

Sending a signal? UK's 'CFIUS' blocks university licensing deal citing national security concerns



On 20 July 2022, the United Kingdom's Business Secretary announced that he had used new powers to prohibit the licensing of certain intellectual property between the UK's University of Manchester and Beijing Infinite Vision Technology Company.¹ This was reportedly the first such instance of such a prohibition decision being made.² Here, Simon Albert sets out the background, facts, and potential implications of this landmark decision.

The National Security & Investment Act ('NSIA')³ came into force in January 2022 and shares similarities with the mandatory filing regime first implemented by the Committee for Foreign Investment in the United States ('CFIUS') in 1988.

The UK government is now able to scrutinise and intervene in certain acquisitions in 17 'sensitive' sectors of the economy made by investors that could harm UK 'national security'. The NSIA allows the UK government to impose certain conditions on an acquisition or, if necessary, unwind or block it.

This has introduced significant new risks into the broader M&A process, in that the new regime provides for potentially lengthy timelines; allows for both 'mandatory' and 'voluntary' filings; is extra-jurisdictional and retrospective; includes civil and criminal penalties for non-compliance; renders non-notified transactions void where they ought to have been notified; and applies whether or not the UK merger control regime is triggered.

In June 2022, the UK government released its first ever annual report on the NSIA, which provided details on the number of filings and other related activities that have occurred under the Act since it came into force.⁴ The Report only covers the period from 4 January 2022 to 31 March 2022, so any trend analysis is necessarily limited.⁵

UK and foreign parties acquiring a 'qualifying entity'⁶ associated with one of the 17



'sensitive' areas must notify the government of the acquisition. Mandatory notifications are triggered where the acquirer's shareholding stake or voting rights increase: (i) from 25% or less to more than 25%; (ii) from

THE FACTS... AND THE WAY IN WHICH THE DECISION HAS ENTERED THE PUBLIC DOMAIN... ARE LIKELY INTENDED TO SEND A SIGNAL BEYOND THE PARTIES IN QUESTION.

50% or less to more than 50%; and (iii) from 75% or less to 75% or more. That is, transactions need not lead to the acquisition of majority control of the target and may even involve the mere acquisition of 'material influence' over the target (i.e., the same low threshold below 25% used in UK merger control law). Asset acquisitions can also be 'called in' by the government for an in-depth review.⁷

There is no legal requirement to notify for acquisitions which

do not trigger a mandatory notification. However, businesses can submit a 'voluntary notification' if they believe the government might be interested in an acquisition due to its national security implications and therefore might commence an investigation after closing.

Following notification using specified 'mandatory,' 'voluntary' or 'retrospective' forms, via a dedicated online IT portal, deals are either cleared within 30 working days or less, or called in, meaning a further in-depth investigation is initiated, lasting 30 working days, subject to a further extension of 45 working days.

Facts

The prohibited transaction involved the licensing of SCAMP-5 and SCAMP-7 vision sensing technology, which can replace traditional chips used in image processing with a 'vision chip.' The latter can provide higher performance for less energy use, according to its developers at the University of Manchester.⁸ This imaging technology may be used to improve computer vision for

autonomous robots, thereby supporting them in navigating difficult terrain. In a funding proposal, the researchers acknowledged the potential 'dual use' nature of the technology: 'Agile micro air-vehicles, and more generally, advanced vision-based navigation systems for autonomous robots will find both civilian and military applications in reconnaissance and search-and-rescue operations.'⁹

The University of Manchester told the UK's *Financial Times* newspaper that it had reportedly 'voluntarily referred this agreement to the UK government.'

In his final order prohibiting the transaction, the Business Secretary noted that 'the University of Manchester and the Acquirer have entered into a licence agreement that enables the Acquirer to use intellectual property relating to SCAMP-5 and SCAMP-7 vision sensing technology to develop, test and verify, manufacture, use, and sell licensed products... The Secretary of State considers that: (i) the technology set out in the licence agreement has dual-use applications; (ii) there is potential that the technology could be used to build defence or technological capabilities which may present a national security risk to the United Kingdom; and (iii) those risks would arise on the transfer of the intellectual property to the Acquirer... The Secretary of State considers that the final order is necessary and proportionate to mitigate the risk to national security.'

The prohibition of the proposed transaction came into force at 16:30 on 20 July 2022.

Potential implications

The recently published annual report referred to the notification of 222 filings in the first quarter of 2022 under the NSIA. Most, if not all, of those cases have not been in the public domain,¹⁰ as the NSIA process is unlike the merger control regime operated by the UK competition authority, which is based on transparency and the publication of all relevant decisions, with only the most confidential information redacted from public documents. Indeed, the recently published 'memorandum of understanding' between the Business Department and the UK Competition and Markets Authority provides for

information sharing between the two bodies, but specifically notes that 'the parties will keep any non-public information including the fact of requests and information contained therein confidential.'¹¹

The fact of this prohibition decision and the way in which it has entered the public domain are likely therefore to be intended to send a signal beyond the parties in question. Two facts stand out – first, the involvement of a British university: given that specific NSIA guidance exists for the higher education sector,¹² this may be interpreted as a signal to the rest of that sector to exercise greater caution in commercialising their R&D

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projects. Secondly, the identity of the commercial partner, being a Chinese entity. That may also send a signal to the market to exercise additional caution when assessing the 'acquirer risks' raised by the national origins of certain counterparties, especially where 'dual-use' technology is found to be involved.¹³

Taken together, the execution risk associated with certain types of transactions with a UK nexus has clearly increased,

with specialist advice being required at an early stage to mitigate or reduce such risks. With the recent publication of further 'market guidance notes'¹⁴ to assist parties potentially affected by the NSIA, including even situations involving the appointment of liquidators or other insolvency measures, and internal corporate reorganisations, now is the time to take the NSIA regime ever more seriously.

LINKS AND NOTES

- ¹ See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1092802/aquisition-scamp5-scamp7-know-how-final-order-notice-20220720.pdf.
- ² See 'First use of UK law to ban foreign deal marks 'stark' trend, warns ex-minister. Jo Johnson says universities need to prepare for 'geopolitical shock' after tech-transfer sale to Chinese firm blocked,' Yuan Yang and Jim Pickard, 21 July 2022, *Financial Times*, at <https://www.ft.com/content/dee8c799-0bbb-4869-96c2-4a733e72bd83>. See also a second reported such prohibition, the acquisition of Pulsic Ltd by Super Orange HK Holding Ltd, dated 17 August 2022, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1098889/acquisition-of-pulsic-by-super-orange-hk-holding-notice-final-order.pdf.
- ³ See <https://www.legislation.gov.uk/ukpga/2021/25/contents/enacted>.
- ⁴ See UK government press release: 'National Security and Investment report shows new system is working: The first report on the UK's new national security and investment system has been published.' Published: 16 June 2022, at <https://www.gov.uk/government/news/national-security-and-investment-report-shows-new-system-is-working>. See also 'National Security and Investment Act 2021: Annual report on the implementation of the National Security and Investment Act 2021.' Published 16 June 2022 at <https://www.gov.uk/government/publications/national-security-and-investment-act-2021-annual-report-2022>.
- ⁵ The next annual report will cover 1 April 2022 to 31 March 2023.
- ⁶ I.e. any entity other than an individual, including a company, a limited liability partnership, any other body corporate, a partnership, an unincorporated association and a trust.
- ⁷ Note that 'qualifying assets include: [...] ideas, information or techniques which have industrial, commercial or other economic value ('intellectual property').' See 'Guidance: Check if you need to tell the government about an acquisition that could harm the UK's national security,' at <https://www.gov.uk/guidance/national-security-and-investment-act-guidance-on-acquisitions>. Note also that 'if through these agreements a person gains control over a university or research organisation's qualifying assets, which can include both tangible moveable and intellectual property, for example where such assets are licensed out (exclusively or non-exclusively) by a university, then this is a qualifying acquisition under the NSI Act.' See the main text and accompanying illustrative examples in 'Guidance: National Security and Investment Act: guidance for the higher education and research-intensive sectors,' updated 4 January 2022, at <https://www.gov.uk/government/publications/national-security-and-investment-act-guidance-for-the-higher-education-and-research-intensive-sectors/national-security-and-investment-act-guidance-for-the-higher-education-and-research-intensive-sectors>.
- ⁸ See 'Scamp5d Vision System and Development Framework: Demonstration Paper,' Jianing Chen, Stephen J. Carey, Piotr Dudek, The University of Manchester, ICDSC '18, 3-4 September 2018, Eindhoven, Netherlands, at <https://personalpages.manchester.ac.uk/staff/p.dudek/papers/chen-icdsc2018.pdf>. See also 'Sensor-level computer vision with pixel processor arrays for agile robots,' Piotr Dudek, Thomas Richardson, Laurie Bose, Stephen Carey, Jianing Chen, Colin Greatwood, Yanan Liu, Walterio Mayol-Cuevas, *Sci Robot.* 2022 Jun 29;7(67):eabl7755. doi: 10.1126/scirobotics.abl7755. Epub 2022 Jun 29, at <https://pubmed.ncbi.nlm.nih.gov/35767647/>.
- ⁹ See 'An Integrated Vision and Control Architecture for Agile Robotic Exploration,' at <https://gtr.ukri.org/projects?ref=EP%2FM019284%2F1>.
- ¹⁰ However, early examples in the public domain include Altice / BT and Nexperia / Newport Wafer Fab. See 'UK government to probe Altice's BT stake,' Anna Gross, Robert Wright and Jim Pickard, *Financial Times*, 26 May 2022, at <https://www.ft.com/content/955e3554-c843-4f06-a981-6869ea43d071>, plus <https://www.gov.uk/government/news/bt-acquisition-called-in-for-national-security-assessment>; and 'UK to review Chinese takeover of semiconductor plant,' Jim Pickard, *Financial Times*, 25 May 2022, at <https://www.ft.com/content/3a3f7c22-138f-4dd5-a3c4-e3ac1f3cca61>, plus <https://www.gov.uk/government/news/newport-wafer-fab-acquisition-called-in-for-national-security-assessment>. Note that the latter case has reportedly entered the further 45 working day 'additional period': 'Decision on Newport Wafer Fab deal hit by fresh delay,' Jim Pickard, *Financial Times*, 6 July 2022, at <https://www.ft.com/content/f75c0a4b-fd93-450c-8430-f4ff53371214>.
- ¹¹ See 'MoU between BEIS and the CMA on the operation of the National Security and Investment Act 2021,' Published 16 June 2022, at <https://www.gov.uk/government/publications/operation-of-the-national-security-and-investment-act-2021-memorandum-of-understanding/mou-between-beis-and-the-cma-on-the-operation-of-the-national-security-and-investment-act-2021>.
- ¹² See 'National Security and Investment Act: guidance for the higher education and research-intensive sectors,' Updated 4 January 2022, at <https://www.gov.uk/government/publications/national-security-and-investment-act-guidance-for-the-higher-education-and-research-intensive-sectors/national-security-and-investment-act-guidance-for-the-higher-education-and-research-intensive-sectors>.
- ¹³ See paragraphs 25 to 29, and especially paragraph 29, on 'acquirer risks,' in 'Notice: National Security and Investment Act 2021: Statement for the purposes of section 3,' published 2 November 2021, at <https://www.gov.uk/government/publications/national-security-and-investment-statement-about-exercise-of-the-call-in-power/national-security-and-investment-act-2021-statement-for-the-purposes-of-section-3>.
- ¹⁴ See 'Guidance: National Security and Investment: market guidance notes,' published 19 July 2022, at <https://www.gov.uk/government/publications/national-security-and-investment-act-market-guidance-notes/national-security-and-investment-market-guidance-notes-july-2022>.