The City of London Law Society

The Law Society

National Security and Investment - Consultation

Law Society and City of London Law Society
joint response

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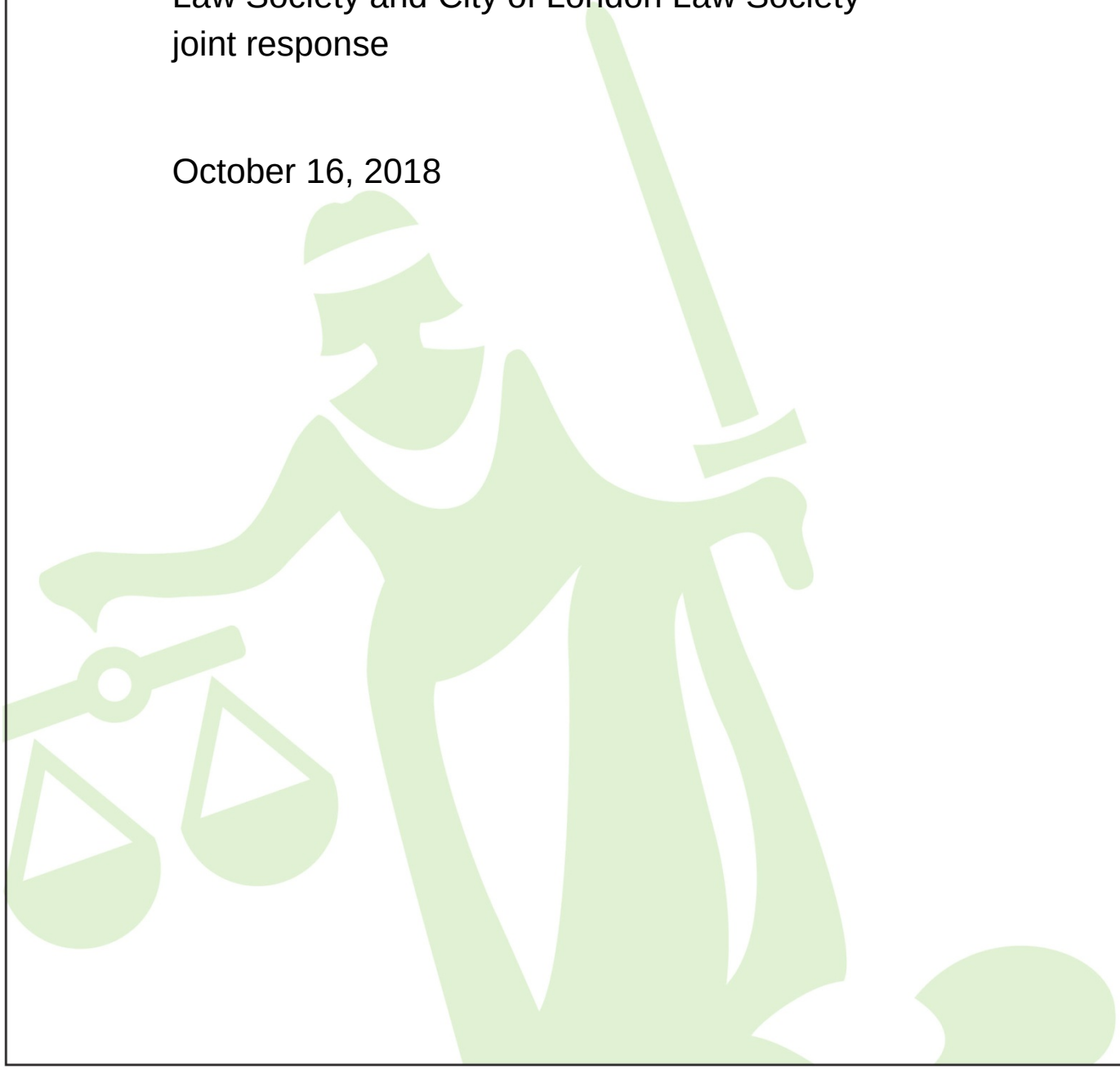

Introduction

1. The views set out in this paper have been prepared by a Joint Working Party of the Company Law Committees of the City of London Law Society (**CLLS**) and the Law Society of England and Wales (the **Law Society**).

2. The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

3. The Law Society is the professional body for solicitors in England and Wales, representing over 160,000 registered legal practitioners. It represents the profession to Parliament, Government and regulatory bodies in both the domestic and European arena and has a public interest in the reform of the law.

4. The Joint Working Party is made up of senior and specialist corporate lawyers from both the CLLS and the Law Society who have a particular focus on issues relating to capital markets.

General

We set out below our detailed comments on certain of the questions put out for consultation in the July 2018 White Paper. We appreciate that any regime whose aim is to protect national security must necessarily be expressed in broad terms sufficient to counter devices that seek to avoid the regime. However, we believe that as currently expressed, the regime is excessively broad both as regards the types of "trigger events" as well as the areas of the economy which the regime may impact. In the absence of clearer guidance or safe harbours, we are particularly concerned that some foreign investors will be reluctant to incur the time and expense of participating in competitive sales/investment processes for in-scope UK assets, especially given the potential risk of being publicly identified as being scrutinised as a potential risk to national security.

It is essential that the regime provides sufficient clarity as well as a clear timetable for assessment of any particular transaction in order that parties can plan the process associated with their transactions. While the White Paper sets out proposed timescales for the formal stages of any notified transaction, it will be just as important for parties to understand the timescales and process that would be involved in seeking informal guidance. This will very likely require considerable resource being made available by Government. Currently it is not apparent how quickly such guidance might be obtained and how definitive it will be.

We believe that the Government materially underestimates the number of notifications that are likely to be made given the breadth of activities and industries that are (or potentially are) within scope. Without narrowing the scope of the regime or providing safe harbours, we believe that there is a significant danger that the Government will be overwhelmed by requests for guidance, particularly during the early stages of the regime. By way of example, an M&A or infrastructure project relating to a potentially in-scope asset could well involve multiple parties (acquirors, potential consortia members, potential financiers, potential suppliers and the seller/sponsor) all seeking "upfront" comfort and guidance.

We would propose that the Statement of Policy Intent (SSPI) or secondary legislation should be developed in order to provide more "safe harbours" to market users. Even for those "safe harbours" that are not conclusive, a greater degree of direction in order to give reassurance as regards the scope of "significant influence or control" would, we think, be helpful. We provide examples below.

In addition to the SSPI, consideration might be given to providing more regular updates to the market as to the Government's approach to exercising its discretions under the regime in order to assist both advisers and potential investors in developing their understanding of how the regime is being applied in practice. This is likely to be of particular assistance given that decisions to clear individual cases are not proposed to be made public unless the relevant case is "called in".

Chapter 3 – the trigger events which could be called:

Q: 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?

Response:

As regards the acquisition of votes or shares in an entity, we agree that 25% may be considered an appropriate threshold. However, we would raise the following for consideration:

- Should the acquisition of 25% be expressed as an automatic trigger or should there rather be a presumption that the test has been satisfied at that level? For example, it is questionable whether the acquisition by a minority partner of a 25% interest in a 75/25 joint venture in which the minority partner does not have any of the decision rights listed in para 5.16 SSPI nor the veto rights in para 5.17 SSPI should be automatically treated as a trigger event.

- It is not clear how the test should be applied where there are different classes of shares with differing voting rights and/or of different nominal amounts. We assume that the legislation will include interpretative provisions similar to those in Schedule 1A Companies Act 2006 (if appropriate). It is worth noting that in the People with Significant Control Regime (**PSC regime**) under Part 21A of the Companies Act 2006, paragraph 13 of Schedule 1A Companies Act 2006 provides that a reference to holding "more than 25% of the shares in an entity" is to holding shares comprised in the issued share capital of that entity of a nominal value exceeding (in aggregate) 25% of that share capital. Paragraph 13 does not distinguish between voting and non-voting shares, therefore, non-voting shares are included in the calculation. This led to confusion in practice when the PSC regime came into force as some practitioners queried the logic of including non-voting shares in the calculation. In addition, paragraph 15 of Schedule 1A Companies Act 2006 excludes treasury shares when calculating whether the voting rights condition is met (although treasury shares are non-voting – see section 726(2) Companies Act 2006). We question whether the exclusion of treasury shares should also apply to the shareholdings calculation for this regime.

We also question whether the “significant influence or control” test as currently expressed is sufficiently clear:

- We understand that the response paper submitted by the City of London Law Society Competition Law Committee advocates the adoption of the “material influence” test as applied in merger control cases in preference to the “significant influence or control” test used in the PSC regime. We will not repeat the arguments in favour of such an approach but we can see the force of the arguments that have been raised in that regard. Equally we understand that BEIS has a preference for a broader based test. Ultimately this is a policy issue for the Government. However, we are concerned that the use of “significant influence or control” risks confusing the interpretation of that expression in the context of the national security regime with that of the PSC regime. It is apparent from the SSPI that the Government intends that “significant influence or control” should be given a broader interpretation for national security

purposes than for PSC purposes (as evidenced by the discussion regarding the right to appoint a single director). We would therefore suggest that (if the "material interest" standard is not adopted) the test for the national security regime should be *"sui generis"* – perhaps referring to "relevant influence or control". It could then draw on certain aspects of the PSC regime but would be distinct. It would not be helpful for the interpretation of the test to be influenced or inhibited by potential "read across" to the PSC regime, which serves a very distinct disclosure focused purpose.

- Notwithstanding that we consider that an alternative expression would be desirable, we refer throughout this response to the acquisition of "significant influence or control" as one of the relevant trigger events.

- The test for "significant influence" is expressed in a number of different ways in the SSPI which are not entirely consistent and are difficult to interpret. In particular, it is not clear whether a person needs to be able to direct activities generally or whether some lesser form of influence over a subset of activities (which may not be relevant to activities relevant to national security) is sufficient:

    - Where a person can ensure that an entity generally adopts the activities which they desire (para 5.10)

    - A person with the ability to appoint a director with particular responsibility over certain important activities such that the director can shape the direction and activities of an entity (para 5.21)

    - Where the person is significantly involved in the management and direction of the entity (para 5.25)

    - Where a person has the legal right to shape an entity's operations or strategy (para 5.27)

- We would submit that the test should be as expressed in para 5.10 – ability to shape activities generally - not the lower threshold as expressed in para 5.25 – involvement in part of management unless the involvement of the person referenced in 5.25 is relevant to activities having a direct or obvious bearing on national security.

- The extent to which access to information is relevant in determining whether a person has significant influence or control is also unclear. For example, in the context of loans, the consultation paper (**CP**) (para 3.101) suggests that a lender might have significant influence simply by having access to sensitive, non-commercial data, whereas para 5.46 SSPI suggests the opposite.

- Further, we are very aware of the complexity of the PSC regime, and that significant work was required by BEIS and stakeholders to deliver an effective PSC regime in 2016. Following implementation, inevitable teething issues, uncertainties over interpretation and anomalies arose, and in 2017 we submitted to BEIS a list of issues that our Committee members regularly encounter in practice. We note that section 82 Small Business, Enterprise and Employment Act 2015 requires the Secretary of State to review and report on Part 21A Companies Act 2006 and related changes by 30 June 2019. If the national security regime is to be modelled on the PSC regime as

proposed, we think it would be highly desirable for the Secretary of State to use the review exercise to resolve the issues with the current PSC regime before bringing in a further piece of legislation based on the PSC regime.

Right to appoint a director

- We question whether the SSPI is overly prescriptive in relation to circumstances where the acquisition of a right to appoint a director of itself would constitute the acquisition of significant influence or control.

- We would expect that only in exceptional cases would the acquisition of a right to appoint a single director amount to the acquisition of significant influence or control. In the majority of cases, a single director will be unable to gain sufficient influence or control in order to ensure that an entity generally adopts the activities that he or she desires. Still less would a person who has the right to appoint a director, but who has not actually exercised that right, be able to so direct. Furthermore, para 5.25 SSPI states that the trigger event is the point at which the person starts to exert significant influence or control. This is difficult to reconcile with a trigger event occurring simply by having a right to appoint a director.

- We would also have expected the guidance to distinguish between the appointment of one or more executive directors as opposed to non-executive directors, the latter being less likely in practice individually to be significantly involved in the management and direction of an entity and thereby to exercise significant influence or control.

- In the context of the new regime, there is a further important distinction between having a right to appoint a director and having actually appointed a director – in the latter case, the appointed director will have access to information (which might be passed to the appointor), in the former the appointor would not have access to that information (absent a contractual right).

- The conclusion that the acquisition of a right to appoint a director may confer significant influence or control also appears inconsistent with the conclusion that the making of a loan will rarely do so. In both cases the holder of the relevant rights (the lender or shareholder) is one step removed from actually having influence over the entity.

Further or additional acquisitions of control: including through new or additional rights

- We would like to see further guidance around circumstances in which the acquisition of *further significant influence or control through new or additional rights might constitute a* trigger event. In particular (i) to make clear whether pre-existing rights conferred conditionally (and included in a first notification) would constitute a trigger event when conferred or only once they became exercisable (ii) whether the acquisition of rights as a result of a change in (UK) law could constitute a trigger event (iii) how a person is to know when he or she has acquired further significant influence or control passively by virtue of third party actions, such as the break-up of a voting block (as mentioned in para 3.120 of the White Paper).

- Once a person has over 50% or 75% ownership or control of an entity, presumably it should not, as a general rule, have to be concerned about being called in over acquisitions of further significant influence or control through new or additional rights?

Loans:

- We refer to the comments contained in the response by the City of London Law Society Competition Law Committee and Financial Law Committee with respect to loans and endorse those comments.

- We anticipate that, notwithstanding that the White Paper asserts that the overwhelming majority of loans raise no national security concerns, lenders will be extremely worried by their inclusion within the regime given the potential consequences. This will be of particular concern to syndicated lenders given that the presence of a bank from a "hostile" jurisdiction (either at inception of the loan or through acquisition of a participation in the secondary market) might have consequences for the entire syndicate.

- We note that neither the making of a loan nor default will constitute a trigger event unless the lender actually exercises significant influence or control (para 3.99 CP) at the relevant time. However, even in the absence of significant influence or control at the point of agreement, many lenders will want reassurance that they will be free to enforce security without running the risk of such enforcement being "called in" at a later stage. However, if the provision of the loan itself is not considered a trigger event, it is unclear whether even informal guidance will be available in order to provide that reassurance.

- We believe that it is therefore essential that the statement of policy sets out in greater detail those features of a market standard loan that would not be regarded as conferring significant influence or control: this could be done by reference to market standard agreements such as those produced by the Loan Market Association referencing, for example, information covenants, covenants regarding acquisitions and disposals, incurrence of debt, etc.

- In the context of secured syndicated loans, we would also suggest that the statement of policy states that a syndicate lender who holds a participation which is less than the majority required under the relevant agreement to direct the security trustee as regards enforcement and realisation of security would not be regarded as having significant influence or control in the absence of other relationships. Additionally, a statement to the effect that a syndicate comprising a relevant majority of UK/EEA banks would not be subject to call-in would be helpful (where "relevant majority" referred to the majority required under the syndicate to enforce security and "UK/EEA bank" referred to a UK/EEA incorporated and authorized deposit taker).

  A similar approach could be taken for bonds.

Conditional acquisitions:

We note that it is proposed that, in the context of conditional acquisitions, a trigger event will only occur at the point of acquisition i.e. not at the point of contract. Notification would only be made at a stage where actual acquisition is in progress or contemplation "which is when the condition has been satisfied or is close to being satisfied" (3.109 CP). "Informal dialogue.. may be sufficient to provide the certainty" (3.111 CP).

We have a number of suggestions:

- Although the heading to paras 3.104 - 3.111 CP refers to "conditional acquisition, such as futures or options", it is not clear from the narrative whether it is proposed to distinguish between the various types of conditional agreements that can arise in practice. These would cover:

    - acquisitions of an entity which are conditional albeit that the parties will expect those conditions to be satisfied in a matter of weeks or months (eg customary form sale and purchase agreements where completion is subject to anti-trust or other regulatory clearances or waivers of change of control provisions in the target's contractual arrangements). We would anticipate that, in such cases, informal guidance could be obtained in anticipation of entering into the agreement and notification made at the time of execution of the agreement rather than at the time the conditions are about to be satisfied.

      Unless notification can be made at the time of entering into such an agreement, there is a danger of circularity in satisfying such conditions. For example, other antitrust or regulatory authorities (particularly those outside of the UK) may be unwilling to clear a transaction that remains subject to UK national security review. Similarly, contractual counterparties may be unwilling to waive a change of control provision in circumstances where the acquirer is yet to be approved from a national security perspective. Consequently it will be important that any condition as regards UK national security clearance is capable of satisfaction before other conditions may be satisfied

    - Agreements (such as a joint venture or consortium agreement) whereby a party may become bound to buy another party's interest or sell its own interest in the relevant entity to another party depending on the occurrence of an external event such as default under the agreement. Such obligation may arise automatically or at the option of the other party. If the relevant entity is engaged in a business which has implications for national security, it is possible that the entering into of the joint venture or consortium agreement will have been notified at the time of execution. In the context of a two party joint venture, that notification may provide sufficient comfort for the joint venture partners as regards the acquisition of further control by either of them. However, in the context of multi-party consortia (such as are common in larger infrastructure deals) a party holding, for example, an initial 5% shareholding could be required to increase its shareholding.

  - True option agreements whereby a party grants another party the option to buy or sell an asset at the election of that other party.

  - It would be helpful to understand, in relation to the latter two cases, what sort of comfort might be obtained at the time of entering into the relevant agreement. We suggest that a clearance should be obtainable, noting that the clearance could not cover changes in circumstances arising between agreement and acquisition that might alter the national security assessment. At the least, some form of guidance should be available.

  - Additionally, it would be helpful to understand the treatment proposed for agreements that are in existence at the time that the new regime comes into effect. Will the parties to such agreements be able to seek guidance or notify at that time, or would they be required to await the time at which the condition is satisfied or the option exercised? This will present a problem for many existing joint ventures and other agreements which include terms that might bring about an automatic change of influence or control but do not contemplate any form of conditionality or work to timetables that would accommodate the new regime.

- Many acquisition agreements will include interim (negative) covenants (often referred to as "gap controls") under which the seller agrees not to carry out certain actions with respect to the conduct of the target's business during the period between signing and completion without the buyer's consent, as mentioned in para 5.65 SSPI. We think that the CP indicates that signing a share purchase agreement is not meant to be a trigger event (see para. 3.109 CP), however, it would be helpful if the SSPI contains some guidance on the scope of such covenants consistent with the buyer not obtaining significant influence or control at the time of signing. (Para 5.59 SSPI contains equivalent safe harbours for minority protection rights; see also paragraph 2.10 of the Statutory Guidance on the meaning of "significant influence or control" over companies in the context of the PSC regime that provides that a person would not have significant influence or control (condition 4 control) where the absolute decision rights or veto derive solely from being a prospective purchaser in relation to the company, on a temporary basis, for example pending clearance by the CMA).

- In addition, if a transaction is called in following the signing of a conditional sale and purchase agreement, it would be helpful to have guidance on what "gap" controls would be permissible if a prohibition on closing is in place. This is analogous to "gun jumping" concerns under a number of anti-trust regimes where a range of negative gap controls are permitted.

Partnerships

- It would be helpful if guidance could be given on how partnerships will be treated when determining whether or not a trigger event has occurred. In particular, we would have expected that the limited partners of a limited partnership wherever formed, as passive investors without the right to exercise influence or control over underlying investments, should be granted a "safe harbour" similar to that in the PSC regime (see paragraph 25 of Schedule 1A Companies Act 2006 that provides an exemption for limited partners, and persons above them in their corporate chains, from meeting

conditions 1 to 3 under the PSC regime). Any such safe harbour should make clear that the participation by a limited partner in an advisory committee with the general partner or similar body would not destroy the safe harbour provided that the committee does not have the ability to control investment decisions. We do not believe any such safe harbour would be capable of abuse given the restricted rights of a limited partner.

Ownership of assets

- Some greater specificity is required as regards how ownership of an asset is determined. The legislation would need to address what owning 50% of an asset means in practice as this may mean different things depending on the nature of the asset e.g. real estate; IP rights etc. Is the test intended to refer to legal ownership or beneficial ownership or both? Also, where arrangements are in place which allocate the income derived from an asset in a different proportion from capital, how should ownership be determined?

Significant influence or control over an asset

- Para 3.83 CP indicates that a person will generally only gain significant influence or control over an asset if the trigger event involves some acquisition of ownership, although the same paragraph indicates that a mere licence to use an asset is a trigger event if it provides the licensee with the means of using (or manipulating) the asset in question. Para 5.42 SSPI refers to significant influence or control only being acquired over an asset through some form of acquisition over, or investment in, the asset or an entity that owns an asset whereas para 5.44 SSPI indicates that rights to use an asset may amount to significant influence or control. Some greater clarity over the question whether the "acquisition of ownership" requirement is a general requirement would be helpful. This will be particularly important given the potential breadth of the extra-territorial reach of the proposed regime where UK concepts of ownership may not be readily applied in a local law context.

Chapter 4 – statement of policy intent

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

Response

- We think that a distinction may be drawn between certain sections when defining its function. As regards the meaning of significant influence or control, we suggest that a similar approach to that in para 24(2) of Schedule 1A Companies Act could be taken ie regard *must* be had to the guidance in interpreting the meaning of significant influence or control. By contrast, some of the SSPI is concerned with matters that the Senior Minister (as a matter of policy) must have regard to when exercising the call-in power. For that reason it may be better to separate out the guidance on the meaning of significant influence or control into a separate document.

Q What are your views about the content of the draft statement of policy intent?

- We welcome the SSPI. However, as discussed above, in order for the SSPI to be of real value, we believe that it should provide greater clarity in particular with regard to the meaning of "significant influence or control" as well as safe harbours for certain types of relationships.

- We question whether a review only once every five years is sufficient for the statement to remain useful and relevant (para 4.25 CP). If, as proposed, only trigger events that are called in will be made public, there will be a large number of transactions where the initial assessment results in clearance, but the reasons for that will not be known to the market. Regular updates to the SSPI (or via an alternative means of publishing guidance) would be helpful in guiding the market on the approach that the Government is taking.

- We think the SSPI could more clearly state that 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. Such a statement could help provide greater reassurance that the regime is not intended to capture all transactions relating to entities or assets with some connection to UK national security.

Chapter 5 – how the Government will screen notifications

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

- The regime will require a sophisticated apparatus that is sufficiently resourced to screen transactions and to provide guidance. We are concerned that the Government underestimates the number of transactions that will be the subject of notifications or requests for guidance, especially in the early stages of the regime. Greater assurance on the process and timeline for informal guidance, and the comfort that it may give, would be helpful. As mentioned above, we think that consideration should be given as to how the market might be informed at regular intervals of the Government's approach to application of the regime as practice develops.

Chapter 6 – the call-in power

Q 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?

Response:

- The call-in power is proposed to be exercisable where the Government:

    - Has reasonable grounds for suspecting that it is *or may be the case* that a trigger event has taken place or is in progress or contemplation; and

    - Has a reasonable suspicion that, due to the nature of the entity or asset concerned, the trigger event *may give rise* to a risk to national security.

- We are concerned that the above is lacking in clarity and sets the threshold for exercise of the call-in power at too low a level.

- Greater clarity should be provided over the evidential threshold to be applied when considering whether a transaction "may" be in-scope – does this mean on the balance of probabilities or some lesser threshold? The word 'may' suggests to us that a mere possibility of a trigger event having occurred or a risk to national security arising is sufficient.

- More fundamentally, we question whether it is desirable to couple reasonable grounds/suspicion with a test which only requires a mere possibility of a trigger event having taken place or a risk to national security. That seems to provide little reassurance that the power will only be exercised where there is a real threat to national security.

- Therefore, we think that a more appropriate formulation providing greater clarity without undermining the power would be for the exercise of the power to be based on reasonable 'belief' rather than 'suspicion' or, if suspicion is retained as the relevant test, for the possibility of a trigger event having taken place or a risk to national security having arisen to be expressed as more than a mere possibility.

Q : Views on the six month period and ability to act retrospectively (6.32).

Response:

- Whilst we acknowledge that the six month period is not unreasonable, we would question why it needs to be longer than the four month period currently provided for under the existing UK public interest regime. Regardless of what period is adopted, we would also highlight that, in the case of some trigger events (eg foreign state acquiring significant influence or control over an entity through the coercion of an individual), the time at which the trigger event occurs will be highly uncertain.

Chapter 7– calling in a trigger event and the subsequent assessment process

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

Response:

- Generally, we think that the time scale of 30 working days, extendable by up to 45 working days, is reasonable. We note that the Government reserves the power to extend via a "Voluntary Period". We think that there should be a time limit on such a "Voluntary Period". We are also concerned by the ability to "pause the clock" as mentioned in para 7.37 CP where a third party has failed to provide information. We are concerned that if such extensions became the norm rather than the exception, the timetable would then become meaningless.

Views on merits of there being a prescribed maximum period for responding to an information request (7.36)

- We agree with the adoption of a flexible approach in setting time limits according to the nature of the information sought. We do have a concern that information sought from persons who are not parties to the transaction in question is provided promptly so as not to hold up the transaction and that, as a consequence, there should be a hard deadline for this except in exceptional circumstances.

Should Government only publish when assessment concluded (7.44)

- We agree with the approach of publishing at the point that a trigger event is called in. However, we think that the parties should be given the opportunity to withdraw the application if the initial assessment leads to a decision to call in, in which case no public announcement would be made. The ability to withdraw and resubmit would also give parties an opportunity to amend a transaction to meet any concerns that had been identified during the screening period and which were capable of being remedied via such amendments. We have a real concern that if an investor is publicly identified as a party to an arrangement which is the subject of a potential acquirer risk on one transaction, then that investor may well be perceived by other market operators and/or the media as liable to give rise to such risks in all future transactions involving some degree of target risk. The statement in para 4.10 SSPI (i.e. that the fact that the Senior Minister has exercised call-in powers in relation to a certain acquirer should not be taken as a judgement that the acquirer is hostile) would not alter this fact. This risk of adverse publicity will be of very significant concern to a number of current major overseas investors in UK infrastructure projects.

Views on five day delay to announcement once a trigger event is called in (7.47)

- We agree that there is merit in having some flexibility as regards when a decision to call in is made public.

Chapter 8 – remedies available to protect national security

Q Views about the proposed remedies available to the Senior Minister in order to protect national security risks raised by a trigger event.

- The scope of a "full unwind" is unclear, particularly as the regime contemplates that conditions can be imposed on any party e.g. buyer and seller. Without clarification, a "full unwind" could, for example, require the return by the seller of consideration paid and shares/assets transferred back by the buyer to the seller. However, the rights of third parties may have been affected i.e. the consideration may have been required to be paid by the seller to a bank in repayment of a loan or may have been distributed by the seller to its shareholders or committed for some other purpose and/or the shares/assets which are the subject of the transaction may have been charged by the buyer to a lender. In addition, a full unwind is likely to be an unduly onerous burden on the seller. The seller may not be in a position to take back and support the business or asset in question either financially or operationally because it no longer has the expertise or commercial infrastructure to run the business or asset in question.

We therefore consider that as with the merger control regime (a) once a transaction has been completed remedies should not be exercisable against a seller and (b) that, where no other remedy is adequate, a "full unwind" would involve an approach similar to that taken under the Enterprise Act i.e. that an entity or assets acquired must be held separate by the buyer and sold to an approved third party.

- We question the complete exclusion of remedies being sought/undertakings being taken during the screening period in order to avoid a transaction being called in. We believe that it would afford the regime greater flexibility in appropriate cases to allow undertakings to be accepted at the end of an initial screening so as to avoid the time and expense, as well as the adverse inferences that may be drawn, of calling in a transaction.

- Where the Government approves a trigger event but wants to have prior notice ahead of a party acquiring a specific further means of control, more clarity needs to be given over what needs to be notified given the potential for criminal or civil sanctions for any breach of this requirement.

Q 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.

- *Views on appropriateness of Senior Minister being granted power to impose a condition allowing them to unwind a trigger event (without time limit) (8.58) (8.60)*

  We do not object to this provided that the condition is clear and drafted objectively. It would be helpful if some sort of warning procedure could be incorporated into the process to the extent that a breach of condition was remediable.

Chapter 9 – sanctions for non-compliance

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

- We do not think that criminal sanctions are appropriate for this regime other than in the case of very clear and objectively assessed breaches of a specific order imposed by Government or by the Courts. In addition, how will the enforcement of criminal sanctions work against non-UK individuals and entities?

- If a director can be disqualified if he ought to have known in his official capacity but failed to take action to prevent the breach (see para 9.23 CP), the legislation should clearly set out what standard is to apply to determine whether a director ought to have known something. For example, should the director be treated as having the general knowledge, skill and experience actually possessed by the director and that which should have been possessed by a person in his position. Equally, is the reference to "official capacity" intended to denote a distinction between directors performing different roles? If so, this needs to be clearer.

Chapter 10 – Judicial Oversight

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

- Whilst we are generally supportive of the proposed judicial oversight regime, we do think there should be scope for an appeal against a decision of the High Court in a manner consistent with other judicial review processes.

Chapter 11 – interaction with other regimes

Q 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?

Takeover Code

- The new regime will be highly relevant to those undertaking public M&A transactions in the UK which are governed by the Takeover Code:

    - Bidders and targets will wish to seek informal guidance as to whether or not a transaction might be of interest to Government and thus whether an offer should be conditional upon clearance. Informal guidance would be sought prior to the announcement of a transaction and, if the parties conclude that a notification should be made, they will wish to submit that notification upon announcement of the transaction. They will therefore wish to engage confidentially with officials prior to announcement and to agree the form of notification in advance.

    - The Takeover Code requires bidders and targets to adhere to a prescribed timetable which requires the conditions to an offer to be satisfied within certain time-limits. Therefore, parties to a takeover offer which is conditional on clearance under the new regime will want to ensure that the process runs in accordance with the statutory timetable (see our concerns with respect to "pausing the clock" above).

- It needs to be clarified whether the new national security regime will be afforded the same special status under the Takeover Code that is currently reserved for Phase 2 CMA references and Phase 2 EC proceedings (as compared to other regulatory approvals) under Rules 12, 13 and 31.6 of the Takeover Code. For example, under Rule 13, a bidder seeking to invoke a Phase 2 CMA or EC condition is not required to satisfy the Panel that the circumstances giving rise to the right to invoke are of material significance to the bidder in the context of the bid, whereas this materiality test renders most other bid conditions unenforceable in almost all situations. Similarly, the restrictions on subjective conditions in Rule 13.1 are disapplied for Phase 2 CMA or EC conditions.

- A related question is whether the Takeover Code will impose an obligation on bidders to include a term that their bid will lapse if "called-in" by the Government under this regime prior to the bid being declared unconditional as to acceptances (in the case of a

contractual offer) or prior to the scheme meeting (in the case of a scheme), as is the case currently for Phase 2 CMA references and Phase 2 EC proceedings where an offer comes within the statutory provisions for a possible Phase 2 CMA reference, or would give rise to a concentration with an EU dimension within the scope of Council Regulation 139/2004/EC.

- In relation to the Takeover Code timetable, where a bid is being implemented by way of a contractual offer, the Panel will usually "freeze" the timetable pursuant to Rule 31.6(iii) (by postponing Day 39, Day 46 and Day 60) if the offer is subject to a Phase 2 reference condition and there is a significant delay in the CMA or the EC's decision as to whether to refer the transaction. We would hope that the Government's "calling-in" decision under the new regime will be subject to the same treatment.

- We would note that, although the Takeover Code now allows for "post-offer undertakings" (see Rule 19.5 of the Takeover Code), the Takeover Panel is not an industry – based regulator in the same way as, for example, OFWAT or OFCOM. Therefore, we would anticipate that the Code's post-offer undertaking regime would not be used as a basis for taking undertakings which have a bearing on national security.

- Finally, it would be helpful to understand whether the Panel will treat any pre-announcement national security-related discussions between the bidder and the Government as using up one of the bidder's six places for the purposes of the Rule of Six in Rule 2.2(e) of the Takeover Code. The Panel will usually ignore regulators for Rule of Six purposes, but only where the relevant regulatory approval is material to the transaction and there is a substantive reason why engagement prior an announcement is necessary.

16 OCTOBER 2018