



UK national security block of Newport Wafer Fab acquisition

November 2022

The UK government has announced that it will require Chinese-owned technology company Nexperia BV to sell the 86% shareholding it acquired in July 2021 in the UK's largest semiconductor plant, Newport Wafer Fab (since re-named Nexperia Newport Limited).

This is the first deal to be blocked by the UK government on national security grounds using its powers to retrospectively review deals completed before the National Security and Investment Act 2021 (**NSIA**) entered into force on 4 January 2022. Nexperia has expressed shock and has vowed to appeal the decision.

On 16 November 2022, the Secretary of State for Business, Energy and Industrial Strategy (**BEIS**) announced that Chinese-owned technology company Nexperia BV must divest the 86% shareholding in Newport Wafer Fab (since re-named Nexperia Newport Limited) that it acquired in July 2021. The divestment would leave Nexperia BV with the 14% shareholding in Nexperia Newport that it held prior to the July 2021 acquisition.

This is the third deal prohibited by the UK government since the introduction of the NSIA, which gives the government wide-ranging powers to screen deals for national security concerns.

Background

On 5 July 2021, Nexperia, which already owned 14% of Newport Wafer Fab's share capital and had board representation, acquired the remaining 86% of Newport Wafer Fab's shares, taking its shareholding to 100%.

The transaction was subject to a high degree of public scrutiny and commentary, with various Members of Parliament questioning whether the UK government should intervene to protect critical advanced technology

assets in the UK and raising various national security-related concerns. Indeed, Parliament's Foreign Affairs Committee in a March 2022 report "*Sovereignty for sale: follow-up to the acquisition of Newport Wafer Fab*" was critical of the UK government's lack of intervention in the deal.

In May 2022, the UK government decided to exercise its powers under the NSIA to assess "retrospectively" deals that had completed since 12 November 2020 (over a year before the NSIA actually came into force) and called-in Nexperia's acquisition for an in-depth review. This possibility had been contemplated as early as December 2021, when Lord Callanan (one of the architects of the NSIA) told Parliament in relation to the acquisition that "*We have retrospective powers under that Act and we will not hesitate to act if we need to*".

However, it is notable that the UK government did *not* act for a considerable amount of time after this statement. This is a criticism that Nexperia is highlighting of the NSIA process and the uncertainty that it creates, noting "*the Secretary of State exercised this power under the [NSIA], after previous reviews by BEIS and the UK's National Security Advisor, both of which found no substantive national security concerns...*".

Nevertheless, the UK government has now made its position clear. In its final order, the government identified risks to national security stemming from "*technology and know-how that could result from a potential reintroduction of compound semiconductor activities at the Newport site*".

The government also identified a separate concern that "*the location of the site could facilitate access to technological expertise and know-how in the South Wales Cluster [...] and the links between the site and the Cluster may prevent the Cluster being engaged in future projects relevant to national security*". On this basis, the government now requires Nexperia to divest the 86% shareholding it acquired in July 2021. The timing of and process for that divestment remains confidential.

What next?

Nexperia has expressed frustration with the delay and lack of transparency in the review process. It said it is "*shocked*" by the decision and does not accept the national security concerns raised. According to Nexperia, the UK government chose not to enter into a meaningful dialogue on its concerns and alternative remedies offered by Nexperia to address those concerns were ignored.

Nexperia has confirmed that it plans to appeal the decision, saying,

"The decision is wrong, and we will appeal to overturn this divestment order to protect the over 500 jobs at Newport. This decision sends a clear signal that the UK is closed for business. The UK is not Levelling Up but Levelling Down communities like South Wales [...] we will appeal this wholly incorrect decision".

Nexperia will need to move fast to appeal the decision. The NSIA provides for a right to appeal to the High Court against a final order, but the appeal must be filed within a shortened period of 28 days. Any appeal would be by way of judicial review, which means grounds of appeal are limited to whether the decision is illegal, irrational and/or unfair due to procedural defects. There is no ability to appeal on the merits of the UK government's decision.

Key takeaways

1. The decision is a stark reminder of the impact that the NSIA is having on deal making (as discussed further in our update, **A Snapshot of experience so far**). As countries around the world seek to shore up their domestic semiconductor capabilities and supply chains, the sale of the UK's strategic semiconductor and other critical technology assets to foreign acquirers is likely to continue to attract governmental scrutiny.

2. Nexperia has highlighted a common frustration with the lack of transparency and dialogue in the NSIA review process. This is a familiar complaint from those dealing with NSIA reviews and one that BEIS is aware of (see our **September 2022 update**). There are a number of features of the system that limit transparency: the government will not publicise the receipt (or not) of notifications and in practice there is very limited access to the Investment Security Unit (**ISU**) ‘case team’ – and often no access at all to the relevant decision maker, the Secretary of State – throughout a review. The government is not required to share details of the nature of the national security concern with the parties (as might be expected in a review of this nature) and while final orders made with respect to called-in transactions will be made public, details on the remedies imposed are very thin (and in some cases, non-existent).
3. The decision is also an important reminder of the retrospective nature of the call-in powers under the NSIA. Nexperia completed its acquisition in July 2021, before the introduction of the NSIA on 4 January 2022. However, the UK government is able to call-in acquisitions that completed in the period between 12 November 2020 and 3 January 2022 for up to five years from 4 January 2022 (or, if sooner, up to six months after becoming aware of the relevant transaction).

If you would like to discuss the issues raised in this alert and their potential implications for your business, please get in touch with your usual Allen & Overy contact.

Allen & Overy LLP

One Bishops Square, London E1 6AD United Kingdom | Tel +44 (0)20 3088 0000 | Fax +44 (0)20 3088 0088

Allen & Overy is an international legal practice with approximately 5,600 people, including some 580 partners, working in more than 40 offices worldwide. A current list of Allen & Overy offices is available at [allenoverly.com/global/global_coverage](https://www.allenoverly.com/global/global_coverage).

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy (Holdings) Limited is a limited company registered in England and Wales with registered number 07462870. Allen & Overy LLP and Allen & Overy (Holdings) Limited are authorised and regulated by the Solicitors Regulation Authority of England and Wales (SRA number 401323).

The term partner is used to refer to a member of Allen & Overy LLP or a director of Allen & Overy (Holdings) Limited or, in either case, an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners, and a list of the directors of Allen & Overy (Holdings) Limited, is open to inspection at our registered office at One Bishops Square, London E1 6AD.

© Allen & Overy LLP 2022. This document is for general information purposes only and is not intended to provide legal or other professional advice.

UKS1: 2010551340.1