RESPONSE OF THE CITY OF LONDON LAW SOCIETY COMPETITION LAW COMMITTEE TO THE GREEN PAPER ON THE GOVERNMENT'S REVIEW OF THE NATIONAL SECURITY IMPLICATIONS OF FOREIGN OWNERSHIP OR CONTROL

This response is submitted by the Competition Law Committee of the City of London Law Society (**CLLS**) in response to Questions 1 to 6 (the short term reforms) of the Green Paper on the Government's review of the national security implications of foreign ownership or control, published on 17 October 2017 (the **Green Paper**).

The CLLS represents approximately 15,000 City solicitors through individual and corporate membership, including some of the largest international law firms in the world. The Competition Law Committee comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions and regulatory and governmental bodies in relation to competition law matters.

The Competition Law Committee members responsible for the preparation of this response are:

- Robert Bell, Partner, Bryan Cave LLP (Chairman, CLLS Competition Law Committee);
- Angus Coulter, Partner, Hogan Lovells LLP;
- Ian Giles, Partner, Norton Rose Fulbright LLP;
- Jenine Hulsmann, Partner, Clifford Chance LLP (Chair, Working Party);
- Nicole Kar, Partner, Linklaters LLP;
- Dorothy Livingston, Consultant, Herbert Smith Freehills LLP;
- Samantha Mobley, Partner, Baker McKenzie LLP;
- Nigel Parr, Partner, Ashurst LLP;
- Alex Potter, Partner, Freshfields Bruckhaus Deringer LLP; and
- Isabel Taylor, Partner, Slaughter and May LLP.

1. SUMMARY

- We consider that the Government's proposed use of secondary legislation to implement the short term reforms is inappropriate, as it will necessarily expose small merging businesses to the risk - with its consequent impact on competition review as well as public interest review - of a competition review and disproportionate associated costs for businesses and taxpayers. Given that the Government's stated objectives relate solely to national security concerns, no case has been made that changes are required to the general merger control regime. We also question the case for intervention in the short term on national security grounds, given the cost and

uncertainty created by the changes and the potential negative impact on foreign investment (for which the Government has stated support).

- In addition, the imposition of those costs is unnecessary as it would be possible to achieve the Government's objectives through changes to the special public interest intervention regime. Parliament's clear intention in enacting the Enterprise Act 2002 (**EA**) was that transactions raising potential national security concerns, but not competition concerns, should be addressed through the special public interest regime, and the Government should therefore prioritise the primary legislation that is required to do so. For the reasons set out below, we do not consider that there is sufficient urgency to merit the proposed use of inappropriate secondary legislation. If the Government proceeds with the short term reforms, we recommend that it explores with the CMA the possibility of an amendment to the CMA's policy on *de minimis* mergers to add mergers that are caught by the lower thresholds as a category of transaction that the CMA will presume to be of insufficient importance to justify a reference on competition grounds.

- We acknowledge that there may, in some cases, be national security justifications for intervening in acquisitions of businesses with products that fall within the scope of the military or radioactive export control lists. However, the Government should recognise that this will create significant transactional costs for small, non-exporting businesses that may not be aware that their products are covered, many of which will not raise any national security concern. We also recommend that products covered by the dual-use list should not be included within the scope of the short term reforms, as they are less likely to give rise to national security issues and their inclusion would give rise to greater costs. Instead, the Government should assess the operation of the short term reforms (if implemented) after a period of their operation to determine whether dual-use products merit inclusion in the longer term reforms, on the basis of more complete information and more detailed consideration. We also recommend that approach for new and temporary additions to the relevant lists, given that their inclusion would give rise to significant unpredictability for small transactions.

- The proposed definitions of advanced technology are excessively wide. We suggest below some ways in which they could be tightened to focus more narrowly on the relevant potential national security concerns.

- We are concerned that the proposed turnover threshold will catch transactions without a sufficient nexus with the UK and therefore recommend that only turnover relating to the products falling within the relevant categories of business activities should count towards the satisfaction of that threshold. Alternatively, the Government might consider a threshold based on the value of the target's UK assets. The proposed share of supply threshold – lacking any requirement for a competitive overlap in the parties' activities – seems to us to be inappropriate in the context of a merger control regime and, in any event, redundant, for the reasons set out below. It should therefore not be implemented, or should at least be significantly raised.

- Transparent and detailed guidance on the operation of the proposed regime will be vital. This should cover jurisdiction, procedure (and in particular, who will be the responsible decision maker) and the approach to substantive assessment. Our response highlights key issues that should be covered in this respect.

- We consider that the impact assessment accompanying the Green Paper does not take into account certain important costs, such as those relating to the legal costs of carrying out competition self-assessments and those relating to determining the application of the military and dual use lists. It also does not provide sufficient information to assess the likely number of transactions that would be affected by the proposals.

- The Government should be mindful of the strong correlation between restrictiveness of foreign investment rules and the extent of foreign investment. We have some concerns that the wide scope of the regime, and the relatively vague explanations of the national security issues that the Government is seeking to address, create possibilities for the proposed regime to be used for purely protectionist purposes. Such protectionism would be self-defeating, as it could lead to prospective technology start-ups choosing other, more open jurisdictions in which to commence their operations.

2. INAPPROPRIATE USE OF SECONDARY LEGISLATION

2.1 The Green Paper states that the objectives behind the reforms relate solely to dealing with ***national security*** issues and not because of concerns about how competition is working in the relevant markets, or for any other public interest rationale. Parliament provided for a specific regime in ss.59-66 EA – the special public interest regime – to allow for mergers below the regular merger control thresholds to be scrutinised solely for public interest reasons and to exclude jurisdiction to review such transactions on competition or other public interest grounds.[1] Accordingly, the appropriate mechanism for implementing the reforms would be through amendment of this special public interest regime. Instead, however, the Green Paper proposes to implement the reforms by amending the regular merger control thresholds in s.23 EA, through the use of the powers conferred by ss.28(6) and 123 EA.

2.2 In our view, such a use of those powers would be inconsistent with the intention and spirit in which Parliament conferred them. In addition to the fact that Parliament clearly intended the special public interest regime to be used for national security reviews falling below the regular thresholds, the wording of ss.28 and 123 EA indicate that the powers to amend the merger control thresholds were intended for the purpose of regulating mergers on ***competition*** grounds:

2.2.1 s.28(6) refers to amendment of "<u>the</u> sum for the time being mentioned" (emphasis added) in s.23. In our view, the rationale for this power is to allow the singular turnover threshold – the purpose of which is to focus on companies with economic significance – to be adjusted to take account of developments in the UK economy, such as inflation, or if it proved that a significant number of harmful anti-competitive mergers were escaping scrutiny altogether;[2]

---

[1] See the Hansard debate at SC Deb (B) 30 April 2002, cols 326-327 and HL Deb 15 October 2002 vol 639 col 793.

[2] See the Hansard debates at SC Deb (B) 30 April 2002, col 359 and HC Deb 30 October 2002 vol 391 col 929.

2.2.2 s.123(3) requires the Secretary of State (**SoS**) to have regard to the desirability of any new condition operating by reference to the degree of commercial strength of the merging parties. This emphasises that the purpose of the s.23 jurisdictional thresholds is to capture transactions raising potential competition concerns and was intended to be adjusted in response to changes in the economic environment.[3] In our view, the Green Paper's use of the test to capture transactions without any potential competition issues at all (because the SoS is concerned only national security issues), subverts the purpose of s.23; and

2.2.3 whilst s.124(2)(a) allows orders to make different provision for different cases or different purposes, that is a general provision, and should not be construed as overriding the intention and purpose underlying the specific powers in ss.28 and 123.

2.2.4 If the Government proceeds with the proposed short term reforms, it would expose a large number of wholly insignificant transactions to the costs (for both businesses and taxpayers) associated with a potential review on competition grounds, as recognised by the impact assessment accompanying the Green Paper. Those costs would not be limited to those transactions that are called by the SoS for a national security review (for which the CMA would be required to carry out a competition review). Parties to any transaction falling within the extremely broad scope of the new regime will need to incur the legal costs associated with assessing the potential competitive impact of the transaction and whether to make a filing. This includes an assessment of vertical or conglomerate competition concerns in mergers between non-competitors that currently escape jurisdiction due to the absence of an increment in the share of supply.

2.2.5 As the impact assessment notes, transactions falling within the scope of the new regime are highly unlikely to raise competition concerns, so those costs will be largely wasted. However, the fact that such transactions are unlikely to give rise to such concerns does not mean that the costs of verifying this can be avoided. As the thresholds will catch transactions involving targets with very low levels of commercial activity in the UK, those legal and familiarisation costs will represent a disproportionate percentage of their turnover and profits. The use of the powers under ss.28 and 123 for a purpose unrelated to the regulation of competition may increase the risk of appeal against decisions made using these new powers.

2.3 It seems to us that the only conceivable reasons for exposing businesses and taxpayers to these unnecessary and disproportionate costs are to avoid the Parliamentary time that would be required to effect the changes to the special public interest regime through primary legislation, or to implement a temporary "sticking plaster" that can be used to carry out national security reviews pending the passing of primary legislation. We do not consider the reforms to be sufficiently urgent to justify that approach. In particular, we consider it unlikely that any transactions raising national security concerns would slip through the net in the time it would take to implement primary legislation, particularly if that legislation is appropriately prioritised. The current power, under the special public interest regime, to review transactions involving government contractors (including businesses that have previously worked

[3] See the Hansard debate at HL Deb 15 October 2002 vol 639 cols 793-794.

for the Government) is already likely broad enough to capture relevant transactions. Moreover, the Government has not identified in the Green Paper or impact assessment any transactions raising potential national security concerns that it considers to have escaped review and itself does not appear to consider the reforms to be particularly urgent, having announced its intention to introduce them over a year ago, in September 2016.

2.4 Consequently, our view is that the Government should refrain from using secondary legislation to implement unsubstantiated reforms and should instead prioritise the "longer term" reforms – amending the EA by primary legislation – that will allow the use of the special public interest regime, or a similar, entirely separate, regime. That would also allow for a sufficient period of consultation (longer than the four week period of the current consultation) to address and consider properly the complex technical issues regarding the appropriate definition of the advanced technology sector.

3. RESPONSES TO GREEN PAPER QUESTIONS

Question 1: Do you think the proposed definitions for the dual-use and military and advanced technology sectors provide sufficient clarity and certainty to businesses and investors?

3.1 We recognise that for many items and technology on the military, dual use and radioactive source lists, there is a national security justification in ensuring that they do not (if located in the UK) fall into the hands of a hostile State actor. However, for many items on the list there is no such justification. In particular:

3.1.1 items which are on the EU Dual Use List but which do not appear in Annex IV to Council Regulation (EC) No. 428/2009. These items may be transferred within the EU without restriction and it therefore seems to us inappropriate to include such items, as by their nature they cannot be particularly sensitive from a national security perspective; and

3.1.2 items on the UK Dual Use List the export of which is prohibited only to certain territories. For example, marine vessels, related equipment, components, software and technology are prohibited for export to Iran under PL9008 of the UK Dual-Use List, but would not give rise to significant national security risks if located in the UK and under the control of a hostile State actor.

3.2 We therefore submit that the Government should produce a separate list, containing only those items for which there could be genuine national security concerns arising from inbound foreign investment and selected from the following lists: the UK Military List; Annex IV items on the EU Dual-Use List, items on the UK Dual-Use List which are subject to intra-EU transfer restrictions; and the UK Radioactive Source List.

3.3 The clarity and certainty that may be derived from the use of these lists appears to be over-stated. In practice determining whether a particular item or technology falls within the listed categories of products can be complex. In difficult cases, the process of ascertaining whether an item is covered by export restriction, in consultation with

BEIS and other government departments with the relevant expertise, can take a year, or longer. In particular, while the criteria used to determine product classifications are published, the way that they are applied by Government is not and can therefore be unpredictable.

3.4 In addition, many of the small business that will be caught by the new regime will not be exporters and will therefore never have had cause to assess whether their products fall within any of the listed categories. Doing so as part of transactional due diligence will add significant legal and consultancy costs that will often be disproportionate to the value of the transaction.

3.5 We therefore recommend that any move to use the military, dual use and radioactive source lists as a basis for determining jurisdiction should be accompanied by an appropriate increase in the Government resources that are available to businesses to assist in the determination of whether items are covered by export controls, so that an answer can be obtained quickly and at minimal cost.

3.6 As regards the dual-use lists, these cover a wide range of commercially available items, such that their inclusion will significantly increase the costs of the proposed reforms for businesses and taxpayers. Items on the list are also, in general, less likely to give rise to national security concerns in the context of inbound investment than those on the military and radioactive lists. We therefore question whether it is appropriate to include them as a basis for jurisdiction under the short term reforms. A more proportionate approach, in our view, would to include only the military and radioactive source lists within the short term reforms and to assess after a period of time whether it is desirable to include also dual-use products as part of the proposed longer term-reforms, taking into account information gleaned during the initial period of operation of short term regime.

3.7 Finally, paragraph 87 of the Green Paper proposes that the new regime will apply to businesses "that design or manufacture items or hold related software and technology" that is specified on the relevant military and dual-use lists and that this would not be limited to businesses that currently export those products, software or technology. In keeping with the objective of regulating the acquisition of UK businesses with the relevant expertise and intellectual property (paragraph 84 of the Green Paper), the definition should make it clear that it is satisfied only to the extent that a business designs, manufactures or holds the relevant items or related software and technology in the UK (i.e. to the extent that UK export controls apply) and will not apply to the acquisition of a foreign target that merely exports the relevant items to the UK.

3.8 As regards the definition of advanced technology, see the response to question 3 below.

Question 2: Do you think the scope of the new thresholds should reflect updates to the relevant Strategic Export Control lists? Do you think that enterprises that design or manufacture items subject to temporary export controls should also be in scope?

3.9 The inclusion of updates and temporarily-controlled items would create significant additional uncertainty for businesses. The process for adding items (whether permanently or temporarily) is opaque and in many instances businesses will not

become aware that one of their products has become subject to export control (and therefore EA jurisdiction) until after it has been added to the relevant list. The consequent risks are that transactions could be called in for a national security review at a late stage in the process and that, in some cases, Government adds items to the list for the sole purpose of obtaining jurisdiction to review a particular transaction. That would result in a degree of unpredictability that could not be addressed in merging parties' contractual arrangements.

3.10 Again, it seems to us that these risks militate against the inclusion of new and temporary items in short term reforms, and in favour of a period of assessment of the operation of the regime once implemented on the basis of the lists as they currently stand with a view to determining, on the basis of more complete information and more detailed analysis, whether new and temporary items should be included as part of the longer term reforms.

3.11 If, instead, the Government does include those items as a basis for asserting jurisdiction, we recommend that for any given transaction, the version of the list that is used to establish jurisdiction should be that which applies on the date that the merging parties sign a binding sale and purchase agreement, or launch a public takeover offer.

Question 3: Are the proposed definitions sufficiently focused on sectors where national security concerns may arise? If not, what amended definitions would help achieve this?

3.12 The proposed definition relating to multi-purpose computing hardware is extremely wide. Almost all computing hardware is multi-purpose, such that any owner or creator of intellectual property (**IP**) relating to computing hardware will be caught.

3.13 While we recognise that businesses with activities relating to "roots of trust" may pose specific cyber-security risks, the reasons for focusing on owners or creators if IP rights relating to computer hardware are less clear to us. The Green Paper states that it is because there are ubiquitous goods with the potential to be directed remotely by a hostile foreign actor and because mergers involving businesses in the advanced technology sector might afford such actors knowledge or expertise that could be used to undermine national security.

3.14 Consequently, the desire to intervene in acquisitions of small technology innovators seems driven by the concern that their technology might conceivably become ubiquitous at some point in the future. In our view, that is too speculative a basis for intervention.

3.15 Moreover, most computing hardware IP rights (including for ubiquitous hardware) are already owned by foreign businesses, so it is not evident that intervening in the takeover of a UK holder of such IP rights would materially add to the national security of the UK.

3.16 If ownership of computing IP is retained as a business activity that will become subject to the new regime, we recommend that the definition is tightened to focus more narrowly on the Government's specific national security concerns. In particular:

3.16.1 the concerns outlined in Chapter 3 of the Green Paper relate almost entirely to critical infrastructure. Accordingly, we submit that businesses active in the ownership or creation of computing hardware IP rights should be subject to the new regime only to the extent that the hardware to which those IP rights pertains is used in the UK's Critical National Infrastructure, as defined by the Centre for the Protection of National Infrastructure;

3.16.2 given the concern to control the ownership of IP relating to ubiquitous computing hardware, the definition should incorporate some objective measure of ubiquity, for example by reference to the volume or value of sales or number of users; and

3.16.3 enterprises should be excluded from the definition if they have mere ownership of defined IP where its creation and application is outsourced to an enterprise that is not under common control with the owner. For instance, a manufacturer of a smart fridge will likely buy processors and outsource their programming, and will not therefore be in a position to exploit any resulting IP to the detriment of national security.

3.17 As regards the design, maintenance or support of the secure provisioning or management of roots of trust of multi-purpose computing hardware, this appears to us to be a broadly sensible definition, provided it is suitably clarified. In particular, we assume it is intended to refer to a set of functions within the trusted computing module that the computer's operating system always trusts and can therefore be exploited to introduce a back door or other cyber security vulnerability. We assume the definition is not intended to refer to Trust Service Providers within the meaning of Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market, although this should be confirmed.

3.18 The scope of relevant products for quantum-based technology as including those that are "for use in" quantum computing is also excessively broad, catching any input no matter how immaterial. We recommend limiting the definition to products that are manufactured or designed for the predominant purpose of use in quantum computing or communications, or that are essential inputs for such activities.

3.19 Finally, while we will comment in more detail on the proposed long term reforms in the subsequent consultation, we note at this stage that the proposed definitions are too broad and vague to form the basis for a mandatory filing obligation.

Question 4: Do you agree that the new jurisdictional tests in the Enterprise Act 2002 for businesses in the above defined sectors should be: (i) a turnover of over £1 million, rather than £70 million as now; and/or (ii) a merger or takeover involving a target with 25% or more share of supply (i.e. with no need for an increase), or which meets the current test of creating or enhancing a share of supply of 25% or more.

3.20 We have two reservations with the proposed thresholds.

3.21 First, the turnover test does not provide for a sufficient jurisdictional nexus with the UK. Paragraph 84 of the Green Paper indicates that the Government's objective is to be able to intervene in acquisitions of UK businesses with the relevant expertise and

IP. However, the thresholds, as drafted, would also allow for interventions in acquisitions of foreign businesses that carry out the relevant activities outside the UK but which sell into the UK. In particular, it seems that the proposed £1 million turnover threshold could be satisfied by sales of any products or services, not just those relating to military/dual use products or advanced technology, such that a business with overseas activities in those areas and unrelated sales in the UK would be caught. In order to ensure an appropriate UK nexus, we submit that only turnover relating to sales of the relevant products or services in the UK be taken into account in determining whether the £1 million threshold is met. Alternatively, the Government might consider a threshold based on the value of the target's UK assets.

3.22 Second, the proposed market share threshold seems to us to be inappropriate in the context of a merger control regime, since under the current proposals there is no requirement for any overlap between the activities of the parties, unlike the current thresholds which require there to be an increment to the share. In any event, this threshold appears to be largely redundant, as it will be relevant only to acquisitions of businesses with insignificant commercial activities, i.e. those with less than £1 million of turnover in the UK. Moreover, the share of supply test is inherently subjective and requires merging parties to incur significantly more legal costs to assess its application than is the case for the objective turnover test. Those costs will be disproportionate for businesses with turnover of less than £1 million. We therefore recommend that this threshold is not implemented and that the Government relies instead on the amended turnover threshold. Failing that, the Government should consider setting the share of supply threshold at a higher level than 25%, given that the putative concern is the availability of alternative sources of supply, not whether there is a substantial lessening of competition. In our view, a 50% share of supply threshold would be more appropriate for that purpose.

3.23 As set out in the introduction to this response, we consider that these lower thresholds should apply only to national security review, and not to competition review.

Question 5: Would Government guidance in relation to its views about the amendments, including their solely national security focus, be useful? If so, what would it most helpfully cover?

3.24 Guidance in relation to the proposed reforms would be not only useful, but necessary. It will also be important that such guidance is issued for consultation before implementation of the proposed reforms. In addition to the clarifications of the jurisdictional tests that are discussed above, such guidance would need to cover both the Government's approach to the substantive assessment of national security concerns, the relevant procedures for calling in and carrying out such reviews and crucially who the responsible decision maker will be.

Substantive assessment

3.25 Given the extremely broad definition of activities that come within the relevant definitions (in particular those relating to computer hardware) and the relatively vague descriptions in the Green Paper of the specific national security concerns that may be raised by transactions that would be caught by the new regime, the guidance should cover, at minimum:

3.25.1 detailed explanations of the specific national security concerns and how the Government proposes to identify technology that it considers may become sufficiently ubiquitous to warrant a national security review;

3.25.2 how the Government's assessment is likely to vary according to whether the acquisition is:

(a) by a State owned enterprise;[4]

(b) by investors from a jurisdiction that is a potentially "hostile actor", including the criteria that will be used to determine whether that is the case and an indication of whether investors from some jurisdictions will be assumed (in all or most circumstances) not to be hostile;

(c) a business with technologies or products that are used in Critical National Infrastructure; or

(d) a foreign-to-foreign transactions (e.g. where the UK target forms part of a multinational business or where the target has no assets or employees in the UK);

3.25.3 other factors that will tend to indicate the absence of national security concerns, such as the availability of alternative technologies, sources of supply and/or expertise within the UK;

3.25.4 illustrative examples of various transactions raising the different types of national security concern; and

3.25.5 the remedies that the Government would normally accept for each of the different kinds of national security concerns that are identified, emphasising that in most cases behavioural remedies, such as restrictions on the flow of information or IP, will be the most proportionate and appropriate way to mitigate those concerns.

3.26 In addition, we recommend that the Government explores with the CMA the possibility of an amendment to the CMA's policy on *de minimis* mergers (as set out in "Mergers: Exception to the duty to refer in markets of insufficient importance" (CMA64)) to add mergers that are caught by the lower thresholds as a category of transaction that the CMA will presume to be of insufficient importance to justify a reference on competition grounds, even if the existing criteria that it applies to determine whether to exercise its *de minimis* discretion are not met.

Procedure

3.27 A transparent and predictable procedure will be critical to ensure that any new foreign investment regime does not unnecessarily deter such investment. In this respect, it should not be assumed that the current procedures for review of transactions involving

[4] See, for example, Canada's guidelines on "Investment by state-owned enterprises — Net benefit assessment" (available at https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#p2) which provide for a more rigorous review of acquisitions by SOEs, which are defined as "an enterprise that is owned, controlled or influenced, directly or indirectly by a foreign government".

Government contractors will be appropriate for a wider category of transactions that raises various different types of potential national security concerns and in which various Government stakeholders may have an interest.

3.28 Procedural guidance should cover the following issues:

3.28.1 Identification of the decision maker: Merging parties must be able to identify the relevant decision maker, so that they can seek early engagement if their transaction raises potential national security concerns. The Guidance should therefore specify which Government Ministers and departments merging parties should approach for each different type of transaction. In that respect, the Government should reflect carefully on which departments have the appropriate expertise to carry out a national security review specifically in relation to inbound investment.

3.28.2 Access to the decision maker: Guidance must also explain how merging parties may access the relevant decision-maker. In particular, if merging parties are unable to verify and understand the precise concerns of the decision maker, it will be impossible for them and their legal advisers to gather information that is responsive to those concerns. For the same reasons, guidance should also be provided on access to the Investment Security Group that is described in paragraph 103 of the Green Paper, as it appears that this body will have an important and influential role in the decision-making process.

3.28.3 Due process: Procedures under the short term reforms will result in a decision under the EA that is subject to judicial review by the Competition Appeal Tribunal (**CAT**), by virtue of s.120 EA.[5] It should therefore be clarified that the SoS will respect the principles of due process that have been developed by the CAT and other courts in respect of such decisions, such as fairness, equal treatment, the right to a fair hearing (including disclosure of the gist of the case which the merging parties must answer), the duty to consult and the duty of candour during review proceedings.

3.28.4 Procedure: a summary of the procedural steps, information gathering powers and notification requirements and review timetable under the EA.

3.29 Confidential guidance: Given the sensitive nature of national security reviews and their potential impact on the UK's international relations with third countries, we anticipate that the Government may not be inclined to publish detailed guidance on its approach to certain substantive issues. If so, it will be important to make available a procedure for obtaining confidential and timely guidance from the Government on a case-by-case basis, and that appropriate Government resources are made available for that purpose. Given that potential transactions may not be in the public domain and

[5] While we will respond to the longer term proposals separately, it seems to us that the CAT will also be the appropriate appellate body for any regime under which decisions are taken solely on national security grounds. While the CAT's primary purpose is to review decisions relating to competition, it has the advantage of being much quicker than the Administrative Court.

information in relation to these transactions will be highly commercially and/or market sensitive, the confidentiality of the process will need to be ensured. It is unclear how this will be achieved with the proposed cross-Government approach.

3.30 Finally, while we will comment in more detail on the proposed longer-term reforms in response to the separate consultation, our initial view is that any such regime should be entirely separate from, and independent of, the competition regime. The Government should consider the creation of a professional secretariat that is sufficiently independent to ensure that potential national security concerns are assessed objectively and independently of the Government's wider industrial policy objectives. The CMA panel system that is used for second phase mergers and market investigations has a good track record in this respect and may therefore serve as a useful model.

Question 6: What do you think are the most important costs and benefits from the proposed threshold changes to the Enterprise Act 2002 for the defined sectors? What could be the potential size of these costs and benefits?

3.31 As explained in Section 2 of this response, we do not consider that the proposed short term reforms give rise to sufficient benefits to justify their urgent implementation through the inappropriate use of the regime for assessing the competitive effects of mergers. As noted in response to question 4 above, the most immediate and significant costs will be those associated with merging parties having to self-assess the competitive effects (in particular, those arising due to vertical or conglomerate relationships between the merging parties) of transactions that currently escape the CMA's jurisdiction, in order to determine the risk that they may be called in for a competition assessment. As noted above in response to question 1, there would also be significant costs for small, non-exporting businesses in determining whether their products fall within any of the categories of the military, dual use or radioactive lists. The impact assessment accompanying the Green Paper does not take these costs into account.

3.32 Beyond that, the CLLS does not have precise information on the potential costs of the proposed short term regime, as the impact assessment does not identify how many transactions giving rise to potential national security concerns the Government considers to have escaped its review under the current EA public interest and special public interest regime. It seems to us that the Government must have identified at least some such transactions in the recent past, given the urgency that it has attached to the short term reforms, and we therefore request the Government to disclose those statistics in order to allow for the costs and benefits of the reforms to be properly assessed.

3.33 A more general point is that the Government should be mindful of the strong correlation – as demonstrated by the chart on page 12 of the Green Paper – between restrictiveness of foreign investment rules and the extent of foreign investment. While we agree that the Government should have appropriate and proportionate powers to intervene in foreign takeovers to protect national security, we have some concerns that the wide scope of the proposed regime, and the relatively vague explanations of the national security issues that the Government is seeking to address, create possibilities for the proposed regime to be used for purely protectionist purposes.

3.34 That would be a particular risk, for example, if the Government were to intervene to maintain UK ownership of technology innovators on the basis that their technology might one day become ubiquitous. Such protectionism would be self-defeating. In our view, one of the reasons why the UK has become such an attractive place for small technology start-ups is that it is so open to foreign investment. That openness maximises innovators' prospects of being able to profitably exit their investments through a sale to a foreign purchaser. Placing restrictions on investors' exit strategies could lead to prospective technology start-ups choosing other, more open jurisdictions in which to commence their operations.

City of London Law Society Competition Law Committee
November 2017