under the Act is necessary and proportionate for the purpose of preventing, remedying or mitigating the risk to national security. The court will necessarily accord great respect to that assessment. In these circumstances, what Farbey J says in R (L1T) at [201], namely that the difference between a rationality review and an assessment of fair balance is 'conceptually sound but in practice small'.

113. I have given careful consideration to the issues as to proportionality, considering in that connexion both the relevant OPEN and CLOSED material. My conclusions in relation to the three disputed limbs of the proportionality assessment follow.

114. As to limb (2), I regard it as clear that the Final Order is rationally connected to the objective of preventing or mitigating the risks to national security which the Secretary of State considers to exist. While there may be room for argument as to the magnitude of any risk, and as to whether the measure goes further than necessary to address such a risk, there is none, in my view, as to whether the measure is rationally connected to the objective. The removal of FTDIHL from having any connexion with FTDI is plainly a means of reducing any national security risk which may arise from FTDIHL's association with FTDI.

115. In relation to limb (4), it is necessary to give full weight to the seriousness of the measure for FTDIHL. I have also taken into account that the acquisition took place before the NSIA came into force, and that the effect of the Final Order will be to deprive FTDIHL of property lawfully acquired. Those matters have to be set, however, against the extreme importance of the interest it is sought to protect, namely national security, and the seriousness of the risk which it seeks to guard against. The assessment of that risk is one for which the court lacks institutional qualification and expertise and on which the court is bound to give great weight to the assessment of the Secretary of State. In light of that assessment, I accept that there is a real risk to national security from the acquisition which is of sufficient seriousness to justify the imposition of significantly intrusive measures on the acquirers. In my judgment, the Final Order is not disproportionate, and does strike a fair balance.

116. Limb (3) is a matter to which it has been necessary to give particularly anxious scrutiny. The issue as it was put in R (FACT Ltd), is whether the desired level of protection could be achieved equally well by less restrictive measures. In relation to this, I accept that if conditions were imposed on the management of FTDI, and measures introduced to ensure compliance with those conditions, the risks arising from the acquisition could and would be reduced. The fact remains, however, that the assessment of the Secretary of State is that divestment is the way in which the risk can be most effectively mitigated, and that this degree of mitigation cannot be achieved by alternative means. That assessment is one which is to be accorded a high degree of respect. It is an assessment which

appears to me to be not only reasonable but one with which, in so far as I have the competence to judge, I am in accord.

117. I would accordingly reject Ground 4.

Ground 5

118. Ground 5 is a contention that the Final Order was irrational or unreasonable. The same matters were relied upon by FTDIHL to justify Ground 5 as Ground 4. As I have rejected Ground 4, Ground 5 must also fail.

Ground 2

The parties' cases

119. FTDIHL's case was that the process of decision-making leading to the Final Order breached the common law and Article 6 ECHR requirements of procedural fairness. A fair procedure required that it should have been given sufficient information to give effective instructions, the right recognised in SSHD v AF (No. 3) [2020] 2 AC 269 being engaged. It should have been given this information during the assessment period and prior to the making of the Final Order. Such information was not given. The First and Second Requests for Representations did not provide FTDIHL with sufficient information to permit it a fair opportunity to be heard. Specifically it was not told: which CNI could be endangered by FTDI's products or how; the basis on which it was considered that the ownership of FTDI and its control by JAC Capital could be used to disrupt CNI; why the measures proposed by FTDIHL to address any risks arising were not sufficient; or why CDL believed that even if FTDIHL's control over FTDI were fully removed, that would not meet any national security risks.

120. In its response, CDL did not dispute that Article 6 is applicable to this case. He equally did not dispute that he had a duty to act fairly. However, in a case involving national security, as this does, the standards of fairness have to be adapted to take this into account. Here, especially given that the court has made a declaration under the 2013 Act, it is self-evident that there will be aspects of CDL's decision-making which could not have been disclosed to FTDIHL. That does not mean that the process was procedurally unfair.

121. CDL does not accept that the requirement of fairness required him, in this case, to give AF (No. 3) compliant disclosure. In any event, even if AF (No. 3) does apply, FTDIHL was actually given sufficient information for it to provide effective instructions. This was decided by Chamberlain J at a CLOSED hearing on 28 February 2025. At that point Chamberlain J had decided that, on the assumption that FTDIHL must be provided with disclosure in accordance with AF (No. 3) fairness did not require any further detail to be added to the gist of the national security risk that had been provided to FTDIHL in the Second Request for Representations.

Analysis

122. Under both Article 6 ECHR and at common law, CDL had a duty to act fairly. Like Farbey J in R (L1T Holdings) at [128], I am not persuaded that the requirements of fairness are exhaustively set out by the procedure specified in the NSIA. Nevertheless, what fairness involved had to take account of the requirements of national security. Concerns as to national security made it necessary that FTDIHL should not be given full information as to the national security risks involved.

123. In my view, in the present case the process leading up to the Final Order has not been shown to be unfair, given the national security concerns involved. FTDIHL was given the opportunity to make representations. There were extensive communications between ISU and FTDIHL, both in writing and in meetings. The Second Request for Representations gave FTDIHL the opportunity to comment on whether the acquisition of FTDI posed a risk to CNI, and in response FTDIHL could and did comment on whether ownership of FTDI and control by JAC Capital could be used to disrupt CNI, and could and did propose remedies to address any risks which there might be. The representations made by FTDIHL were considered by CDL.

124. It is in issue as to whether the obligation to give AF (No. 3) compliant disclosure applied in this case in view of, first, the stage of the process concerned (ie before the executive decision) and, second, the nature of the Final Order. I do not consider that it is necessary to resolve that question because, in my view, it does not make a difference to the outcome on this Ground. Even if it is assumed that there was an obligation to give disclosure compliant with AF (No. 3), such disclosure was given.

125. In this regard, CDL relies on the decision of Chamberlain J. I do not consider that that decision is a 'complete answer' to FTDIHL's complaints in this area. It was a decision given in CLOSED at which neither FTDIHL nor its privies were present. Strictly, moreover, the issue which Chamberlain J was called on to resolve, namely whether there should be further disclosure for the purposes of this hearing, was not identical to the issue which is before the court now. Nevertheless, Chamberlain J's decision, having seen the CLOSED material, was that no further disclosure was required as to the gist of the national security risk than had already been given in the Second Request for Representations. Even if not identical, that was a decision on a very closely related question and is one to which, naturally, respect is due.

126. More significantly, Edis LJ and I have now seen the CLOSED material and have had submissions in relation to it by Special Advocates. My view is that sufficient information was given in the Second Request for Representations 'to enable [FTDIHL] to give effective instructions' (to use the language of AF (No. 3) at [59]) in respect of the national security concerns identified. This was demonstrated by the fact and nature of the representations made by FTDIHL in response.

127. As stated in R (Doody) v Home Secretary [1994] 1 AC 531 at 560-561 per Lord Mustill, it is not enough for an applicant to persuade the court that some procedure other than the one adopted would be better or more fair; it must be

shown that the procedure adopted was actually unfair. I do not consider that that has been shown.

Ground 3

128. Ground 3 is that CDL provided no or insufficient reasons for his decision.

The Parties' cases

129. FTDIHL points to the fact that s. 28(4)(d) provides that each order, or explanatory material accompanying the order 'must … state the reasons for making or varying the order.' Here, the Final Order contained only the following which could, even arguably, be 'reasons':

> '1. [CDL] makes this Final Order pursuant to section 26 of the Act. He is satisfied, on the balance of probabilities, that
>
> (a) a trigger event has taken place; and
>
> (b) a risk to national security has arisen from the trigger event.
>
> 2. The national security risks in this case relate to:
>
> (a) UK-developed semiconductor technology and associated Intellectual Property being transferred to China, and deployed in ways that are contrary to UK national security; and
>
> (b) The ownership of FTDI, and its control by JAC Capital, could be used to disrupt critical national infrastructure which use FTDI Products.
>
> 3. [CDL] has considered the representations referred to above…
>
> 4. [CDL] reasonably considers that the provisions of this Final Order are necessary and proportionate for the purpose of preventing, remedying or mitigating the risk.'

130. Those, FTDIHL contends, are not 'reasons'; they are 'no more than an incantation of phrases that had already been conveyed by [CDL] in correspondence.' Furthermore, although s. 28(5) NSIA permits CDL to exclude from the copy of an order served on any person anything the disclosure of which CDL considers 'would be contrary to the interests of national security', that only permits CDL to exclude some matters from a *copy* of the Order; it does not permit there not to be reasons in the original of the Final Order. If the original of the Final Order contained no further reasons than those in the copy sent to FTDIHL, and which are quoted above, then it was non-compliant with s. 28(4)(d) NSIA. (I note that it has since been confirmed in OPEN that it was in fact the case that there were no more reasons in the original of the Final Order than in the copy given to FTDIHL.)

131. Alternatively, if what was contained in the Final Order counted as 'reasons' at all, they were inadequate. They did not enable FTDIHL to understand why the matter was decided as it was, and give rise to substantial doubt as to whether

CDL erred in law. The Final Order was therefore ultra vires and must be quashed.

132. CDL for his part contended that FTDIHL was provided with adequate information, consistent with the protection of national security, as to why he had made the Final Order. The provision of further information would have been contrary to the interests of national security.

Analysis

133. I accept FTDIHL's submission that s. 28 NSIA provides that an order, and here the Final Order, must state 'the reasons' for the making of the order, and that, even though material may be omitted on grounds of national security from a copy of the order, that does not remove the requirement for the statement of reasons in the original of the order. I am also of the view that what was contained in paragraphs 2-4 of the Final Order, which I have quoted, were not 'the reasons' for the making of the order. While the reasons which should be stated in the order pursuant to s. 28(4)(d) doubtless do not have to be at all lengthy or detailed, the only potentially relevant paragraphs of the Final Order are largely formulaic, uninformative and by no means comprehensive.

134. I should say, however, that this non-compliance with the obligation to give reasons in the Order does not, in the present case, reflect the absence of a focus by the decision-maker on what the reasons were.

135. There is an email of 5 November 2024, which indicates more as to the nature of the CDL's decision-making process in relation to the Final Order and the reasons for it. This shows that, after Mr McFadden MP was provided with the MinSub and all annexes, he held a meeting with officials from ISU, and Cabinet Office Legal Advisers. He raised some points of clarification in relation to the material provided to him. In reaching his decision, he had regard to the MinSub and its Annexes. Specifically he noted the ISRA, the Remedies Assessment, and the Summary of Representations. Accordingly, there is good reason to consider that the reasons for the Final Order are those which are contained in the MinSub and annexes.

136. The question of what are the consequences of a failure to set out adequate reasons in the Final Order in accordance with NSIA s. 28(4)(d) must be one of the proper construction of the statute. Given the matters which are provided for in s. 28(4), I consider it clear that Parliament did not intend that any and all non-compliance should invalidate the order. Had that been intended it would have needed to be expressly provided for. Specifically, the failure to set out sufficient reasons in the order in the present case, given that the Secretary of State actually had sufficient reasons, does not invalidate the Final Order.

Overall Conclusion

137. Edis LJ and I have, concurrently with these OPEN judgments, produced CLOSED judgments in this matter. For the reasons given above and in my CLOSED judgment, I reject all Grounds other than Ground 3. In relation to

Ground 3, I do not consider that the failure to set out sufficient reasons in the Final Order invalidates it.

Lord Justice Edis:

138. I agree.