

UK HIGH COURT UPHOLDS GOVERNMENT ORDER TO DIVEST IN FIRST JUDGMENT ON NATIONAL SECURITY AND INVESTMENT ACT

In the first such judicial review challenge brought against a divestment order made under the National Security and Investment Act 2021 (NSIA), the High Court upheld the Government's decision for LetterOne to divest Upp. The judgment serves as a reminder of the deference that the courts will pay to the Government in national security matters, including under the NSIA regime.

BACKGROUND

In January 2021 a company ultimately owned by LetterOne Investment Holdings S.A. (LetterOne) acquired a UK fibre broadband company that was subsequently renamed Upp. Around a year later, the NSIA came into force and the UK Government decided to review the transaction on national security grounds, the Act having given them the power to review certain transactions even if they had closed before the Act entered into force.

By the time the UK Government came to review the deal under the NSIA, the ultimate beneficial owners of LetterOne were three Russian nationals, two of whom had become subject to sanctions following the 2021 invasion of Ukraine, due to their links with the Russian government. However, the three individuals had resigned from the board of LetterOne and LetterOne had proposed to implement various measures, including structural and legal separation, that were intended to sever links to the sanctioned persons and to show that they could not direct or influence LetterOne's business.

While the Government had informally told the parties that it had no objections to the transaction in 2020, it changed its mind after the invasion of Ukraine. It formally called the deal in for review in May 2022 and, in December 2022, ordered LetterOne to divest Upp entirely. The subsequent divestment resulted in a significant loss for LetterOne.

LetterOne challenged the Government's decision on public law, human rights and procedural fairness grounds. Its fundamental contention was that the Government should have imposed the less onerous behavioural remedies that LetterOne had proposed, instead of ordering divestment. LetterOne's proposed remedies included measures to: (i) restrict access of LetterOne representatives to sites and data of Upp; (ii) limit LetterOne's rights to appoint directors of Upp or to consent to certain contracts entered into by Upp;

Key issues

- The High Court upheld the UK Government's decision to order LetterOne to divest its UK fibre broadband company, Upp, on national security grounds, rejecting LetterOne's proposed behavioural remedies as insufficient to mitigate risks associated with Russian influence.
- The court ruled that the Government was entitled to broadly assess national security risks and was not required to consider alternative statutory powers or engage in extensive consultation with LetterOne, as procedural fairness obligations were met.
- The decision emphasised that the Government could reject proposed remedies if they imposed significant burdens on public resources, and that divestment was a proportionate response given the potential risks and untested nature of the proposed remedies.
- The court found that the refusal to compensate LetterOne for losses from the divestment was lawful, as national security concerns outweighed property rights under the ECHR, and investors should anticipate potential losses in sectors affecting national security.

(iii) keep all critical physical network assets of Upp in the UK; and (iv) create various monitoring, auditing and whistleblowing structures to ensure compliance with the commitments. However, LetterOne maintained that it should have the right to appoint three out of the seven board members of Upp, to propose candidates for other board members and to propose contractors and suppliers for use by Upp.

THE HIGH COURT'S RULING

In a judgment that illustrates the extremely high bar that must be reached for a successful challenge to an NSIA prohibition, the High Court rejected LetterOne's appeal. In particular, it noted that "the court will treat as axiomatic that Parliament has entrusted the assessment of risk to national security to the executive and not to the judiciary" and that when decisions regarding the safety of citizens are taken by democratically elected politicians, "the scope for the intervention of unelected judges is limited".

The most significant findings of the court are summarised below.

The Government can assess national security risks broadly

LetterOne argued that the national security risk in this case was limited, due to the remote likelihood that the Russian government would, through the owners of LetterOne, be able to influence decisions taken by Upp. Any such remote risk, said LetterOne, could have been resolved through the corporate governance changes that they had proposed. The High Court disagreed, stating that the Government was entitled to consider the influence of malign actors exerting influence on LetterOne's owners in any manner of ways, such as deceit, manipulation or other forms of pressure, given that such actors have no intention to abide by UK law and no interest in LetterOne's or Upp's commitment to UK law. Consequently, the Government need not confine itself to assessing the lack of opportunity for influence in the "rigours of company law".

No unfair lack of consultation

LetterOne claimed that it was given insufficient information about the Government's national security concerns to make meaningful representations, and no proper opportunity to rebut concerns about the effectiveness of its proposed behavioural remedies. However, the court ruled that the requirement for procedural fairness did not require the Government to be drawn into a dialogue with LetterOne and that the degree of communication that had taken place satisfied the Government's duties to consult, both under the NSIA and under common law. Those communications, which included lists of remedies that the Government was considering, as well as the final order imposing the remedies, sufficed to inform LetterOne of the gist of the national security risks that the Government considered to arise, so there was no obligation for the Government also to disclose the gist of the internal documents on which it had relied to make its decision.

No need to consider if other statutory powers could address the risk

The High Court ruled that the Government had no obligation to consider whether it might deal with national security risks by using powers under other legislation - such as telecoms and data protection regulatory regimes - that pursued different objectives to the NSIA. And even if it did have such an obligation, those other powers would not have sufficed to address the risk in this case.

Remedies can be rejected if they would impose a significant burden on Government resources

The court ruled that the resources required to ensure that remedies are effective was a relevant factor for the Government to take into account. LetterOne had supplied no cogent argument as to why its proposed behavioural remedies would have not imposed an undue burden on limited public resources for which there are many competing demands. As regards LetterOne's contention that this approach would invariably lead to divestments being preferred because they have minimal monitoring burdens and administrative costs, the court (tellingly) made no comment.

The divestment remedy was proportionate

While the court acknowledged that the divestment order was draconian, it stated that there were powerful reasons to conclude that the Government had struck a fair balance between the LetterOne's rights to peaceful enjoyment of its property under Human Rights law and the interests of national security. The vital importance of the community's interest in national security must be given considerable weight and the court's lack of institutional ability to make its own predictions about future risks to national security warrants a high degree of judicial restraint. Moreover, the statutory test required the Government to consider the proportionality of the measure and it had clearly done so.

LetterOne's assertions that it should have the right to appoint directors to Upp's board, to put forward candidates for other directors and to propose contractors for Upp to use demonstrated, in the court's view, that there would remain a risk that LetterOne would retain influence over Upp if the behavioural remedies were accepted. It was also relevant that the proposed remedies were untested and that Upp's fibre network was likely to grow very significantly over the coming decades. Ultimately, the court applied the test of whether the protection of national security could be attained equally well by LetterOne's proposed remedies, and concluded the Government was entitled to reach its conclusion that nothing less than divestment was necessary and proportionate to quell the risk of Russian State influence on Upp.

Failure to provide compensation was not unlawful

While the NSIA allows the Government to grant "financial assistance" in connection with its national security reviews, the Government's refusal to compensate LetterOne for losses resulting from the forced divestment was not an unlawful breach of its Human Rights, namely the right to protection of property rights under the European Convention on Human Rights (ECHR). Though the protection under Article 1 of Protocol 1 of the ECHR was engaged, the court found that national security prevailed over LetterOne's financial interests and that the Government should be afforded a wide margin of discretion in relation to whether a party operating in a way that is contrary to the interests of national security ought to be reimbursed for financial losses resulting from a divestment ordered under the NSIA. Large-scale investors cannot be surprised that they may lose money on investments that threaten national security: "the risk of such losses is ultimately part of the economic landscape for those operating in the alt-net sector or other parts of national infrastructure. That geopolitical crises may affect the viability of investments in a way that cannot be recouped should not come as a surprise to sophisticated economic actors."

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