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UK NSI Regime A New Dawn for UK National Security

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More than 11 months have passed since the UK's National Security and Investment Act 2021 (NSI Act) came into force, creating a stand-alone foreign direct investment review system in the UK for transactions in specified sectors. To date, there has been limited data on the number of interventions and investigations under the NSI Act. However, since the summer, the UK government has issued a total of nine 'final orders' on whether to prohibit or permit a transaction subject to remedies. Interestingly, out of these nine final orders, the government has prohibited two transactions and cleared seven subject to remedies. While it is still too early to identify any emerging trends, we've set out below some of our key observations from these limited decisions to date.

A more interventionist authority

Since the regime came into force, the government has blocked two transactions under the NSI Act, which stands in stark contrast to the previous regime, where the government did not block a single transaction on national security grounds in almost 20 years of its enforcement.

In July 2022, the government issued the first prohibition decision under the NSI Act – namely, the proposed licensing of intellectual property of vision-sensing technology by the University of Manchester to Beijing Infinite Vision Technology Company. In the government's view, the licence agreement would create UK national security risks due to the dual-use application of the underlying technology, and the potential of the technology being used to build defence or technological capabilities. Interestingly, this first prohibition decision was not subject to mandatory notification requirements under the NSI Act; instead, the parties voluntarily notified the transaction to the government, which then blocked it, highlighting the broad scope of the regime.

In August 2022, the government published its second prohibition decision, blocking a Hong Kong investor from acquiring the entire share capital of UK-based Pulsic Limited, an electronic design automation company; the government was concerned that Pulsic's technology could be used to facilitate the building of integrated circuits for possible use in civilian or military applications. Once again, the dual-use application of the technology gave rise to national security concerns.

Innovative clearance conditions

For transactions that have been cleared subject to conditions, the government has not shied away from adopting somewhat interventionist measures to address its national security concerns. In one decision, the government appointed a government observer to the board of the UK target's subsidiary. In other transactions, the government has restricted an acquirer's ability to undertake certain activities outside of the UK (such as research, development and manufacturing capabilities of certain products), or to restrict the influence of the acquirer over appointments of certain staff members within the target company.

It is noteworthy that in all but one remedial decision, the government ordered some form of control or restriction over access to information. In some instances, these protections and restrictions were internal (i.e., preventing companies from sharing information with other companies in the same group), whereas in other cases, they were external (i.e., protecting sensitive information from external unauthorised disclosure).

A country-agnostic regime

The NSI Act is living up to its word of being a country-agnostic regime, with the legislation applying equally to UK investors and foreign investors. This is clear from the nine final orders, which captured investors from China, Hong Kong, the UAE, the UK and the US.

Sectors reviewed are broadly consistent with government's NSI annual report

It is noticeable from the nine final orders that the main sectors in scope continue to be in the 'traditional' sectors of military and dual-use and defence. This is broadly consistent with the data published in the government's annual report from earlier in the year (see our June 2022 client alert on the NSI regime annual report for more information). However, it is equally clear from the blocked decisions that the government recognises the significant role of emerging or advanced technologies, such as artificial intelligence, advanced materials, data infrastructure and energy, and is willing to intervene in those deals to protect UK national security.

Wide range of transactions in scope

While most of the final order decisions concern share purchase transactions, the government is clearly interested in asset deals too; the first prohibition decision concerned an asset transaction and, once again, in a very recent decision, the government cleared an acquisition of assets subject to remedies. The transaction in question concerned the asset development rights in a project seeking to improve the UK's ability to use renewable energy through developing various energy mechanisms and technologies – the 'Stonehill Project'. The government was concerned that the purchaser (Stonehill Energy Storage Limited, majority-owned by a Chinese government department) would acquire the ability to 'direct or control' further development of the Stonehill Project, which could give rise to UK national security risks relating to the security of an important UK electricity asset, as well as services provided to the National Grid. The deal was cleared subject to conditions, but once again demonstrates the expansive nature of the regime and the powers of the government to scrutinise a wide range of transactions on national security grounds.

A new dawn

The last 11 months have been a busy period for the government, with no sign of slowdown. In the new year, we should expect more of the same as the government continues its review of transactions. Given the broad scope of the regime and the government's willingness to take enforcement action, businesses should continue to invest time upfront to assess the likely implications of the UK NSI regime and its potential impact on their deals.

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