RESPONSE OF THE CITY OF LONDON LAW SOCIETY COMPETITION LAW COMMITTEE TO THE NATIONAL SECURITY AND INVESTMENT CONSULTATION ON PROPOSED LEGISLATIVE REFORMS

This response is submitted by the Competition Law Committee of the City of London Law Society (**CLLS**) in response to the "National Security and Investment" consultation on proposed legislative reforms (the **White Paper**) and the associated draft Statement of Statutory Policy Intent (**SSPI**).

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.

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Key points:

- While we understand the Government's legitimate desire to protect national security from hostile actors, we have serious concerns that the excessively broad jurisdictional scope of the proposed regime will, if enacted in the form proposed by the White Paper, cause substantial and disproportionate detriment to the UK's attractiveness as a destination for foreign investment. For the various reasons described in our response, it would also result in a deluge of filings that would require a reviewing body with very substantial capacity, at considerable cost to taxpayers, as well as a productivity cost to business. Our particular concerns relate to the application of the proposed regime to very small transactions, acquisitions of foreign entities or assets, transfers and licences of intellectual property, loan arrangements, real estate, passive investments and

domestic acquirers. As explained below, for each of these transaction categories, we consider that there are more proportionate ways to mitigate potential national security risks.

- While practical experience of the operation of the regime will undoubtedly be important in building investor confidence, the desire not to discourage foreign investment needs to be more than an aspiration about how the regime will be operated in practice and needs to be embedded in the structure of the regime. In particular, the Government should be sensitive to investors' concerns that being identified as giving rise to a potential "acquirer risk" would prejudice their ability to compete on a level playing field for future investments. In this respect, it will be important to strike an appropriate balance between confidentiality and transparency, in order to ensure adequate accountability and guidance without unduly stigmatising foreign investors. Committee members have differing views on how to strike that balance, but agree that it will be important that investors have opportunities to withdraw their filing and abandon their transaction without publicity during a short period after a transaction is called in. There should also be mechanisms allowing investors to offer undertakings-in-lieu of a call-in, to obtain informal advice and to satisfy the Government that they pose no acquirer risk (with the possibility of binding undertakings where necessary to do so) outside the context of a particular transaction.

- We continue to favour the material influence test under the Enterprise Act 2002 (**EA02**) over the test applies for the purposes of the People with Significant Control (**PSC**) Register. In practice, the test for material influence is significantly broader than the (unmodified) PSC Register test and would allow the Government to achieve what it is seeking to achieve from these reforms, as it is more flexible and responds to the facts to address the actual acquisition of influence over an undertaking's conduct of its business activities.

- We consider that the SSPI requires additional detail and clarifications in a number of important respects, including the relevance of access to information for the purposes of assessing significant influence or control (**SIOC**) and the definitions of the "core" areas.

- Given the anticipated filing volumes, it will be vital that the proposed notification regime is adequately staffed and resourced, with a stable central team of officials that can develop the appropriate expertise to review transactions quickly and efficiently, and to coordinate with other Government departments for sector-specific input where necessary. We consider that the resources of the merger-related functions of the Competition and Markets Authority (**CMA**) are a useful indicator in this respect. We also consider that the primary decision-maker, for consistency and continuity, should be the Secretary of State for Business, Energy and Industrial Strategy.

- We consider that the proposed prohibition on closing after a call-in would be both counter-productive - because it would incentivise unnecessary filings and prevent efficient allocation of regulatory risk - and unjustified, because the risk of prejudice to subsequently-decided remedies can be more proportionately addressed through interim measures, as demonstrated by the practice of the CMA. We also consider the proposed "unwinding" remedy to be unworkable for the reasons explained below.

1. What are your views about the proposed tests for trigger events that could be called in for scrutiny if they met the call-in test?

1.1 While we understand the Government's legitimate desire to protect national security from hostile actors, we have serious concerns that the excessively broad jurisdictional scope of the proposed regime will, if enacted in the form proposed by the White Paper, cause substantial and disproportionate detriment to the UK's attractiveness as a destination for foreign investment. It would also result in a deluge of filings that would require a reviewing body with very substantial capacity, at considerable cost to taxpayers, as well as a productivity cost to business. The inherent difficulty in defining a clear and predictable test for assessing national security risks in advance will prompt many foreign investors to make precautionary filings, making it all the more important that the jurisdictional scope of the regime is carefully circumscribed. This is recognised in other jurisdictions with foreign investment screening regimes, all of which have narrower jurisdictional scope than the regime proposed by the White Paper.

1.2 We understand the Government's desire to ensure that the jurisdictional test for the proposed regime does not contain loopholes that could be exploited by a hostile actor to engage in transactions giving rise to national security concerns. However, many of the transactions that the regime proposes to bring within its scope are not sufficiently likely to give rise to national security concerns to justify the very considerable costs that will be borne by a much wider community of investors, investees and sellers if they are required to assess and notify national security risks in respect of those transactions. Whilst practical experience of the operation of the regime will undoubtedly be important in building investor confidence, the desire not to discourage foreign investment needs to be more than an aspiration about how the regime will be operated in practice and needs to be embedded in the structure of the regime.

1.3 Costs for investors will arise irrespective of whether a given transaction is called in for review, as parties would still need to undertake work to assess the risk that their transaction is called in and subject to a prohibition on closing, additional obligations or even a potential outright prohibition, as well as work to prepare the notification (we refer to these costs as "transactional costs", as distinct from the costs of notifying or undergoing an assessment following a call-in). The costs for parties will be substantially greater if the Government pursues a policy of calling in large numbers of transactions and encouraging high volumes of filings. The White Paper's estimates for the numbers of transactions that would be notified, called in or subject to conditions[1] indicate that this is indeed the Government's intended policy. Avoiding imposing unnecessary cost burdens on investors will be all the more important post-Brexit, given that many will face additional costs arising from parallel reviews of mergers under both UK and EU merger control regimes.

1.4 Our specific concerns relate to: (i) very small transactions; (ii) acquisitions of foreign entities or assets; (iii) transfers and licences of intellectual property; (iv) loan arrangements; (v) real estate; (vii) passive investments; and (viii) domestic acquirers. As explained below, for each of these transaction categories, we consider that there are more proportionate ways to mitigate potential national security risks.

[1] White Paper, para 4.02.

Very small transactions

1.5 The White Paper states that the Government has decided not to implement a test based on turnover or share of supply because "[a]s described in the Green Paper, these are not an appropriate measure of whether a business is likely to pose national security threats should a hostile actor gain control". However, the Green Paper did in fact conclude that a test based on turnover and share of supply (albeit lower than the regular thresholds under the EA02) was appropriate for the implementation of the "short term" reforms that were subsequently implemented. In particular, it stated that a £1 million turnover threshold had been based on a review of the turnover of businesses active in the sectors covered by those short term reforms.[2] There was no discussion in the Green Paper of the suitability of turnover or share of supply thresholds for the implementation of the longer term reforms that are now covered by the White Paper, nor any analysis of whether other financial or value based thresholds might be appropriate.

1.6 We consider that some form of financial thresholds is vital to the success of the regime. Their absence would mean that even the most insignificant transactions would incur transactional costs and that the volume of precautionary notifications would be likely to overwhelm the relevant reviewing body. In many cases, the resulting costs would be disproportionate to the size and value of the transaction, so deterring foreign investment.

1.7 Given that small businesses and assets are inherently unlikely to be in a position to harm national security, imposing those costs would also be a disproportionate way to achieve the Government's objectives. Even if there are some extreme scenarios in which acquisition of a very small business or asset might be used to harm national security (none are described in the Green or White Papers), we consider that those remote risks could be better addressed by a combination of financial thresholds (within the proposed regime) and the creation of specific fall-back powers (outside the scope of a transactional screening regime) that are appropriately tailored to the Government's concerns.

1.8 In particular, the Government should consider a combination of all or some of the following:

1.8.1 A low UK turnover threshold and share of supply test of the type recently introduced pursuant to the Government's short term reforms.

1.8.2 A test based on the value of assets located in the UK. Canada and Australia both use asset value thresholds to target the scope of their foreign investment screening regimes. If appropriately structured, such a test would address the Government's desire to be able to review the acquisition of businesses with significant (e.g. R&D) activities but no sales and assets that do not themselves generate sales. A separate limb of the test might apply to take into account the UK assets of the purchaser, in order to address the scenario in which "a single investor has multiple areas of investment or ownership across a sector (or across sectors or supply chains)".[3]

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[2] Green Paper, para 96

[3] Green Paper, para 49.

1.8.3 A transaction value test, of the type recently introduced under the German and Austrian merger control regimes. This would reflect the fact that transactions for which the consideration is very low are intrinsically incapable of giving rise to an issue of importance to national security. Such test could be supplemented by policy guidance explaining how the Government will assess whether a transaction has a sufficient degree of nexus with the UK (see 1.12-1.15 below).

1.9 Financial thresholds of the type described above could be incorporated by way of secondary legislation, so allowing their adjustment if the Government subsequently considers there to have been transactions raising concerns that it was unable to review. That seems to us to be a more sensible approach than seeking to capture all conceivable transactions from the outset and then having to amend the relevant legislation to introduce thresholds as and when filing volumes become unmanageable. In response to the query posed in paragraph 3.74 of the White Paper, this approach would also have the advantage of excluding commercial transactions in the ordinary course of business.

1.10 It seems to us that the only scenario identified by the Government as giving rise to potential national security risks that would not be covered by the above thresholds would be an acquisition of very low value land that is proximate to a sensitive site. As explained in 1.30 below, we consider that such risks could be better addressed by implementing a register of sensitive land.

1.11 If the Government remains concerned that even very low value transactions might somehow threaten national security, it might consider retaining a power to call in transactions falling below the thresholds in certain limited circumstances, effectively withdrawing the benefit of the safe harbour for below-threshold transactions in individual cases. Even if the Government does not implement thresholds, it should at least reserve the power in the primary legislation to introduce such thresholds by way of secondary legislation at a later date, should the need arise.

Acquisitions of foreign entities and assets (including IP rights)

1.12 We consider the proposed test for extra-territorial jurisdiction to be much too wide. It would catch acquisitions of foreign businesses purely on the basis of sales to the UK, and acquisitions of foreign assets (or businesses that own foreign assets) that are "used in connection with" sales to the UK[4]. In either case, there would be no requirement that the relevant sales to the UK have any connection with a potential "target risk". A sale of £10 worth of paperclips would suffice. Moreover, assets used "in connection" with sales to the UK would ostensibly include those (such as IP rights)[5] that are used in connection with products or services supplied to the UK by third parties, not just the seller of the asset.

1.13 This test would mean that investors in an extraordinarily wide range of overseas businesses and assets would need to investigate the target's operations to establish whether any of its assets (including intellectual property rights) form part of a supply chain that ends in the UK and, if they do, whether the target has any activities, whether or not connected to those assets, that might conceivably have some relevance to the

[4] White Paper, para 6.41.

[5] SSPI, para 5.42.

UK's national security. The White Paper's assurances that extraterritorial transactions are unlikely to be called in will not prevent this need.

1.14 That would be not only disproportionate, but also out of line with international best practice. None of the foreign investment regimes in the US, Canada, Australia, Germany or France assert jurisdiction over acquisitions of foreign businesses purely on the basis of exports to the jurisdiction in question or ownership of foreign assets or IP rights that are used in connection with exports to the jurisdiction in question.

1.15 In our view, the proposed regime should be limited to acquisitions of significant influence or control (**SIOC**)[6] over UK legal entities (including those that directly or indirectly own foreign assets or IP rights) or assets located in the UK, in keeping with the territorial scope of other foreign investment regimes. To the extent that importing products or ownership of extra-territorial assets gives rise to potential national security sensitivities, such concerns should be addressed by other means. For example, concerns that imported products may contain "backdoors" resulting in cyber security risks could be dealt with by a rigorous testing regime and import bans or other penalties for suppliers of products or software found to be in breach, combined with legal requirements for domestic companies to implement appropriate cyber security measures for activities that are national security-sensitive. Concerns relating to control of particularly sensitive foreign assets such as servers or sub-sea pipelines could be addressed through agreements with the foreign States that host such assets, or restrictions on the transfer of sensitive data outside the UK.

Intellectual property

1.16 We consider the scope of IP transactions that would be caught by the jurisdictional test to be unduly broad, in four ways.

1.17 First, the list set out in paragraph 3.67 of the White Paper includes IP that is highly unlikely to give rise to a national security risk, such as copyright over artistic works or design rights or utility models relating to the design of common mass market objects of a limited technical nature. Given that the focus of the potential concerns expressed in the White Paper is the transfer of technology, we consider that the list provided in the EU Technology Transfer Block Exemption[7] to be more appropriate, i.e.:

1.17.1 patents;

1.17.2 utility models;

1.17.3 design rights;

1.17.4 topographies of semiconductor products;

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[6] Subject to our comments regarding the desirability of adopting the test of material influence – see paragraphs 3.5- 3.7 below.

[7] Article 1(b) of Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the TFEU to categories of technology transfer agreements, OJ 2014 L93/17.

1.17.5 supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained;

1.17.6 plant breeder's certificates and

1.17.7 software copyrights.

1.18 Second, the mere assignment or licensing of any of the above rights will not, per se, be liable to give rise to a national security threat. In addition to the act of assignment or grant of a licence, there must also be an effective transfer of technology. We therefore submit that the trigger should include an additional requirement; that an assignment or licence of IP will only be caught if there is also a related disclosure of knowledge or know-how that is not public domain. We recommend defining such knowledge or know-how in the same way as "trade secrets" in Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets).[8] This approach would serve to exclude ordinary course of business transactions such as the licensing of freely available software.

1.19 Third, we consider that database rights should be excluded from the list, at least in so far as they relate to personal data, because the unauthorised transfer or use of personal data is already heavily regulated by the EU General Data Protection Regulation.[9] As regards non-personal data, the Government ought to have an understanding of what data may give rise to a national security threat if in the wrong hands (e.g. data relating to military applications) and so should restrict access, use or transfer of such data through appropriate measures imposed directly on the holders of such data.

1.20 Finally, the proposed test for SIOC refers to "decision rights" over the "operation" of an IP right that enables a party to "use, alter, destroy or manipulate" it. This includes licences of IP that confer such powers. However, all assignments and licenses of IP give an assignee or licensee a right to use the relevant IP. It is a misnomer to refer to the alteration, manipulation or destruction of an intangible right, as opposed to the subject matter of the right (such as software code or computer hardware). Rather, the test should be whether the IP transaction allows an investor to exploit, manipulate or alter the underlying subject matter of the relevant IP right.

Loans and related collateral

1.21 We have concerns in relation to the express reference to trigger events for loans and related collateral. As currently drafted, the proposal has the potential to bring all bilateral and syndicated loan arrangements carried out in the financial markets within the parameters of the regime. This is unattractive for investors in loans as it creates uncertainty. Investors are not able to take a view on whether any particular covenant/undertaking in a loan agreement or enforcement of collateral raises or may raise questions around national security. The proposal is also therefore likely to lead to

[8] OJ 2016 L157/1, Article 2(1).

[9] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ 2016 L119/1. If this legislation ceases to apply in the UK following Brexit, equivalent restrictions can be put into place.

unnecessary notifications at various stages of a loan arrangement and particularly in relation to enforcement of collateral in order to minimise any risk of a call-in.

1.22 London is the leading international market for international finance, especially syndicated lending and the related secondary loan market. Syndicated loans would almost never give any one lender the ability to control the obligor or its assets either through the contractual terms of the loan agreement or on enforcement of security. Security is invariably held by a security trustee for the lenders. The risk of a syndicated loan carried out in the financial markets raising national security concerns is negligible and therefore in order to protect that market there should be a complete exclusion of participations in syndicated loans from the scope of the proposed laws at all stages including when entering into the arrangement, when events of default occur, when participations are traded and when security is enforced through a security trustee.

1.23 If the Government is not minded to expressly exclude syndicated loans and related collateral from these proposals or to remove the express references to loans and related collateral from these proposals, we would suggest that as a minimum the following points need to be addressed to provide as much certainty as possible to the syndicated loan market as to the circumstances in which a syndicated loan and/or related collateral may raise national security concerns requiring notification or raising the prospect of a call-in.

1.24 First, trigger events should not be defined by reference to preferential access to information. It should be made clear that paragraph 5.54 of the SSPI (which states that preferential access to information is not, in itself, a trigger event) applies equally to access to information in the context of a loan agreement, notwithstanding the contrary statement in paragraph 3.101 of the White Paper (our further comments on this point below, at 3.11-3.13, explain why we consider that access to information should not be a trigger event).

1.25 Second, there should be clear safe harbours that are tailored to loan arrangements:

1.25.1 If access to information is considered to be a trigger event in the context of loan arrangements, then there should be a safe harbour for loan agreements containing a standard Loan Market Association ("**LMA**") information undertaking, covering, for example, information regarding the financial condition, assets and operations of the group/any member of the group (see, for example, the LMA Senior Multi-Currency Terms and Revolving Facilities Agreement for Leveraged Acquisition Finance Transactions) and for security documents containing equivalent and otherwise market-standard information requirements, which usually allow for the secured party to call for information about the chargor's business and affairs as well as the charged assets.

1.25.2 Any syndicated loan agreement entered into by a syndicate of lenders substantially on LMA terms should be a safe harbour irrespective of the nature of the obligors on the basis that no significant influence or control is obtained by any one lender party to such an agreement.

1.25.3 The safe harbour should also apply to security held by a security trustee on trust for a syndicate of lenders from time to time on market standard terms and in respect of which no single lender has the ability to instruct the security trustee

to enforce the security or take decisions relation to the secured asset. In addition, it would be helpful to see a clear statement from the Government that this applies even where a lender in a syndicate of lenders is considered by the Government to be a "hostile lender" such that the other lenders in the syndicate would not be prevented from enforcing their security provided such hostile lender has no independent ability to control or significantly influence the secured asset and/or the chargor even if such charged asset and/or chargor has national security implications.

1.26 The case can also be made for complete exclusion of bilateral loans made by any bank regulated by the PRA or FCA or by any third country authority recognised as equivalent by the Bank of England/Treasury. To the extent necessary, particular lenders or categories of lender could be specified as not benefitting from these exclusions in whole or in part (although regulatory conditions imposed by the UK regulator on the type of business that could be done by a financial institution of concern would be a more effective method of control of bilateral financing which raises concerns around national security). Bilateral loans entered into on LMA equivalent terms should also be a safe harbour for both regulated and non-regulated lenders.

1.27 It would also be helpful to have clarity on whether debt securities are regarded as loans and about the status of derivatives, especially where integral to a lending arrangement. Equivalent concerns to those described above in relation to loans then arise in relation to these types of financing arrangements. The need to protect the London markets in relation to these types of transaction and the minimal risk that these could have a negative impact on national security in the way contemplated by the White Paper suggests that the balance lies in favour of complete exclusion of transactions in these markets also.

Real estate

1.28 In the absence of any publicly accessible register of land that is proximate to a site of national security sensitivity, it would be impossible to predict whether any given real estate transaction would be called in, irrespective of the nature of the target's activities. Any foreign investment that would be adversely affected by the imposition of a prohibition on closing would need to be notified, as would any foreign acquisition of a target with real estate assets that are fundamental to its value, even if that value is very small.

1.29 Moreover, most real estate investment is financed through debt. If a site is acquired for development purposes, for example, but is subsequently required to be divested following a national security review, the development will be put in jeopardy and lenders will risk an event of default by the borrower, while the borrower will typically incur financial changes under the loan arrangements for early redemption of the loan. Lenders are highly risk averse and are therefore likely to insist that notification and clearance is a condition precedent to financing. Even residential property transactions would be potentially affected.

1.30 We therefore recommend, as an alternative to application of the general national security regime in this area, the creation of a register of proximate land that, even if not accessible to the public, can be easily checked before entering into a transaction to verify that no such risk will arise. If no such register is created, the notification regime

will simply end up acting as one by default, with attendant strain on the resources of the relevant reviewing body.

Passive investments

1.31 Our response to question 3 below contains our comments on the appropriate control test, as set out in the draft SSPI. Whatever the nature of the control test, we consider that some form of safe harbour is required, in the interests of investor certainty and proportionality.[10] The need for certainty would dictate that such a safe harbour is in primary or secondary legislation, not the SSPI. It seems to us that it should be possible to define such a safe harbour by inverting the conditions of the test for control. For instance, a safe harbour could exist where an investor has:

1.31.1 no ability to veto decisions beyond the minority investor protections listed in paragraph 5.59 of the SSPI;

1.31.2 no power to direct or influence day-to-day management or control of an asset or entity; and

1.31.3 no right to appoint an executive board member of the target company.

1.32 We submit that there should, at minimum, be a legislative exception for limited partners of a limited partnership wherever formed, similar to that in the PSC Register regime.[11]

1.33 As a related point, it is unclear to us why a 25% threshold for shareholding or voting rights in an entity (or 50% interest in an asset) is desirable. It appears likely to lead to notifications of transactions that give rise to no SIOC and which will therefore inevitably be cleared, as there will be no "trigger event risk". It seems to us that a 25% threshold therefore serves no additional purpose other than consistency with the threshold used for the purposes of the PSC Register (there being no such legislative threshold under the merger control regime), as indicated in paragraph 3.31 of the White Paper. However, we do not consider such consistency to be desirable for its own sake, particularly if the test under the regime will (as is proposed) be inconsistent with the PSC Register test in other respects. We therefore recommend that the 25% threshold (50% for assets) is not implemented.

Domestic acquirers

1.34 We query the rationale for including acquisitions by domestic acquirers within the scope of the regime. No other significant jurisdiction with a national security screening regime includes domestic purchasers within its scope.[12] While we recognise the legitimacy of preventing ownership or control of sensitive assets by criminals, we

[10] For example, the CFIUS regime has a safe harbour for investments resulting in a foreign person having an ownership interest of 10% or less of the outstanding voting interests in a US business, provided they are held "solely for the purpose of passive investment."

[11] See paragraph 25, Schedule 1A Companies Act 2006 and Regulation 8 of the Register of People with Significant Control Regulations 2016.

[12] We recognise that the current UK national security provisions under the EA02 are not limited to foreign investors, but do not consider that to justify replicating that approach in the much more far reaching regime that is proposed by the White Paper.

consider that this aim could be achieved more proportionately through the application of the director disqualification regime or confiscation proceedings under the Proceeds of Crime Act 2002 (or, if required, bespoke legislation allowing for the confiscation from convicted criminals or their associates of assets giving rise to national security risks). In our view, domestic acquirers with no criminal history or connections to foreign states are so unlikely to give rise to national security concerns that they can be safely excluded from the regime.

1.35 We note that one of the purported justifications for extending the regime to UK based or British acquirers is that they may be "subject to the control of a hostile actor",[13] but if that hostile actor is foreign (as is implied by that statement) that scenario would still be caught by a regime that applied only to foreign investment.

2. What are your views about the proposed role of a statement of policy intent?

2.1 We welcome the proposed role of a statement of intent and, in particular, the statutory requirement for the Senior Minister to have regard to it in the exercise of his or her powers. However, an inherent problem with policy guidance is that it can provide only a limited degree of legal certainty and predictability. That is particularly true in respect of national security assessments, given the very significant leeway granted by the courts to decision-makers in that area.[14] For example, while paragraphs 2.08-2.34 of the SSPI contain useful descriptions of core and non-core areas that are likely to trigger national security concerns, paragraph 2.35 states that "[a]lthough less likely, the Government may consider that a trigger event in respect of an entity or asset in the wider economy (i.e. an area not mentioned above) could pose a risk to national security".

2.2 We favour an alternative approach that would afford investors significantly greater legal certainty by setting out in secondary legislation the scope of core and non-core assets that may be subject to national security reviews. As shown by the Government's implementation of the short term reforms earlier this year (regarding targets with activities involving IP or roots of trust relating to computer processing units, military or dual use products, or quantum technologies), it is possible to define areas of interest in secondary legislation with a good degree of precision. For example, the French and German foreign investment screening regimes also set out in legislation the specific sectors to which certain of their provisions apply.[15] To address changes in the Government's approach to national security over time (e.g. due to geopolitical or technological changes), and to prevent hostile actors from "gaming" loopholes in the statutory definitions, the Government could reserve powers to amend the legislation to add new categories of assets to the list should the need arise (including in response to a specific transaction), similar to its power to add new public interest considerations on an ad hoc basis under the merger control regime. These powers were used effectively to allow Government intervention in the merger between Lloyds TSB and HBOS.

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[13] SSPI, para 4.22.

[14] See, for example, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 A.C. 153 at [62] (Lord Hoffmann); *A v Secretary of State for the Home Department* [2005] 2 A.C. 68 at [29] (Lord Bingham).

[15] In Germany, section 55 (1) sentence 2 of the German *Außenwirtschaftsverordnung* and the so-called BSI-Regulation of the Federal Office for Information Security, which defines the term "critical infrastructure".

2.3 We also note that the regime described in the White Paper and the SSPI would not require the Senior Minister to take into account the benefits of foreign investment in the UK and the potential for those benefits to be undermined by his or her individual decisions. Given that this is a relevant consideration for all of the decisions under the proposed regime (e.g. decisions to exercise call-in powers, the final determination as to the presence of a national security risk and the decision on appropriate remedies for that risk), we consider that this should be an over-arching statutory duty included in the primary legislation.

3. What are your views about the content of the draft statement of policy intent published alongside this document?

3.1 Our comments on the content of the SSPI relate primarily to the chapters dealing with acquirer risk and the meaning of SIOC. However, a more general observation is that the SSPI should contain a clear statement that in order for a transaction to be considered a threat to national security, all three risks (acquirer risk, trigger event risk and target risk) must be present. For example, acquisition of a passive interest in a sensitive asset, even by a hostile party, cannot give rise to national security concerns if it does not afford the acquirer any ability to harm national security.

Necessity and proportionality requirements

3.2 We welcome the indication in the SSPI that interventions around national security should be "necessary, proportionate, even-handed and will not impose arbitrary restrictions on corporate transactions or other activities".[16] This statement could usefully be supported with the illustrative examples that are included in paragraph 6.23 of the White Paper, i.e. the possibility of sector specific regulations, physical security measures or export controls as alternative ways to address a potential concern.[17]

Acquirer risk

3.3 Paragraphs 4.12 and 4.14 of the SSPI state that "[m]ost parties acquiring control over entities or assets do so for purely financial or commercial reasons" and that "[t]he Government's national security assessment will consider whether the party may seek to use the entities or assets to undermine national security" (emphasis added). We welcome the implicit recognition that intent to undermine national security is a fundamental element of acquirer risk, such that buyers who will be motivated purely by financial or commercial considerations should not be considered risky. However, this important principle should be stated explicitly.

3.4 In our view, it is crucial that the regime does not create scope for the Government to intervene purely because it disagrees with an acquirer's business model or investment strategy, as it threatened to do in relation to the recent acquisition of GKN by Melrose.[18] If acquirers' financial or commercial strategies can be called into question under the

[16] SSPI, para 1.07.

[17] White Paper, para 6.21.

[18] See the correspondence between the Secretary of State for BEIS and Melrose Plc on the proposed GKN/Melrose takeover, available at: https://www.gov.uk/government/publications/correspondence-on-the-proposed-gknmelrose-takeover

proposed regime, that would risk deterring a wide range of beneficial investment into the UK, including from private equity and venture capital investors.

3.5 We also consider that the SSPI should contain a clear statement in the section relating to non-hostile states and nationals of those states[19] that "when assessing acquirer risk in respect of other foreign investors, the Government does not intend to distinguish between foreign entities that are State owned and other types of foreign entities and recognises the importance of equal treatment of such investors for the maintenance of a level playing field for investment in the UK".

The interpretation of SIOC

3.6 As noted in our response to the Green Paper, we favour applying a test based on the concept of material influence under the EA02 over the test applied for the purposes of the PSC Register. That would have the advantage of familiarity and a relatively deep body of EA02 case law to guide interpretation of the test. In contrast, the criteria relating to the PSC Register are untested, have limited published guidance and lack a body of interpretative case law. Our experience is that businesses have encountered substantial difficulties and uncertainties in applying the PSC Register test.

3.7 We consider that the test for material influence under the EA02 is sufficiently flexible to capture the type of influence that is liable to give rise to national security issues. While aimed at influence over a target's commercial policy, such influence also necessarily entails influence over its management and staff, which is the fundamental national security issue. Unlike the PSC Register test, the material influence test would not, in our view, require significant modification to capture the types of influence that the Government intends to bring within the scope of its call-in power. In practice, the test for material influence is significantly broader than the (unmodified) PSC Register test and would allow the Government to achieve what it is seeking to achieve from these reforms, as it is more flexible and responds to the facts to address the actual acquisition of influence over an undertaking's conduct of its business activities. In particular:

3.7.1 the material influence test can, in principle, capture influence derived as a result of management or operational responsibilities conferred on directors that do not have veto rights over board decisions;[20] and

3.7.2 the test is also broad enough to capture situations in which an acquirer has the "legal right to shape an entity's operations or strategy", including exceptionally through additional agreements such as supply relationships [21] or loan

[19] SSPI, paras 4.20-4.21.

[20] See, for example, the decision of the Office of Fair Trading (OFT) on the acquisition by First Milk Limited of a 15 per cent stake in Robert Wiseman Dairies PLC, in which the OFT established that some members of the Wiseman board had involvement in price negotiations for major customer accounts in the context of their management roles, but concluded that there would be no material influence because (among other things) the non-executive director to be appointed by First Milk would not be involved in such matters.

[21] See *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), para 4.26

arrangements.[22]

3.8 We recognise that using either of the material influence or PSC Register tests would mean that there would be two independent bodies interpreting the same concept for different purposes, each having the potential to impact on the other (or, if not, there being the potential for the meaning of the same term to diverge between the two regimes). It will therefore be important, in our view, that whichever test is used under the proposed regime it is worded in a way that establishes a clear distinction between that test and its counterpart under existing legislation. For instance, it might refer to "material influence over decisions or actions that are capable of giving rise to harm to national security".

3.9 As regards the guidance on the test for SIOC that is set out in the SSPI, we have three comments.

3.10 First, in paragraphs 5.18-5.24 of the SSPI it should be clarified that where an acquirer will have rights to appoint one or more directors that will not have managerial or operational responsibilities (e.g. non-executive directors), satisfaction of the test for significant influence will depend on whether the acquirer's appointed directors would be able, collectively, to control or veto the types of decisions set out in paragraph 5.16 and 5.17. The current guidance is insufficiently clear in this respect, stating only that satisfaction of the test will be met "depending on the composition of the Board" and "in certain circumstances".[23] Moreover, we consider that the acquisition of a mere right to appoint a single director would not be capable of amounting to the acquisition of significant interest or control unless the exercise of that right would confer a veto right over relevant board decisions. In line with the statement at paragraph 5.25 of the SSPI, the trigger event in such cases should be the point at which the person starts to exert significant influence or control, being the time when the right to appoint a single director with managerial or operational function is exercised.

3.11 Second, the White Paper and SSPI are unclear as to whether rights to access information may be considered to confer significant influence. Paragraph 5.46 of the SSPI states that a person or entity having preferential access to information "is not in itself a trigger event or an indicator of significant influence or control." However, paragraph 3.101 of the White Paper states that a lender may acquire significant influence "where unusual clauses are attached to the loan at the outset requiring sensitive, non-commercial data to be provided" and paragraph 5.58 of the SSPI states that a shareholder would not be considered to have SIOC if they have "access to routine commercial information made available to all shareholders but not otherwise in the public domain" (implying that information rights beyond this might give rise to significant influence).

3.12 In our view, the approach set out in paragraph 5.46 of the SSPI is the correct one, as:

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[22] See *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), para 4.27 and the report of the Monopolies and Mergers Commission in *Stora Kopparbergs Bergslags AB\ Swedish Match NV, and Stora Kopparbergs Bergslags AB\ The Gillette Company*.

[23] SSPI, para 5.20.

3.12.1 access to information does not, in the absence of legal or de facto governance rights, confer the ability to control or influence a target or asset (or, in the context of loan arrangements, an obligor, a charger or the underlying collateral);

3.12.2 access to information can arise in a variety of ways, including contractual relationships, that are entirely unrelated to an acquisition or exercise of influence or control; and

3.12.3 where a foreign investor is a minority shareholder without any legal or de facto veto rights over commercial decisions of the target, the presence of other shareholders will necessarily discipline its ability to access sensitive, operational information that is unnecessary for the purposes of monitoring its investment or which might otherwise lead to erosion of the value of the target (e.g. through transfer of know how or technology).

3.13 Accordingly, while we recognise that access to information is relevant to the substantive national security assessment of a transaction, we submit that it should not be a factor in the determination of whether a trigger event has arisen, and that this should be reflected consistently in the SSPI.

3.14 Third, neither the SSPI nor the White Paper explains what is meant by "a majority share" (i.e. over 50%) of an asset. It would be useful to have some illustrative examples of the types of partial ownership interest that are intended to be covered by this concept.

The core areas (Annex A)

3.15 Some of the descriptions of the core areas in Annex A could be further tightened, either to make them more objective or to exclude assets and entities that are unlikely to give rise to national security risks.

3.16 As regards energy infrastructure:

3.16.1 "Energy networks that deliver secure, reliable electricity and gas to customers, ensuring continued supply as far as possible on the supply chain": the criteria of "secure, reliable" and "continued" supply are too subjective. It is not clear whether the intention is to include all networks or only those above a certain size. The Government should consider including objective, quantitative criteria, e.g. by reference to the number of customers served by a network (similar to the one million user criterion for communications networks). The Government should also clarify the types of networks it seeks to cover i.e. transmission networks (onshore / offshore), distribution networks, private networks etc.

3.16.2 "Gas and electricity interconnectors, long range gas storage and Gas Reception Terminals, including Liquefied Natural Gas that contributes to the security of supply". The additional requirement to “contribute to security of supply” implies that the intention is to exclude some operators (since otherwise these words are redundant) but it is not clear where the line should be drawn. Instead of specifying that LNG infrastructure must "contribute to security of supply", the Government should consider thresholds linked to the volume of gas stored, received or liquefied, as appropriate.

3.16.3 "Organisations owning large scale power generation of greater than 2GW with the capacity to significantly impact balancing of the electricity system if disrupted". It appears that the "2GW" and "capacity to significantly impact balancing" are 2 separate, cumulative tests, but this should be clarified. It should also be clarified whether the 2GW threshold applies to single generating stations or a portfolio of generation facilities owned by the organisation.

3.16.4 "Energy suppliers that provide energy to significant customer bases". Again, the inclusion of a reference to "significant customer bases" suggests that the intention is to exclude some suppliers but it is not clear who is excluded. This should refer to volume of electricity / gas supplied and/or the number of customers served by the network.

3.16.5 "Significant upstream petroleum infrastructure" should be defined as "comprising" (not "including") the listed types of infrastructure.

3.17 As regards advanced technologies, many of the definitions in this area are insufficiently focused on the specific applications of the relevant technology that have national security implications. For instance, there is an important distinction between "deep machine learning" or general artificial intelligence (AI) and "narrow" AI. Narrow AI is developed for specific tasks and therefore its propensity to give rise to national security risks should be defined according to the sensitivity of the tasks for which it is developed. The term "computing hardware" is also overly broad in this context and is not sufficiently constrained by the use of more tightly defined narrower illustrative examples in Annex A. It is also unclear what is meant by a "computer processing unit", as this does not appear to be a technical term of art. We would suggest use of a more precise definition, such as "central processing unit design and control", in place of any reference to computing hardware.

4. Does the proposed notification process provide sufficient predictability and transparency? If not, what changes to the proposed regime would deliver this?

Transparency

4.1 We are concerned that many foreign investors will be so averse to any public suggestion that they might give rise to an acquirer risk, that they will be deterred from making investments in the UK, unless the regime strikes an appropriate balance between confidentiality and transparency.

4.2 The factors that may give rise to acquirer risk are independent of those that may give rise to trigger event risk or target risk. This means that if an investor is publicly identified as giving rise to a potential acquirer risk in one transaction, there is a risk that it will be perceived by other market operators as liable to give rise to such risks in all future transactions involving some degree of target risk (e.g. assets in the core areas and other key parts of the economy) and even those that do not appear to give rise to such risks (e.g. significant real estate deals, where the presence of a "proximity" risk cannot be known in advance).

4.3 Investors that are publicly associated with acquirer risk may then face an unlevel playing field when competing to invest in such assets, in comparison with investors that are not perceived to be at risk of a call-in. The statement in paragraph 4.10 of the SSPI

would not alter this fact and we do not consider there to be any form of general reassurance that the Government could give in the SSPI that would do so. It will therefore be important that the risk is mitigated in individual cases.

4.4 As regards where to strike the appropriate balance between confidentiality and transparency, members of the Competition Committee have differing views, although there is a consensus that there should be an option for investors to withdraw their notification and abandon their transaction during a short period after their transaction is called in, without publicity.

4.5 Some committee members consider that the adverse effects of stigmatising investors and so deterring investment outweigh the benefits of transparency. Accordingly, they favour no publicity of decisions to call in transactions or of final decisions finding that that a transaction gives rise to no national security concerns.[24] This approach would be consistent with the approach to confidentiality taken by foreign investment regimes in other major jurisdictions, including the US[25], Germany,[26] France[27] and Australia.[28] They consider that the development of a body of decisional practice that can guide future investments would be served adequately by the publication of final decisions,[29] combined with an annual report giving aggregated information on filing volumes and outcomes broken down by home country of the acquirer and sector of activity of the target.[30]

4.6 Other committee members considered that publication of final decisions alone would not be sufficient to create accountability, because it would create a risk that bidders are pressured in the private stages of the process either to withdraw or amend their proposals, and there would be no subsequent scrutiny of whether the Government is using its powers properly. In their view, it would also give insufficient guidance on how the regime works, as it would give only a partial picture of the cases that undergo

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[24] This would need to be combined with legislative powers to require third parties from which information is requested not to disclose the fact of the review or any related details.

[25] CFIUS does not disclose whether parties to any transaction have filed notices with CFIUS, nor does CFIUS disclose the results of any review. When a transaction is referred to the President, however, the decision of the President is announced publicly. See https://www.treasury.gov/connect/blog/Pages/CFIUS-at-a-Glance.aspx.

[26] The German Ministry of Economic Affair does not have on its website a publicly available list of mergers notified under the foreign investment regime. The names of the parties and some further details about the transaction are published only rarely in public statements of the Ministry's officials and/or in the course of parliamentary inquiries.

[27] No information about French foreign investment reviews is made public. There is no way to obtain public information about ongoing review or past notifications or authorisations.

[28] Applications for foreign investment approval under Australia's Foreign Investment Review Board (FIRB) Regime are confidential and there is no public disclosure of details of notifications, notifying parties or decision documents. The Australian Government's stated policy is to not provide applications to third parties outside of the Government (with sharing of information being limited to other relevant agencies) unless it has permission or it or ordered to do so by a court.

[29] Such decisions could also set out the reasons why the transaction was called-in, in accordance with the suggestion in para 7.44 of the White Paper that any statement setting out the reasons for a call-in is published only after the assessment has concluded and the case has been determined.

[30] Such as the annual CFIUS reports prepared by the US Department of Treasury, available at https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-reports.aspx

review and would create an appearance that many cases end in interventions when that might not be the case. They consider that concerns about stigmatising investors could be addressed in other ways, such as by being open to informal "in principle" discussions about bidder suitability of the type described in 4.9 below, and by being careful and being clear in final decisions, for example where the conclusion is that there is no acquirer risk, or if the reason for remedies is not to do with the identity of the acquirer. Publicity of call-in decisions would also allow for the participation of third parties that may have a legitimate interest even if not invited to be involved, for example because they have concerns about remedies or if the case raises a point of principle that might be relevant to them.

4.7 One possible option that may allow a degree of transparency while mitigating the risk of stigma, at least during the review period, would be to announce the fact of a call-in without naming the parties to the transaction until later in the proceedings when it has become clear that remedies are required. The CMA and the Office of Fair Trading have operated a similar principle for investigations under the Competition Act 1998 which has provided some comfort to those under investigation.

Informal advice

4.8 We welcome the availability of informal advice on whether it would be appropriate to submit a notification in a particular case. However, we consider that this mechanism could be usefully extended to cover other issues, such as the type of remedies that might be appropriate to remedy specific national security risks, should they be identified as realistic concerns following notification. While we recognise that such advice cannot be binding on the Senior Minister, the content of any informal advice should, in our view, be a factor that must be taken into account by the Senior Minister when deciding whether to exercise the call-in power.

4.9 For similar reasons to those outlined in 4.1-4.5 above, we also consider that there should be a vetting mechanism to allow regular investors in the UK to satisfy the Government, outside the context of a particular transaction (and in addition to the possibility of informal advice on a specific trigger event), that they do not give rise to acquirer risk, so that for any subsequent investment they would need only to confirm that all relevant facts have been previously disclosed and that nothing has changed since that disclosure. This might be coupled with a mechanism allowing the Government to accept binding undertakings from a foreign investor, outside the context of a particular transaction, so that it can be sure that the investor will not give rise to acquirer risk in the context of any transaction. Again, the presence of such undertakings would be a factor to which the Senior Minister must have regard when deciding whether to exercise the call-in power. For instance, an investor might commit:

4.9.1 to ensuring the operational independence of the targets. Similar requirements apply under the nuclear licensing regime, where licence applicants must be able to show that they have an adequate organisational capability and arrangements in place to manage nuclear safety and comply with the nuclear site licence conditions when the licence is granted. This could be combined with requirements to ensure that governance boards or management comprise most UK nationals; or

4.9.2 that even if an investor acquires rights to determine or veto a target company's decisions it will not exercise those rights (whether through the exercise of formal voting rights or through informal communications with the target's management) without first seeking Government consent.

Notification requirements

4.10 Given that many filings will be precautionary and not liable to give rise to national security risks, it will be important that information requirements are kept to a minimum. In that respect, the anticipated information requirements described in paragraph 5.11 of the White Paper seem to us to be reasonable, provided they are appropriately limited. In particular, notifying parties should not be required to provide detailed information on the products, services, activities and supply relationships of the acquirer and the target entity/asset. Such information should be requested separately, using information gathering powers, only where the Senior Minister has reasonable grounds for suspecting that they require the relevant information for the purposes of informing their decision as to whether to exercise the call-in power, as indicated in paragraph 7.10 of the White Paper.

Institutional arrangements

4.11 We have commented above and below on various features of the proposed regime that will, in our view, lead to very high filing volumes. Whatever the precise level of filings, it will be vital that the proposed notification regime is adequately staffed and resourced, that guidance that is given can be relied upon, and that there is consistency in practice. In particular:

4.11.1 To assist the relevant Senior Ministers in reviewing and deciding upon notified and un-notified transactions, it will be important to maintain a stable central team of officials that can develop the appropriate expertise to review transactions quickly and efficiently, and to coordinate with other Government departments for sector-specific input where necessary. Transacting parties will also benefit from the presence of a stable point of first contact. We also consider that the primary decision-maker, for consistency and continuity, should be the Secretary of State for Business, Energy and Industrial Strategy.

4.11.2 By way of comparison, the CMA's gross annual expenditure on its merger-related functions in its 2017-2018 financial year was in excess of £4.5 million[31] and in 2016 it had 80 staff members dedicated to reviewing mergers.[32] While most national security reviews are likely to be less resource-intensive than merger control reviews in the initial stages, the overall resource requirement is likely to be similar or greater as we consider the likely volume of reviews will far exceed those under the merger control regime (62 in the CMA's 2017/18 financial year).[33] The burden of monitoring and enforcing compliance with

[31] Competition and Markets Authority, Annual Report and Accounts 2017/18, page 139.

[32] See Global Competition Review, Rating Enforcement 2017: Competition and Markets Authority, available at: https://globalcompetitionreview.com/benchmarking/rating-enforcement-2017/1144784/united-kingdoms-competition-and-markets-authority

[33] CMA Merger Inquiry Outcomes, available at: https://www.gov.uk/government/publications/phase-1-merger-enquiry-outcomes

remedies is also likely to be greater, as it appears that behavioural remedies will be more common under the proposed regime. Accordingly, the CMA's resourcing requirements should be a useful indicator of the minimum level of resources that will be required to operate the proposed national security regime.

5. What are your views about the proposed legal test for the exercise of the call-in power? Does it provide sufficient clarity about how it would operate?

Wording of the test

5.1 The proposed legal test requires some clarification, in our view. The proposed wording would require the Senior Minister to have a reasonable suspicion that the trigger event may give rise to a risk to national security "due to the nature of the activities of the entity involved in the trigger event or the nature of the asset involved in the trigger event (or its location in the case of land)".[34] This seems to imply that the nature of the acquirer (acquirer risk) and the nature of the transaction (trigger event risk) are not relevant considerations. However, it is proposed that in exercising the call-in power the Senior Minister will be required to have regard to the SSPI, which states that acquirer risk and trigger event risk are relevant factors. We therefore submit that the relevant wording should instead refer to a risk to national security "due to: (i) the nature of the activities of the entity involved in the trigger event or the nature of the asset involved in the trigger event (or its location in the case of land); (ii) the nature of the acquirer; and (iii) the nature of the trigger event".

Temporal jurisdiction

5.2 Instead of the arbitrary six-month period for temporal jurisdiction that is proposed in the White Paper, we favour alignment with the four-month period that applies (and will continue to apply) to merger control reviews under the EA02. Unlike the current system of public interest interventions, the CMA would not, under the proposed regime, prepare a report for the Senior Minister so there is no reason why the Senior Minister and the CMA could not coordinate the timing of their initial reviews of those transactions and the resulting decisions (i.e. for the CMA, whether to open a Phase 2 investigation and, for the Senior Minister, whether to call in the transaction), as well as their gathering of intelligence to identify potentially relevant transactions for review.

5.3 Aligning temporal jurisdiction with the EA02 would give the Government extra flexibility, as the period would start to run only once the transaction is notified to the Senior Minister or is appropriately publicised, so transacting parties would not avoid jurisdiction simply by avoiding publicity of the deal. However, that could mean an unlimited temporal jurisdiction for many of the transactions caught by the proposed regime that are not routinely publicised, such as IP transfers and licensing, foreign transactions, real estate deals and acquisitions of assets. Such transactions would be exposed to the risk of being unwound or subject to remedies due to national security concerns many years after the event. The Government should consider ways to mitigate that legal uncertainty. For instance, for land that is proximate to a sensitive site, registration of an interest in the land registry should also start the period for temporal jurisdiction.

[34] White Paper, para 6.03.

Undertakings-in-lieu of a call-in

5.4 To maximise the flexibility of the proposed regime, we consider that there should be an option for transacting parties to offer and enter into binding commitments in order to avoid a call-in, in the same way that merging parties can enter into undertakings-in-lieu of a Phase 2 reference under the UK merger control regime. The call-in power should not be exercisable where such commitments mean that the Senior Minister no longer has a reasonable suspicion that the trigger event may give rise to a national security risk. At minimum, any voluntary steps undertaken by transacting parties to mitigate national security risks (e.g. by altering their transaction structure, governance arrangements or contractual relations with third parties) should be a factor that must be taken into account by the Senior Minister when deciding whether to exercise the call-in power.

5.5 See also our comments in 1.12-1.15 above regarding the proposed test for territorial nexus.

6. What are your views about the proposed process for how trigger events, once called in, will be assessed?

Prohibition on closing

6.1 The White Paper does not give reasons for the proposal to prohibit automatically the completion of transactions that are called in. We consider that such a prohibition would be both counter-productive and unjustified.

6.2 An automatic prohibition on closing would be counter-productive because the risk of this outcome would greatly increase transacting parties' incentives to notify benign transactions, so contributing significantly to an unmanageable deluge of filings. If a transaction becomes subject to a prohibition on closing shortly before its anticipated date of completion that will often have substantial adverse consequences, such as additional financing costs or a failure to satisfy contractual log-stop dates. Some transactions would be abandoned as a result. Given these adverse effects and the difficulty of predicting national security concerns, many transacting parties will make precautionary notifications to guard against that risk.

6.3 An automatic prohibition on closing would be unjustified because the use of interim orders would be a sufficient and more proportionate way to ensure that a transaction does not give rise to national security risks while being reviewed. In particular:

6.3.1 Interim orders can be used to prohibit or reverse any aspect of integration between acquirer and target, any exercise of influence over the target entity or asset, or any provision of information or access rights relating to the target. The CMA and its predecessors have a long and successful track record of using interim orders and undertakings to that effect, with the use of independent trustees to monitor compliance, where appropriate.

6.3.2 The legal act of closing does not, in itself, have any national security significance if powers to impose interim orders and remedies are available. The only reason to prohibit closing is if it would risk frustrating the Government's ability to impose remedies to address any national security concerns that it subsequently identifies. That will very rarely be the case. Such a frustration

risk would arise only where the ultimate remedy is a requirement to divest the target entity or asset and no suitable (non-hostile) third party can be found to acquire and operate the entity/asset in place of the original acquirer. However, the CMA has had a power to prohibit closing (on an ad hoc basis) for over four years and has not once – for any of the almost 300 transactions reviewed in that time - considered that the legal act of closing was likely to frustrate its ability to impose a divestment remedy. Moreover, the White Paper's indicative list of potential conditions[35] indicates that behavioural remedies are likely to be more common under the proposed national security regime than they are under the merger control regime,[36] such that an automatic prohibition would be even less justified.

6.3.3 We recognise that there may be some exceptional cases in which it is necessary to prohibit closing. However, a more proportionate way to address those cases would be to give the Senior Minister a power to prohibit closing on an ad hoc basis (coupled, perhaps, with an obligation on parties to a called-in transaction to inform the Government of their intention to close before doing so), so that only those exceptional cases are caught. That would be consistent with the CMA's powers under the EA02 merger control regime.

6.3.4 The ability to close allows for efficient allocation of regulatory risk between transacting parties and is consequently viewed by businesses as a beneficial feature of the UK merger control regime, which contributes to the UK's attractiveness as a destination for foreign investment. Imposing an unnecessary and disproportionate automatic prohibition on closing under the proposed national security regime would undermine that attractiveness.

Timescales

6.4 The proposed 15-30 working day period for the initial review following a notification seems to us to be broadly appropriate, as it should allow parties to coordinate parallel merger control and national security reviews (subject to our comments at 6.6-6.7 below regarding suspension of time periods).

6.5 We also broadly agree with the proposed 30 working day timetable for decision-making after a transaction has been called in and the possible 45 working day extension where necessary to further consider the national security risk and decide upon appropriate remedies. As recognised by the Government,[37] however, that may not be enough time to conclude some unusually complex cases. While it seems sensible to provide for the possibility of a voluntary extension to the review period, we consider that this should be time-limited (e.g. a single extension of up to 15 working days) and that such

[35] White Paper, Annex B.

[36] This is the case at present. None of the transactions that have been reviewed under the existing national security public interest intervention regime have been subject to prohibition or structural (divestment) remedies.

[37] White Paper, paragraph 7.31.

extensions should be used only rarely and in exceptional circumstances.[38] In addition, the Government should consider implementing appropriate procedures for pre-notification discussions, so that discussions regarding possible national security issues and potential remedies can be undertaken early in the process, so minimising the risk that there is insufficient time to resolve the relevant issues following a call-in.

6.6 We strongly disagree with the proposal in paragraph 7.37 of the White Paper that the act of requesting information should "pause the clock". Assuming the Government adopts the light-touch filing requirements indicated in paragraph 5.11 of the White Paper, the Government will need to request additional information for almost all transactions that give rise to potential risks. Moreover, the extent of delays would be outside the control of the parties, given that the act of sending a request to a third party would also pause the clock and the clock would only be un-paused if the Senior Minister considers that party's tardiness in replying to have "unfairly harmed" the acquirer's interests. The combination of these factors would mean that the proposed statutory timetables would be all but meaningless for transactions raising national security risks. Transacting parties would be incapable of accurately predicting the likely timetables for the post-notification and post-call-in decisions and would be unable to plan their transactions accordingly, or to coordinate them with other regulatory clearance timetables. In addition, third parties would be able to frustrate their competitors' transactions simply by refraining from responding to an information request.

6.7 We therefore recommend that the clock should be paused only if a party to the transaction fails to provide requested information by a deadline specified in the information request. Where a third party fails to respond to an information request by the specified deadline, the clock should be paused only if the Government initiates the procedure for imposing penalties for failure to respond. That would help to ensure that the clock is not paused in respect of failure to provide information that is not vital to the Senior Minister's decision or information that the addressee of the information request cannot be lawfully compelled to provide (e.g. foreign governments).

7. What are your views about the proposed remedies available to the Senior Minister in order to protect national security risks raised by a trigger event?

Legal test for remedies

7.1 Paragraph 8.12 of the White Paper describes the legal test for the imposition of remedies as being where "necessary to impose a remedy for purposes connected with preventing or mitigating" a national security risk". That test seems to us to be unduly vague. In our view, remedy powers should instead be available where "necessary to impose a remedy in order to prevent or mitigate" a national security risk.

Power to unwind trigger events

7.2 It is unclear to us whether the proposed power to "unwind" a transaction is intended to refer to a requirement that the original transaction is entirely reversed (e.g. through rescission of the sale agreement), causing the seller to resume ownership of that

[38] By way of reference, the EA02 provides that the Phase 2 merger timetable can be extended by an additional eight weeks if the CMA considers there to be "special reasons" why it could not conclude the Phase 2 investigation within the normal 24 week timetable – see EA02, s.39(3).

entity/asset, or is instead (as implied by the reference to the "similar powers" under the EA02)[39] simply referring to a power to require the buyer to divest the target entity or asset in its entirety to an unconnected third party. If it is the former, that would greatly complicate contractual sale and purchase arrangements, particularly if unwinding can be ordered several years after the transaction takes place, due to breach of a condition. If the value of an asset has fallen, must the seller assume that loss? Who would be responsible for liabilities incurred during the buyer's period of ownership? If a trigger event arises in the context of loan arrangements, must the underlying loan be repaid? If the shares or assets that must be returned to the seller have been charged to a lender in the interim, how are the lender's interests affected? How would the remedy work if the original vendor is not in a position to reacquire, e.g. because abroad (and thus outside the jurisdiction of the UK enforcement mechanism) or failing?

7.3 These are all reasons why merger control regimes across the world do not provide for or use rescission as an appropriate remedy. If the acquisition of control is not through an interest in a company or a partnership, then remedies should still primarily focus on transfer (e.g. novation of rights and obligations under a loan agreement to a financial institution approved by the Bank of England, with obligation to pay any arrangement fee or interest make-up required, so as not to damage the underlying business). The list of remedies used in standard merger control should be available, but it is difficult to see why there would be need to add an unwinding remedy as opposed to a divestment remedy.

7.4 We consider that if, despite the difficulties of a rescission remedy, it is intended that there should be one, such a remedy should be available only as a last resort, as the White paper recognises.[40] We consider this to be where:

7.4.1 the buyer (or a divestment trustee) has been unable to find – at any price - any purchaser for the target that meets the Government's requirements for a suitable purchaser, i.e. one that the Government is satisfied does not itself give rise to acquirer risk and is capable of operating the entity or asset in a way that avoids the relevant national security risk; and

7.4.2 the Government is not itself capable of operating the entity or asset in a way that avoids the relevant national security risk (if it is, it should assume ownership of the target, subject to payment of appropriate compensation).[41]

7.5 It should also be appreciated that such an unwinding would effectively impose an obligation on the original seller to take back and operate a business that it was not interested in purchasing at any price, and would be unable to sell, as no other purchaser was interested in buying it at any price. That could be a very significant financial burden, particularly if the business is loss-making. Accordingly, the Government should ensure that its spending powers extend to the payment of compensation for losses incurred by the original seller as a result of being required to take back and

[39] White Paper, para 8.52. The CMA does not have powers under the EA02 to reverse a legal transfer of ownership.

[40] White Paper, para 8.50.

[41] For a comparable regime allowing for expropriation of an asset from a foreign investor subject to the payment of compensation, see the Industry Act 1975, Part II.

operate the target business. There should be a mechanism for winding up the target if rescission also proves impossible.

7.6 We also consider that the same safeguards should apply before the exercise of a power to unwind a transaction for breach of a remedy condition.

8. What are your views about the proposed powers within the regime for the Senior Minister to gather information to inform a decision whether to call in a trigger event, to inform their national security assessment, and to monitor compliance with remedies?

8.1 Subject to our comments in 6.6-6.7 above and our response to question 9, we consider the proposed information gathering powers to be broadly appropriate. We do not favour the implementation of a prescribed maximum time period for responding to an information request.

9. What are your views about the proposed range of sanctions that would be available in order to protect national security?

9.1 In our view, neither criminal penalties nor civil penalties for individuals would be appropriate for breaches of call-in notices, interim restrictions or conditions. It is unlikely that such a breach would be, or could be demonstrated to be, the fault of a particular individual within the acquirer. In addition, the absence of comparable criminal offences in other jurisdictions would mean that it would be difficult to enforce criminal penalties, as extradition of the relevant individuals would not be possible due to the double criminality rule. Moreover, an inadvertent failure to comply would give rise to disproportionate implications for merging parties under the Proceeds of Crime Act 2002, with attendant adverse effects on incentives to invest in the UK.

9.2 For consistency, we suggest aligning penalties with the civil penalties that apply for breach of an interim order under the merger control regime, i.e. 5% of worldwide turnover.[42]

9.3 The legislation should also address the possibility of a conflict of laws. In particular, an individual or company should not be subject to penalties for breach of a requirement, if compliance with that requirement would place them in breach of the laws of another jurisdiction, e.g. where the Government requests information the disclosure of which is prohibited by another jurisdiction.

10. What are your views about the proposed means of ensuring judicial oversight of the new regime?

10.1 We agree that appeals against decisions of the Senior Minister on national security issues can only be assessed on the basis of the judicial review standard and that decisions imposing penalties should be subject to appeal on the merits. Given the existing judicial deference to Government in matters pertaining to national security,[43] it will be important that the statutory scheme for such appeals does not further restrict the application of the judicial review principles, the grounds for review or the rights and remedies available to appellants. In particular, we consider that the requirements for

[42] Section 94A(2) EA02.

[43] See the case law referred to in footnote 14 above.

necessity and proportionality in the interventions of the Senior Minister[44] should be expressed in the primary legislation so that they can form a basis on which the High Court can assess the lawfulness of those decisions.

10.2 We recognise that Closed Material Proceedings are likely to be unavoidable for many appeals and consider that the proposed approach to such proceedings is broadly correct. However, the Government should recognise the importance of effective appeal rights in maintaining investor confidence.

11. What are your views about the proposed manner in which the new regime will interact with the UK competition regime, EU legislation and other statutory processes?

11.1 It will be important to avoid mechanisms that delay the CMA's review, or which create incentives for the CMA to delay its reviews. Clearly, if the Senior Minister prohibits a merger on national security grounds, the CMA's review process will end. In all other circumstances, however, the existence of a parallel national security review should not cause the CMA to delay its substantive assessment of the competition issues relating to the merger in question. The Senior Minister's assessment of the presence of national security risk has no bearing on the CMA's substantive competition assessment. Consequently, if the reference to "adapted timings for competition assessments" in paragraph 11.17 of the White Paper is intended to allow for delays to the CMA's substantive assessment (as distinct from the consideration and formulation of remedies), we consider that would be undesirable.[45]

11.2 In the area of remedies, we recognise that some coordination may be beneficial in certain cases. However, we consider that such cases are likely to be rare and would not justify a general requirement to coordinate the timing and procedure of competition and national security assessments to ensure simultaneous remedy assessment by the two decision-makers. If national security remedies will have priority over competition ones, it is not obvious why the Senior Minister should intervene to delay the imposition of competition remedies (particularly in Phase 1). A better approach might be to allow the CMA to accept undertakings and then to have input into any subsequent assessment of remedies by the Senior Minister with a view to ensuring competition considerations are taken into account (as provided for in paragraphs 11.21-11.22 of the White Paper).

11.3 We agree with the analysis in paragraphs 11.31-11.36 of the White Paper regarding the interaction between the proposed regime and the EU Merger Regulation.[46] As regards alignment between with Takeover Code, we refer to the separate submission to this consultation of the CLLS Company Law Committee.

11.4 Finally, the Government should consider how the proposed regime will interact with foreign investment screening regimes in other jurisdictions. In particular, the Government will need to establish the legal, institutional and procedural framework for information sharing and cooperation with such agencies. A key element of that

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[44] White Paper, paragraphs 6.21-6.23 and 8.12

[45] In contrast to the suggestion in paragraph 11.16 of the White Paper, the current position under the public interest regimes does not provide for an adapted timetable for the CMA to issue its Phase 2 report in public interest cases, as the time periods in sections 51 and 39 of the EA02 are the same.

[46] Albeit uncertainties remain over the interaction of the regimes at a future point when the EUMR no longer applies in the UK.

framework should be the principle that interactions with foreign agencies must respect the confidentiality of information provided by transacting parties to the Government, with no disclosure to a foreign agency unless the parties have granted waivers to that effect.

CLLS Competition Law Committee
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