# Early Trends In UK National Security Reviews Of Transactions

By **John Schmidt, Ronald Lee and Ludovica Pizzetti** (August 19, 2022)

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On July 20, the U.K. government prohibited for the first time a transaction under the new National Security and Investment Act 2021, or NSIA.

In other cases where the government has intervened so far, enforcement action only involved imposing conditions on the acquirer.

Here, we take stock of the emerging practice and outline key takeaways for businesses, including U.S. transaction parties, involved in acquisitions in and outside the U.K.

The prohibited transaction involved the acquisition by Chinese company Beijing Infinite Vision Technology Co. Ltd. of intellectual property developed and owned by the University of Manchester. The U.K. government had concerns over the deal as the relevant technology has dual-use applications and could be used to build defense or technological capabilities, posing a potential national security risk to the U.K.

Interestingly, the transaction did not involve a share acquisition of a company, which would have required a mandatory prenotification, but a licensing arrangement concerning sensitive technology that was notified voluntarily — evidence of the fact that, although acquisitions of IP fall within the voluntary notification regime under the NSIA, these can nonetheless be subject to close government scrutiny.

Since IP licensing forms an integral part of the university business model, this case also makes clear that universities will need to reevaluate their risk assessment processes and ensure compliance with the obligations under the NSIA.

It is also interesting to note that the decision was adopted in the same week that the secretary of state for the Department for Business, Energy and Industrial Strategy, or BEIS — the government's department responsible for the application of, and final decisions under, the NSIA — accepted undertakings by the U.S.-listed Parker Hannifin Corp. in respect to its acquisition of Meggitt PLC.

As recently confirmed by BEIS,[1] publication of NSIA decisions is generally limited to final orders imposing conditions on, unwinding or blocking a transaction, whereas clearances and other procedural decisions are usually not published.[2]

Despite that, BEIS might decide to publish some information concerning a call-in notice, an interim order having been issued or a clearance having been granted where the parties disclose such information, or if the acquisition is otherwise in the public domain and BEIS considers it is in the public interest to do so.

It is also worth pointing out that, compared to merger control decisions, final decisions that are published are scant, as the government provides no reasoning for its decisions. This somewhat limits predictability and certainty.

Nevertheless, as the body of published cases expands and some insight on current and recent cases becomes available in the legal press, the following key takeaways on the enforcement have emerged.

**Nationality does not determine outcome.**

Although, somewhat unsurprisingly, the only deal having been blocked so far concerned a Chinese acquirer, transactions undertaken by acquirers headquartered in countries that are close allies of the U.K. are not immune from close scrutiny.

Experience shows that acquirers from close allies such as the U.S., France or Israel may still give rise to a U.K. national security issue where the target business is engaged in sensitive activities.

Examples of deals that have been recently called in or closely scrutinized by BEIS include BT Group PLC, which was involved in a deal retrospectively called in, in which the acquirer was the French telecom group Altaic Europe NV owned by French-Israeli billionaire Patrick Drahi. Another example involved Truphone Ltd. and a deal that was called in for in-depth review by way of an interim order, in which the acquirer was German entrepreneur Hakan Koç.

In fact, even a U.K.-to-U.K. deal may trigger a filing. The acquisition of U.K.-based Sepura Ltd. by U.K. private equity firm Epiris LLP, which was cleared subject to conditions on July 14, is a clear example.

**U.S. as well as other non-U.K. transaction parties should carefully consider the potential U.K. nexus of their transaction.**

This applies, most notably, to U.S. and other non-U.K. buyers, but also other transaction participants such as financial investors, sellers, etc.

There are many examples of transactions involving U.S. buyers that have recently been called in or closely scrutinized by BEIS.

Notable examples include The WindAcre Partnership LLC-Nielsen Holdings PLC deal, as well as a number of recent deals initiated under the NSIA's predecessor regime, namely those between Parker Hannifin Corp. and Meggitt PLC, Cobham Ultra Acquisitions Ltd. and Ultra Electronics Holdings PLC, and NVIDIA Corp. and Arm Ltd.

As previously highlighted, the NSIA has a broad extraterritorial reach. Although U.K. target companies and U.K.-based target assets are a priority, the U.K. regime also captures international transactions where, despite not being either based in the U.K. or having U.K. subsidiaries, the target:

1. Has activities, e.g., a research and development facility, in the U.K.;

2. Supplies goods or services in the U.K, e.g., through distributors to U.K. customers; or

3. Is or has an asset used in connection with activities carried out in the U.K. or in connection with the supply of goods or services to people in the U.K.

As such, U.S. and other non-U.K. investors and, more generally, U.S. and other non-U.K. transaction participants should be live to the implications of this regime when entering into

international transactions with a potential U.K. angle, particularly if these fall within one of the 17 sensitive sectors that require a mandatory prenotification for share acquisitions.[3]

**Defense is just one of the many sectors.**

As mentioned, there are 17 sectors that the NSIA identifies as requiring a mandatory prenotification of any share acquisition. Those sectors are also highly relevant where the acquisition involves assets and hence may not require a mandatory prenotification.

According to BEIS' first report, and consistent with the cases we have seen so far, alongside the defense sector, military and dual use, critical supplies to the government, data infrastructure and artificial intelligence rank among the top sectors that have been more often and more closely scrutinized by BEIS.[4]

This confirms the intention behind the regime to tackle modern threats involving sensitive and cutting-edge technology.

**Transaction parties should be aware of timing implications for closing.**

The statutory review period for the vast majority of deals is one to three months, and statistics so far show that the majority of deals are cleared within 30 days. However, where substantive issues emerge the review will take much longer as the government has the power to stop the clock in certain circumstances.

Most recently, BEIS has used its extension powers in both the Nexperia-Newport Wafer Fab and the Altice Europe NV-BT Group PLC deals, which were called in on May 25 and 26, respectively, and are still pending review.

**Investment Security Unit decision making is opaque.**

Unlike merger control filings, which involve a very iterative prenotification process with the relevant case team, NSIA notifications are very much a black box: The process is less iterative in the initial stages and any dialogue is very limited.

Parties should also not expect the Investment Security Unit, or ISU — the body within BEIS in charge of the review process under the NSIA — to provide regular status updates during its reviews on timing or on whether it has identified any potential national security concerns or is considering a particular set of remedies.

**Filing is still a piece of advocacy.**

Unlike merger control filings, an NSIA filing is a relatively short form, submitted through an online portal. Nevertheless, it is a piece of advocacy, albeit constrained by the straightjacket of the online form.

This is reflected in BEIS' recent guidance, previously mentioned,[5] that explicitly calls on the parties to use all available opportunities in the form to be as descriptive and as detailed as possible, e.g., by adding relevant information and explanations in the additional information sections included throughout the form, or highlighting any circumstance as to why the case should not raise any concern.

This can help limit the risk of receiving extensive questions from the ISU, potentially at a late stage in the review process, and can help achieve a prompt clearance.

**Overall problematic cases are still rare.**

Government statistics from the first three months of operation of the NSIA — January to March this year[6] — show that out of the 222 filings, only 17 were called in for further review.

The vast majority of these — 196 — were mandatory notifications, which means that it is too early to draw conclusions on enforcement practices for non-notified transactions involving asset or IP acquisitions.

**Behavioral commitments seem to be playing an important role in securing clearance.**

In a relatively high number of cases, parties have secured clearances by providing behavioral undertakings such as ensuring supplies, as in the case of Parker-Hannifin Corp. and Meggitt PLC, and implementing enhanced controls to protect sensitive data, such as in the Epiris LLP-Sepura Ltd. deal.

This marks a stark contrast with the decisional practice in merger cases, where structural remedies are far more commonly accepted.

In view of the first prohibition, we will need to see how this practice further unfolds and whether we will see further prohibitions or disposals.

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[1] https://www.gov.uk/government/publications/national-security-and-investment-nsi-act-market-guidance-notes/national-security-and-investment-market-guidance-notes-july-2022.

[2] https://www.arnoldporter.com/en/perspectives/advisories/2022/06/uk-national-security-and-investment-act-2021.

[3] https://www.arnoldporter.com/-/media/files/perspectives/publications/2022/06/uk-national-security-and-investment-act-2021final.pdf#page=15.

[4] https://www.gov.uk/government/publications/national-security-and-investment-act-2021-annual-report-2022, pages 14 and 18.

[5] https://www.gov.uk/government/publications/national-security-and-investment-nsi-act-market-guidance-notes/national-security-and-investment-market-guidance-notes-july-2022.

[6] https://www.gov.uk/government/publications/national-security-and-investment-act-2021-annual-report-2022.