



## **NATIONAL SECURITY AND INVESTMENT ACT 2021 ONE YEAR ON**

The UK's National Security and Investment Act 2021 (the "Act") entered into force on 4 January 2022. In this briefing, we review the impact of the Act one year on, what we can take away from decisions made under the Act to date, and the implications of this for transactions.

## How does the Act work?

The Act gives the Department for Business, Energy and Industrial Strategy (“BEIS”) expansive powers to review investments in order to protect the UK’s national security.<sup>1</sup> In 17 critical sectors of the UK economy notification and prior clearance of certain transactions are mandatory.<sup>2</sup> We published a briefing in June 2021<sup>3</sup> looking at how the Act works in detail, including its retrospective aspects.

In summary, the Secretary of State can “call-in” acquisitions or investments for detailed review if the Secretary of State reasonably suspects that they may pose a risk to national security.<sup>4</sup> There is also a notification system, whereby certain investments must be notified<sup>5</sup> to the Investment Security Unit (“ISU”) within BEIS.

At the time of writing, statistics on notifications made under the Act are only available for the period from January to March 2022.<sup>6</sup> A total of 222 notifications were received in the three months following the Act’s entry into force, 17 of which were called in for further review. The level of notifications is lower than had been expected – it was anticipated that between 1,000 and 1,830 notifications would be made per year.<sup>7</sup> These numbers may be due to the relatively suppressed M&A market in 2022.

These initial statistics also show that it took on average three working days for a notification to be processed. It then took on average 24 working days to decide whether or not to call in a notification for further review.<sup>8</sup> This is slightly below the maximum 30 working day period which the ISU has under the Act to make this decision,<sup>9</sup> but still represents a lengthy period which needs to be accounted for in a transaction timetable.

Across the first year of the Act’s life, the Secretary of State made a total of 14 final orders, whereby acquisitions which were called in for review were either blocked or ordered to be reversed, or allowed to proceed subject to conditions.<sup>10</sup>

Before imposing remedies, such as a prohibition or conditions to the completion of a transaction, the Secretary of State must be satisfied on the balance of probabilities that there is a risk to national security. The Secretary of State will consider the acquirer’s affiliations to hostile parties or countries rather than the existence of a relationship with particular foreign states in principle or their nationality.

While it was initially thought that the Act would target certain Chinese influence in the UK, the published final orders show that a much wider range of acquisitions have been targeted for review than those involving certain Chinese investors. We will look in turn at acquisitions which were blocked, and those which were permitted to proceed subject to conditions.

## What acquisitions has the UK Government blocked?

Of the 14 final orders issued over the last year, five blocked the acquisition in question, or required it to be reversed. Four of these five acquisitions involved Chinese investors, while the fifth concerned a Russian investor.

The first transaction to be blocked concerned a licence agreement between the University of Manchester and a Chinese company, Beijing Infinite Vision Technology Company Ltd, whereby Beijing Infinite Vision obtained the right “to use intellectual property relating to ... vision sensing technology”.<sup>11</sup> According to the order, it was

considered that this technology could be used to develop “defence or technological capabilities which may present [a] national security risk”.<sup>12</sup> For more information, please see the briefing we published on this case in August 2022.<sup>13</sup>

On 17 August 2022, the Secretary of State blocked the acquisition of Bristol-based electronic design automation firm, Pulsic Ltd, by a Hong Kong firm owned by a larger Chinese industrial software company. Similarly, the stated reason for this decision was the risk that Pulsic’s products could be used “to facilitate the building of cutting-edge integrated circuits” with potential military applications.<sup>14</sup>

On 19 December 2022, another ostensibly similar acquisition was blocked by the Secretary of State. SiLight (Shanghai) Semiconductor Ltd had sought to acquire Southampton-based HiLight Research, but the Secretary of State considered that there was “potential for HiLight Research Limited’s technology to be used to build technological capabilities” threatening the UK’s national security.<sup>15</sup>

These three decisions are a textbook example of what it was expected that the Act would do-i.e. prevent the acquisition of British-developed technology by certain Chinese companies, which could repurpose it for perceived hostile purposes. However, an order made on 16 November 2022, ordering the Chinese-owned Nexperia BV to reverse its acquisition of Newport Wafer Fab, which owns the UK’s largest semiconductor factory, arguably appeared to be based more on industrial planning concerns.<sup>16</sup>

1 National Security and Investment Act 2021 (Guidance and Information) - GOV.UK ([www.gov.uk](http://www.gov.uk))

2 The 17 sensitive sectors are transport (ports, harbours, terminals, airports, air traffic control), energy, defence, military and dual-use, data infrastructure, advanced materials, advanced robotics, artificial intelligence, civil nuclear, communications, computing hardware, critical suppliers to government, cryptographic authentication, quantum technologies, satellite and space technology, suppliers to the emergency services and synthetic biology.

3 HFW | National Security and Investment Act 2021

4 The Act, s. 1

5 The Act, s. 14

6 National Security and Investment Act 2021: Annual Report 2022 ([publishing.service.gov.uk](http://publishing.service.gov.uk))

7 NSI Impact Assessment ([publishing.service.gov.uk](http://publishing.service.gov.uk))

8 National Security and Investment Act 2021: Annual Report 2022 ([publishing.service.gov.uk](http://publishing.service.gov.uk))

9 The Act, s. 14(9)

10 Notice of Final Orders made under the National Security and Investment Act 2021 - GOV.UK ([www.gov.uk](http://www.gov.uk))

11 Acquisition of know-how related to SCAMP-5 and SCAMP-7 vision sensing technology notice of final order ([publishing.service.gov.uk](http://publishing.service.gov.uk))

12 Ibid.

13 HFW | National Security and Investment Act 2021: Final Order Made by UK Government Preventing the Acquisition of Intellectual Property Relating to Vision Sensing Technology

14 Acquisition of Pulsic Ltd by Super Orange HK Holding Ltd: notice of final order ([publishing.service.gov.uk](http://publishing.service.gov.uk))

15 Acquisition of HiLight Research limited by SiLight (Shanghai) Semiconductors Limited: notice of final order - GOV.UK ([www.gov.uk](http://www.gov.uk))

16 Newport Wafer Fab decision: notice of final order ([publishing.service.gov.uk](http://publishing.service.gov.uk))





According to press reports, Newport Wafer Fab manufactures silicon wafers, which are then shipped to Asia to be made into semiconductors. Nexperia said that it offered “*far-reaching remedies*” to address the Government’s security concerns, including ruling out any future compound semiconductor activity or development at the site.<sup>17</sup> Yet, the final order ordered the reversal of the acquisition because of the “*potential reintroduction of compound semiconductor activities at the Newport site*” and because it could prevent other companies in the sector in South Wales from becoming involved in future national security-related projects.<sup>18</sup>

This case highlights the opaqueness of the decision making process under the Act and the uncertainties that this can create for a transaction. This is further compounded by the fact that a merits-based appeal of a final order made under the Act is not possible – the decision can only be challenged via the more limited judicial review procedure.<sup>19</sup> This case also illustrates

the retrospective powers under the Act – Nexperia acquired Newport Wafer Fab six months before the Act entered fully into force, yet was still subject to the Act’s review procedure, as it allows the Secretary of State to call in transactions potentially dating as far back as 12 November 2020. These retrospective provisions may be applied in certain circumstances for up to five years following the Act’s full entry into force (i.e. 4 January 2027).<sup>20</sup>

The final decision which was blocked during 2022 was the only one not to involve a Chinese investor. On 19 December 2022, a final order was issued ordering the reversal of the acquisition of regional broadband provider Upp Corporation Ltd.<sup>21</sup> The purchaser was owned by LetterOne Holdings S.A., an investment company whose owners include three sanctioned Russian oligarchs. The order states that the national security risk arose from the fact that the ultimate owner of the purchaser was LetterOne, which suggests that the identity of LetterOne’s owners was of concern to the Secretary of

State. While LetterOne itself is not sanctioned, and, in a statement said that it “*has taken fast, decisive action to put in place strong measures to distance [itself] from its sanctioned shareholders*”, it appears that the link to the sanctioned oligarchs was the reason for the order to reverse the acquisition.

### **What conditions have been imposed on other acquisitions?**

In addition to the five acquisitions which were blocked, a further nine were allowed to proceed, but subject to conditions. These acquisitions were broader than the five which were blocked, with investors from places including Abu Dhabi,<sup>22</sup> the US,<sup>23</sup> and Germany.<sup>24</sup>

Some of the conditions placed upon the acquisitions included: 1) restrictions on information sharing;<sup>25</sup> 2) requirements to keep certain R&D and manufacturing capabilities located in the UK;<sup>26</sup> 3) Government approval of or involvement in energy purchase agreements;<sup>27</sup> and 4) the appointment of a

<sup>17</sup> Nexperia is shocked by the Secretary of State's order to divest Newport Wafer Fab | Nexperia

<sup>18</sup> Newport Wafer Fab decision: notice of final order (publishing.service.gov.uk)

<sup>19</sup> The Act, s. 49

<sup>20</sup> The Act, s. 2(4)

<sup>21</sup> Acquisition of Upp Corporation Ltd by LIT FM Holdings UK Ltd: notice of final order - GOV.UK (www.gov.uk)

<sup>22</sup> Acquisition of shares in Reaction Engines Limited by Tawazun Strategic Development Fund LLC: notice of Final Order - GOV.UK (www.gov.uk)

<sup>23</sup> Acquisition of Connect Topco Limited by Viasat, Inc. - GOV.UK (www.gov.uk)

<sup>24</sup> Acquisition of the assets and subsidiaries of Truphone Limited by TP Global Operations Limited: notice of final order - GOV.UK (www.gov.uk)

<sup>25</sup> Acquisition of Connect Topco Limited by Viasat, Inc. - GOV.UK (www.gov.uk)

<sup>26</sup> Acquisition of CPI Intermediate Holdings, Inc by Iceman Acquisition Corporation: notice of final order (publishing.service.gov.uk)

<sup>27</sup> Acquisition of XRE Alpha Limited by China Power International Holdings Limited: notice of final order (publishing.service.gov.uk);

Acquisition of the Stonehill project asset development rights by Stonehill Energy Storage Ltd: notice of final order - GOV.UK (www.gov.uk)

Chief Information Security Officer approved by the Secretary of State,<sup>28</sup> or of a Government observer to the board of directors.<sup>29</sup>

Although these acquisitions were allowed to proceed, the conditions can be onerous and require a potentially unacceptable amount of Government involvement in what is typically an internal company matter, such as senior personnel appointments. Indeed, in one case, despite receiving permission to proceed with the acquisition, the Chinese investor appears to have decided that the restrictions were too onerous, and did not proceed with the acquisition.<sup>30</sup>

### What have we learnt?

What conclusions can be drawn from activity during the Act's first year in force?

First, while the statistics indicate that transactions involving a Chinese, or Chinese-owned investor have to date been the most likely to be blocked, the LetterOne-Upp transaction suggests that the range of investors which the UK Government considers unacceptable is widening. Indeed, even the fact that the investor is from an allied country, such as the US or Germany, or even the UK itself, will not necessarily prevent the imposition of potentially onerous conditions.

Secondly, on the basis of the cases to date, certain key sectors and product types appear to be more likely to attract attention. These are the energy distribution network; the communications network; semiconductors and microchips; and dual use technologies. Together, these four categories account for over 70% of the transactions called in for review in 2022.

Thirdly, the range of conditions which the Government is prepared to impose on acquisitions is varied and wide ranging. In some cases they will even extend into restrictions on commercial agreements.

Finally, while the Act purports to relate to national security alone, it is arguable that industrial strategy or economic issues<sup>31</sup> may be behind certain decisions. The Newport Wafer Fab case is the clearest example of this, and given that "national security" is not defined anywhere in the Act, it is unsurprising that the Government appears to have taken advantage of this flexibility with an associated negative impact on predictability of outcomes. In its statutory statement on how the Secretary of State intended to use the call in power, the Government said that national security is not defined, reflecting "*longstanding government policy to ensure that national security powers*

*are sufficiently flexible to protect the nation.*"<sup>32</sup> However, the sectoral application of the call in power has so far been exercised as this statement set out. None of the transactions called in for review in 2022 involved sectors outside the critical 17 sectors, which is in line with the Government's statement that such transactions would be "*unlikely to be called in as national security risks are expected to occur less frequently in these areas*". In this regard, at least, there has been some predictability as to how the Act has been applied to date.

As we move into 2023, we will no doubt continue to see more final orders published and gain further insights into how to navigate the regime created by the Act.

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28 Acquisition of the assets and subsidiaries of Truphone Limited by TP Global Operations Limited: notice of final order - GOV.UK ([www.gov.uk](http://www.gov.uk))

29 Acquisition of Ligeance Aerospace Technology Co. Ltd by Sichuan Development Holding Co. Ltd: notice of final order ([publishing.service.gov.uk](http://publishing.service.gov.uk))

30 Acquisition of Electricity North West Limited by Redrock Investment Limited: notice of revocation of final order - GOV.UK ([www.gov.uk](http://www.gov.uk))

31 Acquisition of CPI Intermediate Holdings, Inc by Iceman Acquisition Corporation: notice of final order ([publishing.service.gov.uk](http://publishing.service.gov.uk))

32 National Security and Investment Act 2021: Statement for the purposes of section 3 - GOV.UK ([www.gov.uk](http://www.gov.uk))

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