The National Security and Investment Act 2021

The National Security and Investment Act 2021 ("NSI Act") came fully into force on 4 January 2022, setting up a new regime for UK government scrutiny of acquisitions and investments. The NSI Act applies retrospectively to transactions from 12 November 2020.

The NSI Act is intended to modernise UK Government's powers to investigate and intervene in investments, mergers and acquisitions and other deals to protect national security as a foreign-direct investment (FDI) regime, while applying to UK and non-UK acquirers alike. It replaces the national security element of the Enterprise Act 2002. The regime is a hybrid mandatory and voluntary notification regime, supported by call-in powers on national security grounds.

The first order under the NSI Act blocking an IP licence was issued in July 2022, preventing the licensing by a Chinese company from the University of Manchester of know-how relating to vision sensing technology. Although this is so far the only order made to prevent the acquisition of an asset, it has already proven a cause for serious concern in IP licensing because of the implications the decision holds for the range of IP licences that may be affected by the NSI Act. Following this decision, a much wider range of IP licensing activity than was previously thought to be affected should be reviewed for possible notification under the NSI Act.

A proposed transaction triggers the application of the NSI Act if it involves the acquisition of a specified level of control over certain qualifying entities or qualifying assets in certain relevant sectors.

There are currently 17 relevant sectors of activity (prescribed by statutory instrument). The sectors having perhaps the greatest impact are probably energy, communications, and computing hardware; the remaining sectors cover a wide range of other activities (advanced materials; cryptographic authentication; suppliers to emergency services; advanced robotics; data infrastructure; artificial intelligence; defence; civil nuclear; synthetic biology; military and dual use; quantum technologies; critical suppliers to the government; satellite and space technology; transport).

"Trigger events" are broadly defined: for instance acquiring 25%, 50% and 75% of votes or shares in a qualifying entity, or acquiring a right in or in relation to a qualifying asset. Qualifying entities include UK companies and foreign companies that supply goods or services to persons in the UK. Qualifying assets include land (not limited to land in the UK), moveable property, and

"ideas, information or techniques which have industrial, commercial or other economic value" such as trade secrets, source code, plans, drawings, and software.

Notification under the NSI Act is mandatory before certain triggering events, and is the acquirer's obligation. At present, this does not extend to asset acquisitions (but could be so extended by statutory instrument), consistent with the comparatively high level of awareness of compulsory notification within M&A practitioners and the comparatively low level of awareness elsewhere including in licensing. If a mandatory notification is required, the transaction must be approved by the Secretary of State ("SoS") before completion. Failing to comply with this requirement renders the transaction void, and exposes the acquirer to significant criminal and civil penalties (up to the greater of 5% of worldwide turnover or £10m).

For non-triggering events, voluntary notification is available where the transaction may raise national security concerns. This is important because of the government's "call-in" powers, under which the SoS can call in transactions for review on national security grounds, for up to five years after completion (or without time limit, following default in mandatory notification). A voluntary notification may be made to obtain a clearance protecting against call-in. It is interesting to note that the University of Manchester case, outlined above, appears to have arisen following a voluntary notification.

By avoiding any restrictive definitions, the NSI Act provides the government with a very flexible range of responses to the complex and changing threats to national security. The flip side is that a lack of definitions leaves businesses exposed to wide-ranging uncertainty over a range of different investments as national and international politics and economics change. The uncertainty is also affected by the government's indication that it will keep the scope of mandatorily notifiable transactions under review, and possibly narrow or broaden it.

Decisions on notifications are taken by a new operational unit: the Investment Security Unit (ISU). The government's impact assessment accompanying the NSI Bill on its first publication estimated 1,000 to 1,830 notifications annually. This expectation was in line with real experience at least over the first three months of the Act's operation (figures for that period being reported in the first Annual Report on the NSI Act, published in June 2022).

According to the first Annual Report, notifications were, on average, either accepted within 3 days or rejected within 5 days (slightly longer for voluntary notifications). Once a notification is accepted, the SoS decision on clearance has to be made within 30 days. Transactions that are not cleared within that period are called in for a full national security assessment, requiring a case-by-case review of the entity or asset involved, the identity of the acquirer, and the type and extent of control.

Where a call-in notice is issued, the SoS must determine whether to impose remedies or clear the transaction, within an initial assessment period of 30 working days, extensible by another 45 working days (and by any other period by agreement with the acquirer). Taken together with the initial screening period, this can mean up to 105 working days from notification to

clearance. Any SoS requests for information, and the periods for response to them, may extend the process.

The NSI Act's impact assessment estimated that 70 to 95 cases would be called in annually, and the first Annual Report is in line with that (17 transactions having been called in during the quarter-year reporting period). The impact assessment also estimated that around ten transactions will be subject to remedies each year. In reality, this appears to be a substantial underestimate, with the real rate being nearly double the estimate.

The SoS is required to keep final orders under review, which provides a route for parties to address concerns and ask for the order to be varied or revoked.

The SoS is required to publish notices about final orders, and may publish notices about notifications and clearances. The possible effects of Freedom of Information requests should also be considered. It will therefore be prudent to consider how information is presented and to be clear what is confidential, and why.

Note that while judicial review is available in relation to the NSI Act decisions, the NSI Act imposes a highly accelerated timetable: a request for JR must be filed within 28 days instead of the usual 3 months.

In relation to its impact on IP licensing, the NSI Act clearly has implications for licensing where any element of know-how is involved. That may include for instance the right often found in patent licences that enables the licensor to call for licensing back of any improvements to the licensed technology made by the licensee. Consequently consideration of the NSI Act should now form a standard part of IP licensing practice; businesses and their commercial partners (including universities) should have processes for identifying transactions requiring NSI review, including a broad range of IP commercialisation such as licensing or monetisation, including consideration of the counterparty identity, the level of control over IP, and how the IP is connected with the 17 sensitive sector activities.

Given the uncertainties over the scope of the NSI Act, and the potentially severe downside risk, it is likely that there will be a growing number of precautionary notifications of IP licences, at least until NSI Act practice becomes more established or UK government advice gives firm reassurances on circumstances where notification is not required. It is hoped that NSI Act guidelines will become clearer and more constrained, with a clearer picture emerging of when notifications are not needed.

One specific issue is whether notification can be required on the licensing or disposal of pure patent rights. While it is arguably not necessary to notify such transactions, there remains room for doubt. The relevant definition in the Act refers to "ideas, information or techniques which have industrial, commercial or other economic value" and provides a list of various items ("trade secrets, databases, source code, algorithms, formulae, designs, plans, drawings and specifications, software"). That list does not expressly include "patents" and – at least to an IP

lawyer – it appears to be a list of things that are different in kind to patent rights (i.e., not statutory rights to control identified and publicly-disclosed technology) However, the NSI Act provides the government with great flexibility in applying and broadening the legislation, and it may be prudent not to rely on legal niceties of IP law to conclude that patent licences are necessarily outside the scope of the Act.

It is worth putting the NSI Act in the international context, and in particular by contrast with the much longer-established "CFIUS" regime operating in the US (the name deriving from the responsible interagency US government Committee on Foreign Investment in the United States). While CFIUS has a long pedigree (celebrating 50 years of operation in 2025), its jurisdiction was substantially expanded in 2018 and saw a corresponding large jump in the examined transactions; the total number of filings reviewed in 2021 was around 400, leading to around 130 notifications. Given the relative size and positioning of the UK and US economies, this may indicate that the current regime in the UK is imposing proportionally greater requirements on industry than its established US counterpart.

Dr Justin Watts, Partner, Wilmer Cutler Pickering Hale and Dorr LLP, London
Dr Bobby Mukherjee, Chair of IP Federation Trade Working Group