

# THE UK NATIONAL SECURITY REGIME WETS ITS FEET: UK GOVERNMENT PUBLISHES NEW GUIDANCE

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## Policy and Regulatory Alert

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The National Security and Investment Act 2021 (NSI Act) came into force on 4 January 2022 and represented a brand new regime for the review of transactions with potential national security implications for the United Kingdom. The NSI Act marks a stark shift in the UK mergers and acquisitions landscape; no mandatory regime for prior review and approval of transactions has previously existed (including for merger control), and the range of sectors can surprise deal parties with its breadth.<sup>1</sup>

A pre-closing review can be triggered not only in the well-established categories of defence and media plurality, but where the target is active in any one of a wide array of areas considered to be of national strategic importance, ranging from energy to key technologies to supplies to public entities or the emergency services. The UK government's Investment Security Unit (ISU)<sup>2</sup> has now released further guidance<sup>3</sup> and some initial statistics following the first six months of the NSI Act's operation. In this alert, we highlight some key observations for parties considering a deal where the target has operations or customers in the United Kingdom.

## GENERAL EXPERIENCE SO FAR

The government has continually promised that the United Kingdom remains a welcome destination for foreign investment, despite the introduction of the NSI Act, and that the ISU will handle its reviews as efficiently as possible. Broadly speaking, the regime seems to be working as intended, with the vast majority of notifications being processed within the basic 30-working day time frame. This has also been our own experience when submitting notifications, as discussed further below.

## UNLIKELY ACQUISITIONS THAT FALL WITHIN THE NSI ACT'S SCOPE

The ISU's new guidance has reiterated that certain, unlikely acquisitions remain within the scope of the ISU's review, including:

### Temporary Acquisitions of Control

The ISU has clarified that the appointment of a liquidator or other insolvency receiver could lead to a mandatory notification where the insolvency proceedings involve change in title of the ownership of a qualifying entity. While the appointment of an administrator or creditor over a qualifying entity will likely not lead to a notification, the appointment of a liquidator or receiver may result in them holding rights in the qualifying entity that enable them to enact its winding up and therefore fall within the scope of the NSI Act at this stage.<sup>4</sup>

### Granting of Security Over Shares

The granting of certain types of share security such that title to the shares is transferred to the secured lender (or its nominee) resulting in the lender gaining voting rights may mean a mandatory notification under the NSI Act has been triggered, provided the relevant thresholds<sup>5</sup> have been met.

### **Internal Reorganisations**

As the government has explained in previous communications,<sup>6</sup> internal corporate reorganisations remain within the scope of the NSI Act and can trigger a mandatory notification even where the ultimate beneficial owner remains the same. In particular, BEIS<sup>7</sup> is concerned that, where the ultimate beneficial owner is “passive,” this could enable a new hostile actor further down the ownership chain to exert control over the target, i.e., where a new entity, within the existing corporate structure, could enter the chain of control of the qualifying entity.

Although it will be disappointing to many industry players that the regime has not been narrowed to avoid some of these transactions triggering filings altogether, the government's position does represent some welcome steps towards pragmatism. For instance, it has been clarified that multiple notifications under one internal reorganisation will not be required; additionally, the initial pledging of shares for security or the appointment of a creditor will not trigger a notification where there is no transfer of control.

### **ISU'S FIRST PROHIBITION OF A TRANSACTION AND PUBLISHING INFORMATION**

The notifications made to the ISU are not publicised; indeed, given the potential sensitivity of the review process and decisions, the government has confirmed it will not publish information regarding the receipt of a notification and the acceptance or rejection of individual notifications. The government may however choose to publish information in certain circumstances, including where the transaction has been subject to a final order from the ISU. We discuss some examples below.

The ISU reviewed a license agreement between the University of Manchester (the University) and Beijing Infinite Technology Company Ltd (Beijing Infinite),<sup>8</sup> which marked the first prohibition of a transaction under the NSI Act and imposition of a final order. The agreement would have enabled Beijing Infinite to use certain intellectual property relating to the University's vision-sensing technology, which the company stated would be used in relation to children's toys. However, the ISU blocked the transaction, determining the technology had defence applications and could ultimately pose a threat to the United Kingdom's national security. The transaction did not trigger a mandatory notification but highlights the ISU's wide remit for review and confirms our own experience that the ISU will take a keen interest in transactions that involve politically sensitive foreign investors.

The acquisition by Nexperia, a Dutch subsidiary of China-based Wingtech Technology Company Ltd, of Newport Wafer Fab was also blocked by the ISU in May of this year using their powers under the NSI Act following the discovery of Nexperia-made components in Russian missiles fired at Ukraine. The Nexperia example highlights that transactions remain at risk of call-in if additional risk factors are later detected or ministers face significant industry or public pressure to vet a deal.

Furthermore on 17 August 2022, the ISU announced in its final order that it had blocked the acquisition of Pulsic Limited, a Bristol-based company active in integrated circuits, by the Hong Kong-based firm Super Orange HK.<sup>9</sup> The ISU remarked that Pulsic Limited's technology could be used in “a civilian or military supply chain” and therefore had defence applications, which could present a risk to UK national security. The action taken by the

ISU in this transaction, alongside the two mentioned above, indicates that the authority is beginning to flex its muscles and is not afraid to impose final orders to block transactions where it has national security concerns.

## **ISU'S FIRST ANNUAL REPORT**

On 16 June 2022, the ISU published its first annual report<sup>10</sup> concerning the first three months of operation of the NSI Act, which included some interesting statistics on the length of the ISU's review periods and the sectors that seem to be the most popular for review. Although notifications have been processed in relation to all 17 sectors, notifications have arisen most commonly in the defence, military, and dual use sectors in relation to the critical suppliers to government, artificial intelligence, and data infrastructure sectors.

The statistics in the ISU's annual report are largely in line with our own experience of submissions to the ISU in that they are trying to progress their reviews as fast as possible but in practice are largely utilising the majority of their full 30-working-day time frame. The fact that the military and dual-use sector is the one that has been “called-in” the most for in-depth review is unsurprising given changes in control of the entities active in this sector are the most likely to have immediate implications for UK national security.

The ISU received 222 notifications between January and March 2022, which is at the lower end of what the ISU anticipated in their impact assessment (1,000–1,830 notifications per year). However, this was most likely due to an initial lack of awareness of the NSI Act's notification requirements, and we believe the number of notifications is likely to continue to grow, particularly given some of the uncertainty regarding certain sector definitions or the risk of the ISU choosing to intervene in certain transactions even if they do not require mandatory approval. In any event, the number of reviews this year has dramatically increased when compared with the previous regime under which the government could voluntarily intervene in transactions potentially affecting the UK public interest.

## **CONCLUSION**

The ISU is expected to publish figures next month on the first six months of the NSI Act's operation, and the ISU's next annual report is due on 31 March 2023. It will be interesting to assess whether notifications and call-ins remain below the ISU's estimates at these two stages of review or if the broad remit of the NSI Act has begun to take hold. Questions remain as to how “national security” will be interpreted, including under the new guidance, and the government appears keen to continue to leave the term undefined so it can take a broad remit to review transactions. The sorts of transactions that are likely to trigger interest or concerns will become more apparent as increasing numbers of deals are processed.

If you are contemplating a purchase, sale, or other corporate transaction, we would be happy to discuss whether the NSI Act, or investment regimes in other countries, may be relevant and have any timing or risk implications for your transaction.

## **FOOTNOTES**

<sup>1</sup> For further information on the relevant thresholds that result in a transaction being a “qualifying acquisition” and which sectors of the economy fall within the 17 sectors, please see our previous alert here:

<https://www.klgates.com/The-UK-Government-Shares-New-Detail-Regarding-Incoming-National-Security-and-Investment-Act-7-30-2021>.

<sup>2</sup> The body set up by the Department for Business, Energy and Industrial Strategy (BEIS) with responsibility for reviewing transactions with national security implications.

<sup>3</sup> <https://www.gov.uk/government/publications/national-security-and-investment-nsi-act-market-guidance-notes/national-security-and-investment-market-guidance-notes-july-2022>.

<sup>4</sup> Section 8 of the NSI Act.

<sup>5</sup> The acquirer's (lender's) shareholding or voting rights in the qualifying entity must meet or cross certain percentage thresholds, e.g., from less than to more than 25%, or if the acquirer (lender) gains voting rights that enable it to pass or block resolutions governing the affairs of the entity.

<sup>6</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/965784/nsi-scope-of-mandatory-regime-gov-response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965784/nsi-scope-of-mandatory-regime-gov-response.pdf).

<sup>7</sup> See footnote 2.

<sup>8</sup> From publicly available information, the company appears to be privately owned rather than having any direct connection with or ownership by the Chinese government.

<sup>9</sup> <https://www.gov.uk/government/publications/acquisition-of-pulsic-ltd-by-super-orange-hk-holding-ltd-notice-of-final-order/acquisition-of-pulsic-ltd-by-super-orange-hk-holding-ltd-notice-of-final-order>.

<sup>10</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1083295/E02757792-nsi-annual-report-2022.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1083295/E02757792-nsi-annual-report-2022.pdf).

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