The City of London Law Society

The Law Society

National Security and Investment: Sectors in Scope of the Mandatory Regime

Consultation on secondary legislation to define the sectors subject to mandatory notification in the National Security and Investment Bill 2020

Joint Response of the Company Law Committees of the City of London Law Society and the Law Society

6 January 2021

JOINT RESPONSE OF THE COMPANY LAW COMMITTEES OF THE LAW SOCIETY AND THE CITY OF LONDON LAW SOCIETY TO THE CONSULTATION ON SECONDARY LEGISLATION TO DEFINE SECTORS SUBJECT TO MANDATORY NOTIFICATION IN THE NATIONAL SECURITY AND INVESTMENT BILL 2020

The views set out in this paper, in relation to the consultation on secondary legislation to define the sectors subject to mandatory notification in the National Security and Investment Bill 2020 (the ***Bill***) (the ***Consultation***), have been prepared by a Joint Working Party (the ***Committee***) of the Company Law Committees of the City of London Law Society (***CLLS***) and the Law Society of England and Wales (the ***Law Society***). See the annex to this paper for further information relating to the CLLS and the Law Society.

1. INTRODUCTORY COMMENTS

1.1 The Committee believes that the currently proposed mandatory notification regime (including the sectors subject to mandatory notification as set out in the Consultation) is materially disproportionate in view of the Government's expectation that a relatively small number of cases are expected to give rise to national security concerns. The broad scope of the sectors subject to mandatory notification, as proposed in the Consultation, exacerbates that concern in light of the other aspects of the mandatory regime as set out in the draft Bill which give it disproportionate breadth: the proposed regime's very broad extra-territorial scope, the absence of *de minimis* thresholds, the absence of clear safe harbours, the fact that transactions that close without approval will be void and that criminal sanctions will apply.

1.2 As currently proposed, the breadth of the mandatory regime (including the breadth of the proposed sectors as set out in the Consultation) and the very serious potential consequences of failing to make a notification will force investors to take an over-cautious approach. Investors will therefore either seek informal guidance or make a voluntary notification even if they do not think a mandatory notification is required.

1.3 This is likely to mean that the volume of enquiries/notifications is far higher than currently anticipated by the Government: a lack of sufficient resources will lead to process delays that could portray the UK in a bad light. It will also potentially deter certain types of foreign investors which are much valued to the UK and, more generally, potentially adversely impact foreign investment in the UK, including in sectors which are key to the UK's recovery from the COVID-19 pandemic. In particular, given that a number of the sectors subject to mandatory notification as set out in the Consultation impact the tech sector (including the very broadly defined sectors mentioned below in Section 2), in the Committee's view, the proposed mandatory regime may cause serious damage to the UK as a hub for the technology sector (both as regards the establishment of businesses and their development and growth through continued investment).

1.4 When viewed in the context of the Government's expectation that a relatively small number of transactions are expected to give rise to national security concerns, these factors and the significant incremental costs for market participants (even on smaller investments) highlight the disproportionality of the proposed mandatory notification regime and the related sector definitions.

1.5 In relation to the 17 proposed sectors subject to mandatory notification set out in the Consultation, the Committee's principal concerns are that the sectors, as defined, are overly broad in scope and are unclear in application, with the effect that, as explained below, some of the sectors could potentially capture almost any business in one way or another.

2. GENERAL COMMENTS

2.1 The Committee's view is that the breadth of the 17 sectors currently proposed in the Consultation should be materially narrowed.

2.2 As the Government states in various places in the Consultation, the definitions it has proposed in the Consultation are broad[1] and, in certain areas, capture a range of business and assets which will not present

[1] See, for instance, the "Rationale" sections in relation to the "Artificial Intelligence" and "Communications" definitions.

national security concerns.[2] In addition, the Government has introduced new definitions in relation to a number of sectors which are currently regulated by the Enterprise Act 2002 which appear to be materially broader than those which currently apply in the Enterprise Act 2002.

2.3 As a conceptual matter, the Committee disagrees with this approach. Given the other very broad aspects of the mandatory notification regime which are mentioned in Section 1 above, the proposed sector definitions as set out in the Consultation will contribute to a mandatory notification regime which is excessively broad. This excessively broad mandatory notification regime will likely lead to significant uncertainty and significant costs and adverse impacts on the UK as also mentioned in Section 1. The Committee also believes there is limited benefit to such an approach, or at least the benefits of this approach are significantly outweighed by the potentially serious costs and impacts. This is because the Government would always retain the right, as a general matter, to call-in transactions under the Bill where the mandatory notification regime did not apply and has very broad powers to do so. In addition, in relation to some sectors the subject of the Consultation, the Government already has other powers to regulate those sectors including defence and communications.

2.4 In sum, the Committee believes that reducing the scope of the sectors subject to mandatory notification (and making certain defined changes to promote certainty) will avoid significant costs and adverse impacts of the proposed regime, without undermining its broad objectives, given the Government's residual call-in powers under the Bill and other regulatory powers.

2.5 At the very least, the Committee recommends that not all 17 sectors should immediately become subject to the mandatory notification regime. The Committee anticipates significant logistical and resourcing issues if all 17 were to go live at the same time; instead the Committee believes that the regime should initially apply only to those sectors which are already (to some extent or another) within the existing Enterprise Act 2002 regime. This would be on the basis that the Government will already have experience of dealing with those (or similar) scope definitions; private parties will also have experience of these definitions; and turning the existing voluntary national security regime into a mandatory one would create an useful baseline for comparison between the pre- and post- Bill regimes. Those sectors already within the Enterprise Act 2002 in some way or another are: (a) Advanced Materials; (b) Artificial Intelligence; (c) Computing Hardware; (d) Cryptographic Authentication; (e) Defence; (f) Military and Dual Use; and (g) Quantum Technology.

2.6 The Committee has a number of general comments and recommendations which are set out below. More specific comments and recommendations (including drafting comments) are set out in the attached table.

The mandatory notification regime set out in the Consultation is more onerous than those applicable in other regimes referred to in the Consultation

2.7 The Government states in the Consultation that the proposed regime is in line with many of those administered by other developed jurisdictions.

2.8 However, the Committee notes that while countries such as the US have mandatory notification regimes, they generally apply in much more limited circumstances than is proposed with the 17 sectors set out in the Consultation.[3]

2.9 The Committee does not believe that this is justified – in light of the costs and adverse effects it will cause and in light of the Government's residual call-in and other regulatory powers – and indeed believes that this approach will be particularly disproportionate and harmful to the UK. This is especially the case given that the UK is in a different position to a number of the other jurisdictions which the Government cites.

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[2] For instance, in the "Communications" section the Government states that the definition currently captures a very wide range of private communications networks, many of which will not present national security concerns and wishes to work with industry to reduce its scope.

[3] For example, the sectors subject to mandatory notification under the CFIUS regime in the US are far narrower than those proposed in the Consultation, while the French mandatory regime applies only to acquisitions of an interest in French-registered entities.

The UK post-Brexit is and seeks to be an open and international trading centre – adverse impacts on foreign investment would severely disrupt one of the key underpinnings of our economy. If anything, this warrants a narrower mandatory notification regime than the regimes in other developed countries, rather than a broader regime.

The Government should introduce an appropriate de minimis threshold in the regulations subject to the Consultation either generally or for each sector

2.10 Currently the proposed regime does not provide for a *de minimis* threshold, either generally or for specific sectors.

2.11 The Committee believes that a general *de minimis* threshold based on transaction value, below which mandatory notification is not required, should be introduced as detailed below. If that were the case, the Government would still retain the ability to call in any relevant transaction (even if below the mandatory filing threshold) in circumstances where national security is deemed to be at risk.

2.12 In the Committee's view, it is counterintuitive that small transactions, small businesses and assets, and businesses and assets to which the market attributes a low value, would be likely in the overwhelming majority of cases to give rise to material national security concerns. If, for example, an entity owns a technology that is likely to be of significant strategic value in the future – which the entity in question is best-placed to assess – it is unlikely that the entity or technology could be acquired at a low value.

2.13 The Committee believes the absence of a *de minimis* transaction value threshold will again increase the likelihood that the Government is inundated with notifications and requests for informal guidance in relation to transactions which are inherently very unlikely to pose any material risk. This burden (both for the Security Investment Unit and the parties involved in the transactions) and the associated adverse costs and impacts seems entirely disproportionate given the likelihood of potential risk.[4]

2.14 The Committee is also particularly concerned that this could have a serious chilling effect on investment in the technology sector in the UK given that a number of the sectors the subject of the Consultation (including the very broadly sectors mentioned below) will implicate technology-related business. In particular, the proposed regime may have a detrimental impact on seed and venture-type investments, as early-stage start-ups are unlikely to have the resources to devote to managing the complexities of the proposed regime and their investors may not be prepared to participate in early (or even later) funding rounds.

2.15 A financial transaction value threshold below which the mandatory notification regime would not apply should be introduced in the regulations the subject of the Consultation. If the Government disagrees with adopting a general financial transaction value threshold for the mandatory regime (for example, because it believes that would not be appropriate in some of the sectors), then sector-specific financial transaction value thresholds should be introduced into the relevant sector definitions.

2.16 On a related note, the Committee notes that some sector definitions in the Consultation have certain materiality thresholds built into the underlying defined activities. For instance, in relation to the "Energy" sector, certain terminals and infrastructure are subject to mandatory notification requirements where throughput is greater than a certain tonnage of material per year. However, the approach on this issue in the other sector definitions is inconsistent. In particular, other sector definitions – for instance "Critical Supplies to Government" – do not contain such qualifications. Additional adverse effects will arise from the currently proposed regime if, for instance, a transaction of a very small value in relation to a business making *de minimis* supplies to Government triggers the mandatory notification regime. The Committee believes that these materiality thresholds will ease the disproportionate administrative burden of the regime and, in the attached table, has made suggestions in relation to other sector definitions which should introduce materiality qualifications in certain areas. These materiality qualifications could, for instance, be

[4] The Committee notes that, earlier this year, the *de minimis* threshold was removed from the Australian foreign investment regime, with the consequence that FIRB was inundated with notifications and expectations on clearance times in the middle of the year inflated by at least several months.

based, for instance, on the value of certain Government contracts, or the volume of supply, whichever is most relevant to the sector.

The Government should clarify the extra-territorial application of the mandatory regime in the regulations the subject of the Consultation

2.17 The Committee believes that the extra-territorial application of the sectors the subject of the mandatory regime is unclear and inconsistent and should be clarified.

2.18 In particular, section 6(4) of the Bill provides as follows:

> *"A description of qualifying entity that is specified must include provision that the entity carries on activities in the United Kingdom which are of a specific description (whether or not it also carries on other activities".*

The Committee had understood that the intention of this section is to provide for a narrower extra-territorial regime for mandatory notification than that which applies more generally in section 7(3) of the Bill. As the Committee has expressed in other submissions made to the Public Bill Committee, section 7(3) is of itself excessively broad - even for the voluntary notification regime - and will require investors to diligence the entire direct and indirect supply chain of a foreign entity to determine the application of the regime.

2.19 As the Committee identifies in the attached table, while a number of the sector definitions do contain the provision required by section 6(4) of the Bill (that the relevant activities must be carried on in the UK), there is no such provision included in a number of the other sector definitions. The Committee has made specific drafting suggestions to address these concerns in the attached table.

Guidance and safe harbours

2.20 The Committee is concerned, given the very broad remit of the mandatory notification regime and the very widely drawn sector definitions, that there will be considerable uncertainty in the market as to the application of the mandatory notification regime. This will lead to investors making a large number of filings in relation to transactions which could not plausibly give rise to any national security concerns, and other costs and adverse impacts as detailed in this document.

2.21 It is therefore important that the Government seeks to update the market (where relevant, through additional regulations made under the powers in the Bill or in guidance materials) on a regular basis as particular concerns are raised and/or other material developments in the Government's approach occur in relation to the sector definitions. This is particularly relevant for the sector definitions given: (1) the concerns expressed in this submission as to their breadth; and (2) the fact that the Government has expressly sought to define the sectors broadly and has stated in the Consultation that it accepts the current definitions will catch businesses which do not give rise to national security concerns.

2.22 In addition, to promote clarity and predictability, the Committee believes that the Government should also consider introducing specific safe harbours based on the industry and technical feedback it has sought in relation to the Consultation and based on ongoing practice. The technical issues involved in defining the sectors in a proportionate and appropriate way are not straightforward, but specific safe harbours in relation to matters which the Government is clearly not seeking to subject to the mandatory notification regime could be relatively easily developed and would greatly promote clarity for the market. For instance, in relation to the "Advanced Robotic" sectors, the Consultation states that "*the draft definition could be refined to avoid capturing domestic applications and other less sophisticated applications. It is not our intent, for example, to capture technologies such as robot vacuum cleaners etc.*"

High level concerns in relation to key sectors such as "Artificial Intelligence", "Communications" and "Data Infrastructure"

2.23 Finally, the Committee has specific, significant concerns in relation to the breadth of the definition of certain sectors such as "Artificial Intelligence", "Communications" and "Data Infrastructure". These sectors are also obviously key to the UK's tech industry. In particular, the concern is that these sectors could potentially catch almost any business in the UK, which the Committee believes will give rise to significantly detrimental impacts.

2.24 More detail in relation to these concerns is developed in the attached table. However, at a high level:

1. Artificial Intelligence

2.25 The definitions of "artificial intelligence and "complex task" in the "Artificial Intelligence" sector appear to be egregiously broad, and could capture an extremely wide range of activities that employ even relatively straight-forward levels of artificial intelligence for purposes that could not give rise to any plausible national security concern. In particular, most basic artificial intelligence, which is now ubiquitous in the UK economy, will involve "*statistical prediction based on uncertain or incomplete information*" (see the definition of "complex task"), and almost any software involves "reasoning". The concern therefore is that a very large number of businesses in the UK will be "*developing or producing goods, software or information that use artificial intelligence to perform a complex task*". It seems entirely disproportionate to apply the mandatory regime in this way given the Government's residual call-in and other powers.

2.26 Indeed, the proposed definition is so broadly drafted that it would also apply where the relevant entity itself has no control over, or access to, the relevant artificial intelligence technology but develops products or data that use the output of such artificial intelligence technology under a licence agreement. The mandatory regime should be focused on development of the underlying AI technology (as in the proposed definition of the cryptographic technology sector),[5] not those implementing the technology (whose activities would be caught, where relevant to national security, under other sectors subject to the mandatory regime).

2.27 In addition, the relevance of artificial intelligence to national security is closely tied to its application, and the mandatory regime could be better targeted by focusing on technology with current or anticipated applications in core sensitive sectors (e.g., Defence). By way of example, the French FDI regime requires notification in artificial intelligence (and advanced robotics) sectors only where the relevant research and development is (i) likely to prejudice the interests of national defence, participating in the exercise of official authority or likely to prejudice public policy and public security, and (ii) intended to be carried out in one of a number of specified sectors (e.g., weapons, munitions, powders and explosive substances for military purposes or military equipment).

2.28 Finally, the Committee believes that the Government should consider limiting the definition by reference to:

- AI that makes decisions based solely on automated processing, including profiling, in line with Article 22 of the UK GDPR, but excluding AI that merely extracts data from documents, makes recommendations, or makes predictions that support human decision makers; and

- Specific forms of AI, such as that which employs deep learning and re-enforcement learning, but excluding other forms of AI such as advanced statistical algorithms.

2.29 Specific drafting recommendations to narrow this definition are developed in the attached table.

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[5] "*An entity that **designs, produces or creates technology** to verify the identification of a person, user, process or device, where the method of verification employs cryptography in performing that function to protect the authenticity, confidentiality or integrity of the information*" (emphasis added).

2. Communications

2.30 In the "Rationale" relating to the "Communications" sector, the Government states that "*the definition currently captures a very wide range of private communications networks, many of which will not present national security concerns*." In the Committee's view, the scope of the mandatory notification regime should be limited to networks and services that are designated by Ofcom under s.33 of the Communications Act. The Government could then work with Ofcom to develop appropriate designations, which would provide greater legal certainty and clarity.

2.31 In addition, the definition of "associated facilities" in s.32 of the Communications Act 2003 is extremely broad and encompasses any facility which has the potential to be used for the purpose of making the provision of an electronic communications network or service possible. The Committee believes the Government should, in place of the definition of "associated facilities", combine:

- The definition of "electronic communications apparatus" which is used in the Electronic Communications Code in Schedule 3A of the Communications Act 2003, as this is more precise; and

- The definition of "essential services in the digital infrastructure subsector" in Schedule 2, paragraph 10 of the Network and Information Systems Regulations 2018 (in order to catch the entities that the consultation refers to in point 2 at the top of page 38 of the consultation).

2.32 If the Government is nevertheless minded to use the definition in section 32 Communications Act 2003, it could be sensibly limited to associated facilities that are designated by Ofcom under s.33 Communications Act 2003 (as suggested above in respect of electronic communications network and electronic communications service).

2.33 Specific drafting recommendations to narrow this definition are developed in the attached table.

3. Data Infrastructure

2.34 As currently defined, an entity which owns or operates data infrastructure, either physical or virtual, which hosts, stores, manages, processes, controls or transfers "relevant data" will be subject to the mandatory notification regime in the "Data Infrastructure" sector. "Relevant data" is defined to be "*data used for the operation of essential services or businesses continuity of any entity that falls under the mandatory notification regime*".

2.35 The Committee is concerned that the "relevant data" definition, combined with the references to virtual data infrastructure, could potentially catch a very wide range of UK businesses.

2.36 Indeed, it may not be apparent to the entity that "*hosts, stores, manages or processes or controls or transfers*" such data whether the data is used by a third-party entity that falls under the mandatory notification regime, let alone whether the data is used for "*the operation of essential services or business continuity*" of the third-party entity.

2.37 It is likely, therefore, that the only way for investors to be sure of not breaching the mandatory notification requirement would be to notify every transaction involving a data infrastructure provider (or even a security service provider with access to such infrastructure). This would be unreasonably burdensome on investors, discouraging investment, and would also be an inefficient use of Government resources.

2.38 The Committee therefore suggests that the definition of "relevant data" be amended to cover only specific categories of data that the entities caught by paragraph 1 would necessarily be aware they were handling. The Committee believes that the Government should engage proactively with data infrastructure providers to understand in what circumstances this might arise (e.g., if data infrastructure providers are required to certify compliance with certain procedures when handling information classified as TOP SECRET). By way of analogy, section 59 of the Enterprise Act 2002 defines "relevant government contractor" as a contractor "*who has been notified by or on behalf of the Secretary of State of information, documents or*

other articles relating to defence and of a confidential nature which the government contractor or an employee of his may hold or receive in connection with being such a contractor."

2.39 Specific drafting recommendations to narrow this definition are developed in the attached table.

TABLE REFERRED TO ABOVE

Advanced Materials		
Page on Consultation Document	*Comment*	*Drafting Suggestion*
16	The proposed definition should be expressly limited to UK activities. As noted above, section 6(4) of the Bill provides that "*[a] description of qualifying entity that is specified must include provision that the entity carries on activities in the United Kingdom which are of a specified description (whether or not it also carries on other activities).*"	1. An entity whose activities in the United Kingdom consist of or include – a. research into; b. developing or producing; c. developing or producing anything designed as an enabler for use in; ~~d. developing or producing anything designed to be used to make;~~ e. providing ~~qualified or certified~~ designs, materials, parts or products which are qualified or certified [under a specified standard] for use in; f. owning, creating~~,~~ or supplying ~~or exploiting~~ intellectual property relating to, or g. providing know-how or services of enablers relating to, where "enabler" means any material or process which is not an advanced material but is used in the manufacture of an advanced material advanced materials ~~for use~~ in the sub-sectors set out in paragraph (2), where the entity is carrying out the corresponding functions set out in paragraph (3).
	Drafting clarification: The proposed definition does not flow correctly, obscuring its meaning (i.e., the construction of, for example, "*…research into […sic] for use in…*" requires grammatical amendment).	
	Drafting clarification: Paragraph 1(d) is very broad and could conceivably cover entities producing machinery (or even components of machinery) that (i) relates to a minor part of the production of advanced materials, or (ii) is suitable for a range of applications and happens to be used for the production of advanced materials.	
	Drafting clarification: Paragraph 1(e) does not specify the appropriate qualification or certification. As drafted, it is also unclear whether the qualification and certification conditions apply only to designs, or extend to materials, parts and products too.	
	Drafting clarification: Paragraph 1(f) is very broad and could conceivably capture entities exploiting (potentially unknowingly) intellectual property relating to any aspect of advanced materials.	
	The definition should more clearly require a direct link between paragraphs 1, 2 and 3: i.e., only companies (i) whose activities fulfil paragraph 1 and relate to the sectors in paragraph 2, and (ii) who carry out the functions in paragraph 3 that correspond to the relevant sector in paragraph 2, should be subject to mandatory notification.	

	Paragraph 3 provides a list of "functions" that an entity must "carry out" to fall within the scope of the mandatory notification regime, but many of the sub-paragraphs refer to products or technologies rather than functions. For example, sub-paragraph 3(a)(ii) refers only to "*[m]etal matrix composites: powder-based metal matrix composites and continuous fibre reinforced metal matrix composites.*" Some of the specified functions are also widely formulated and encompass aspects not relevant to national security, such as subparagraph 3(f)(iv) "*Software. Chip and Device design*." Additional detail and specification is needed to facilitate companies' self-assessment of whether notification is required.	Given the degree of specialist technical expertise necessary to formulate such "functions", the Committee recommends that the Government give careful consideration to industry responses on this proposed definition.
Advanced Robotics		
Page on Consultation Document	*Comment*	*Drafting Suggestion*
30	The proposed definition for entities active in "advanced robotics" is redundant given the wide definition for entities active in "artificial intelligence." Entities "*carrying on activities in the United Kingdom which consist in or include developing or producing advanced robotics (or underpinning components or capabilities) that use artificial intelligence to perform a complex task*" appear to be a subset of entities "*carrying on activities in the United Kingdom which include developing or producing goods, software or information that use artificial intelligence to perform a complex task.*"	If the scope of the "artificial intelligence" sector is amended as suggested below, the "advanced robotics" sector would no longer be redundant.
	As recognised by the Consultation document, the proposed definition could capture "*domestic applications and other less sophisticated applications*." The relevance of advanced robotics to national security is closely tied to its application, and the mandatory regime could be better targeted by focusing on robotics with current or anticipated applications in core sensitive sectors (e.g., Defence). By way of example, the French FDI regime requires notification in artificial intelligence (and advanced robotics) sectors only where the relevant research and development is (i) likely to prejudice the interests of national defence, participating in the exercise of official authority or likely to prejudice public policy and public security, and is (ii) intended to be carried out in one of a number of specified sectors (e.g., weapons, munitions, powders and explosive substances for military purposes or military equipment).	"An entity carrying on activities in the United Kingdom which consist in or include developing or producing advanced robotics ~~(or underpinning components or capabilities)~~ that use artificial intelligence to perform a complex task with applications (current or anticipated in the entity's board-level business plans) in the following sectors [as defined in the regulations: Civil Nuclear, Defence, Military and Dual Use, Satellite and Space Technologies]."

	The term "*underpinning components or capabilities*" is too broad and vague to enable investors to assess whether a notification is required. It could be interpreted to capture, for example, basic components used in a variety of industries.	
	The definitions of "*artificial intelligence*" and "*complex task*" are too broad and could capture technology that has no plausible implications for national security, whether implemented in advanced robotics or otherwise. "Reasoning", for example, could capture almost any software. The definitions should be limited to technology systems capable of autonomous decision making by an evaluative process, and should exclude deterministic technologies that predictably result in a given output when provided with a given input.	Given the degree of specialist technical expertise necessary to formulate such definitions, the Committee recommends the Government give particularly careful consideration to industry responses on these definitions.
Artificial Intelligence		
Page on Consultation Document	*Comment*	*Drafting Suggestion*
32	Given the ubiquity of artificial intelligence, the proposed definition of the "artificial intelligence" sector would capture an extremely wide range of activities that employ even relatively straight-forward levels of artificial intelligence for purposes that could not give rise to any plausible security concern. The proposed definition is so broadly drafted that it would also apply where the relevant entity itself has no control over or access to the relevant artificial intelligence technology but develops products or data that use the output of such artificial intelligence technology under a licence agreement. The mandatory regime should be focused on development of the underlying AI technology, not those implementing the technology (whose activities would be caught, where relevant to national security, under other sectors subject to the mandatory regime). In addition, the relevance of artificial intelligence to national security is closely tied to its application, and the mandatory regime could be better targeted by focusing on technology with current or anticipated applications in core sensitive sectors (e.g., Defence). By way of example, the French FDI regime requires notification in artificial intelligence (and advanced robotics) sectors only where the relevant research and development is (i) likely to prejudice the interests of national defence, participating in the exercise of official authority or likely to prejudice public policy and public security, and (ii) intended to be carried out in one of a number of specified sectors (e.g.,	An entity carrying on activities in the United Kingdom which include developing ~~or producing goods, software or information that use~~ artificial intelligence to perform a complex task with applications (current or anticipated in the entity's board-level business plans) in the following sectors [as defined in the regulations: Civil Nuclear, Defence, Military and Dual Use, Satellite and Space Technologies]."

	weapons, munitions, powders and explosive substances for military purposes or military equipment). Though the Consultation notes that a "*wide definition ensures the Government is able to act in the minority of cases where national security concerns arise, accounting for future development of the sector and the wide range of possible risk factors*," the Committee believes that the definition proposed would require such a large number of notifications that it (a) would have a harmful effect on investors, and (b) could overwhelm the Government's efforts to identify transactions giving rise to genuine concerns.	
32	The definitions of "*artificial intelligence*" and "*complex task*" are too broad and could capture technology that has no plausible implications for national security, whether implemented in advanced robotics or otherwise. "Reasoning," for example, could capture almost any software. The definitions should be limited to technology systems capable of autonomous decision making by an evaluative process, and should exclude deterministic technologies that predictably result in a given output when provided with a given input.	Given the degree of specialist technical expertise necessary to formulate such definitions, the Committee urges the Government to give careful consideration to industry responses on these definitions. In particular, The Committee believes that the Government should consider limiting the definition by reference to: • AI that makes decisions based solely on automated processing, including profiling, in line with Article 22 of the UK GDPR, but excluding AI that merely extracts data from documents, makes recommendations, or makes predictions that support human decision makers; and • Specific forms of AI, such as that which employs deep learning and re-enforcement learning, but excluding other forms of AI such as advanced statistical algorithms.

Civil Nuclear		
Page on Consultation Document	*Comment*	*Drafting Suggestion*
34	The proposed definition should be expressly limited to UK activities. As noted above, section 6(4) of the Bill provides that "*[a] description of qualifying entity that is specified must include provision that the entity carries on activities in the United Kingdom which are of a specified description (whether or not it also carries on other activities).*"	"1. An entity carrying on activities in the United Kingdom that: a. […]"
	Paragraph 1(c) contains an outdated reference to s. 76(7) of the Anti-Terrorism, Crime and Security Act 2001. s. 76 was repealed by Energy Act 2004 (c. 20), ss. 197, 198(2), Sch. 23 Pt. 1 (with Sch. 23 Pt. 2 para. 3); S.I. 2005/877, art. 2(1), Sch. 1 Table). Based on paragraph 1(h), it seems this should refer to s. 77(7) of the Anti-Terrorism, Crime and Security Act 2001.	c. holds Category I/II and/or Category III 'nuclear material' as defined in section 7~~6~~7(7) of the Anti-Terrorism, Crime and Security Act 2001 and regulation 3(3) and (4) of the Nuclear Industries Security Regulations 2003
Communications		
Page on Consultation Document	*Comment*	*Drafting Suggestion*
37	As noted in the Consultation document, the proposed definition "*captures a very wide range of private communications networks, many of which will not present national security concerns*." In the Committee's view, the scope of the mandatory notification regime should be limited to networks and services that are designated by Ofcom under s.33 of the Communications Act. The Government could then work with Ofcom to develop appropriate designations, which would provide greater legal certainty and clarity. In addition, the definition of "associated facilities" in s.32 of the Communications Act 2003 is extremely broad and encompasses any facility which has the potential to be used for the purpose of making the provision of an electronic communications network or service possible. The Committee believes the Government should, in place of the definition of "associated facilities", combine:	"1. An entity carrying on activities in the United Kingdom which consists in or include: a. providing a~~n~~ designated electronic communications network; b. providing a~~n~~ designated electronic communications service; c. providing electronic communications apparatus or essential services in the digital infrastructure subsector. ~~making available facilities that are associated facilities~~.

	• The definition of "electronic communications apparatus" which is used in the Electronic Communications Code in Schedule 3A of the Communications Act 2003, as this is more precise; and • The definition of "essential services in the digital infrastructure subsector" in Schedule 2, paragraph 10 of the Network and Information Systems Regulations 2018 (in order to catch the entities that the Consultation refers to in point 2 at the top of page 38 of the Consultation). If the Government is nevertheless minded to use the definition in section 32 Communications Act 2003, it could be sensibly limited to associated facilities that are designated by Ofcom under s.33 Communications Act 2003 (as suggested above in respect of electronic communications network and electronic communications service).	2. For the purposes of this regulation, ~~"associated facility",~~ "designated electronic communications network" and "designated electronic communications service" have the same meanings as given in sections 32 and 33 of the Communications Act 2003, "electronic communications apparatus" has the same meaning as given in the Electronic Communications Code in Schedule 3A of the Communications Act 2003, and "essential services in the digital infrastructure subsector" has the same meaning as given in Schedule 2, paragraph 10 of the Network and Information Systems Regulations 2018.

Computing Hardware		
Page on Consultation Document	*Comment*	*Drafting Suggestion*
40	The proposed definition should be expressly limited to UK activities. As noted above, section 6(4) of the Bill provides that "*[a] description of qualifying entity that is specified must include provision that the entity carries on activities in the United Kingdom which are of a specified description (whether or not it also carries on other activities).*" Drafting clarification: Paragraph 1(c) captures fabrication and packaging of computer processing units, however it is not clear that such activities would give rise to national security concerns. Any transaction falling outside the scope of the proposed definition could be nevertheless reviewed under section 1 of the Bill.	1. An entity carrying on activities in the United Kingdom that comprise or include: a. creating or supplying intellectual property relating to the functional capability of i. Computer processing units ii. the instruction set architecture for such units iii. computer code that provides low level control for such units b. designing, maintaining or providing support for the secure provisioning or management of: i. roots of trust of computer processing units ii. computer code that provides low level control for such units ~~c. fabricates or packages computer processing units~~

Critical Suppliers to the Government		
Page on Consultation Document	*Comment*	*Drafting Suggestion*
43	The proposed definition should be expressly limited to UK activities. As noted above, section 6(4) of the Bill provides that "*[a] description of qualifying entity that is specified must include provision that the entity carries on activities in the United Kingdom which are of a specified description (whether or not it also carries on other activities).*" The mandatory regime could otherwise apply to entities with UK activities irrelevant to critical supply to the Government or any other sensitive sector. Drafting clarification: The proposed definition ("*whether directly or indirectly*") could capture an entity that has no contractual relationship with the Government but instead supplies a third party that enters into a Government contract (e.g., for fuel supply) without the knowledge of (a) the upstream supplier, or (b) any investor in that upstream supplier. Imposing a notification requirement based on factors that could not be identified by an investor would be unreasonable. This concern could also be addressed by the Government (perhaps over a specified time period) issuing notices to certain contractors that the service they provide amounts to critical supply to Government as appropriate. Drafting clarification: Paragraphs 1(g) and 1(h) refer to design information relating to, or access to, Government property. Not all Government property, however, could plausibly give rise to national security concerns. The Committee therefore proposes that the definition should be limited to Government property used for specific sensitive purposes (e.g., Ministry of Defence property).	1. An entity that is~~, whether directly or indirectly,~~ contracted to provide goods and services in the UK which if lost or compromised could result in a detrimental impact on the availability, integrity or delivery of government services, or an adverse impact on national security, or the functioning of the state, as confirmed by notice to the entity by the Government, whose contracts include one or more of the following: a. The handling of SECRET or TOP SECRET material b. A requirement for List X and / or List V accreditation c. A requirement for employees of the company to be vetted above Baseline Personnel Security Standard (BPSS) d. The processing or storage of personally identifiable information (PII) of ~~5000~~1,000,000 or more individuals in the aggregate as part of 'the

	The term "*critical suppliers*", as well as the part of the proposed definition that refers to "*a detrimental impact on the availability, integrity or delivery of government services, or an adverse impact on national security*", rightly implies a materiality threshold. Only a few of the sub-paragraphs in the proposed definition, however, include an objective basis for investors to determine whether the supplier is "*critical*" or not (based on number of individuals, in the case of sub-paragraph (d), or the nature of the security clearance/vetting required, in the case of sub-paragraphs (a)-(c)). The Committee suggests amending the definition to ensure that there is a clear materiality threshold in each sub-paragraph. In paragraph 1(d), the threshold of 5,000 individuals is very low when compared with CFIUS thresholds of 1 million individuals for the definition of Sensitive Data, in particular given the fact that the UK (unlike the US) has a UK GDPR regime that penalises strongly the unlawful use of PII. This definition would catch many very low-risk suppliers, such as a building contractor to local governments that fixes homes for public housing tenants (and therefore keeps PII relating to those tenants), or an operator of nursing homes for the Government. The Committee therefore urges the Government to adopt the CFIUS threshold of 1 million individuals.	company's' provision of goods or services to Public Sector organisations. e. The collection, distribution or handling of Government monies, including but not limited to taxes, benefits, grants and subsidies, where the total contractual value exceeds [a specified threshold] f. The supply or maintenance of infrastructure, software or hardware as an integrated element of Government network functions, including the provision of data storage and use of data centres where the total contractual value exceeds [a specified threshold] g. The design and/or construction of Government property, including but not limited to drawings, CAD, blueprints, specifications, digital models, digital twins and calculations, to the extent that the relevant property is used for activities relating to [the Ministry of Defence…], and where the total contractual value exceeds [a specified threshold] h. Unaccompanied access to buildings owned or managed by central or local Government organisations to the extent that the relevant property is used for activities relating to [the Ministry of Defence…], and where the total contractual value exceeds [a specified threshold], but excluding rights that are exercisable only when the tenant is in default i. Provision of security services to physical estates or cyber networks where the entity is providing specialist security services for the Government and has, or controls, access to specific premises let to the Government, and where the total contractual value exceeds [a specified threshold], but excluding entities which have a contractual responsibility to
	Limbs (g) to (j) of the definition risk catching investments in any entity which has an ownership interest in any land which is leased to the Government. Without narrowing the definitions, this would be an unnecessary burden on property investors and may discourage property owners from letting to the Government. The definitions could also be made more proportionate as follows: • Excluding from limb (h) certain rights that are exercisable only when the tenant is in default. In particular, a common landlord right in leases is the "Jervis v Harris" self-help remedy allowing landlords to enter premises where the tenant is in default (typically of its repair covenant) and to remedy the defect. Such a right only arises if the tenant is in default and typically requires the landlord to give the tenant a reasonable period to remedy the defect itself first before entering. Even leases which, for security reasons, tightly restrict the landlord's ability to enter for other reasons without the tenant's supervision may still allow this right to be exercised on an unaccompanied basis so that the tenant cannot prevent their remediation works by refusing to accompany the landlord. Similarly, it would be disproportionate for a right of re-entry (or forfeiture) in a lease which would, if exercised following tenant default, constitute unaccompanied access, to bring a landlord entity within limb (h). These rights can only be exercised if the tenant is in default and therefore cannot easily be	

	manipulated by landlords for hostile or espionage purposes and it would be disproportionate for them to bring a landlord entity within limb (h). • Limb (i) should be clarified to make it clear that it does not catch entities which have a contractual responsibility to provide security services, but outsource the provision of such services. In addition, the definition does not require a link to Government, without this link it is not proportionate in scope as it could require the change of ownership of every owner of an estate to notify. We also suggest that there should be a distinction made between routine security provided for all occupiers of an estate as a whole and those who are providing specialist security services for the Government and have, or control, access to specific premises let to the Government. • Similarly, limb (j) risks catching landlords who provide premises to the government in "multi-let" buildings (e.g. where electricity is included in the lease of the premises such that the Government does not have a separate metered supply connection with an electricity supplier or a landlord who provides power to common areas or who provides a backup electricity supply to a building for use in emergencies). In addition to a *de minimis* threshold based on contract value, the Committee believes the definition should expressly carve out landlords who provide such supplies in the context of a lease or licence to occupy land or buildings.	provide security services but outsource the provision of such services j. Provision of energy and fuel supplies to Government where the total contractual value exceeds [a specified threshold], excluding entities that provide such supplies in the context of a lease or licence to occupy land or buildings.
Critical Suppliers to the Emergency Services		
Page on Consultation Document	*Comment*	*Drafting Suggestion*
45	The proposed definition should be expressly limited to UK activities. As noted above, section 6(4) of the Bill provides that "*[a] description of qualifying entity that is specified must include provision that the entity carries on activities in the United Kingdom which are of a specified description (whether or not it also carries on other activities).*" The mandatory regime could otherwise apply to entities with UK activities irrelevant to critical supply to the Emergency Services or any other sensitive sector.	1. An entity that is contracted by the emergency service, governing body, or professional organisations, to provide goods or services in the UK to Emergency Services that are critical to the delivery of that emergency service, as confirmed by notice to the entity by the relevant emergency service.

	The term "*critical suppliers*", as well as the part of the proposed definition that refers to goods or services being "critical to the delivery *of that emergency* service" rightly implies a materiality threshold. There is, however, no objective basis in the definition for investors to determine whether the supplier is "*critical*" or not. The lack of a materiality threshold is particularly problematic given that products caught in paragraph 3 likely include those that are easily replaceable or not inherently critical. The acquisition of an entity that supplies a *de minimis* amount of facemasks ("*PPE*") or car tyres ("*vehicle hardware*"), for example, could not give rise to any plausible national security concern. The Committee suggests amending the definition to ensure that there is a clear materiality threshold in each sub-paragraph. This concern could also be addressed by the relevant emergency services (perhaps over a specified time period) issuing notices to certain contractors that the service they provide amounts to critical supply to the relevant emergency service.	2. In paragraph (1), "emergency service" refers to: a. Fire and Rescue services and their authorities b. Police c. British Transport Police d. Ministry of Defence Police e. Civil Nuclear Constabulary f. Ambulance g. Border Force 3. In paragraph (1), "Services that are critical to the delivery of that emergency service" are, for the purposes of these powers, defined as: a. Personal Protective Equipment where the total contractual value exceeds [a specified threshold] b. Non-PPE hardware used operationally where the total contractual value exceeds [a specified threshold] c. Vehicle hardware where the total contractual value exceeds [a specified threshold] d. Forensic Services where the total contractual value exceeds [a specified threshold] e. IT and Communications Infrastructure where the total contractual value exceeds [a specified threshold]

Cryptographic Authentication		
Page on Consultation Document	*Comment*	*Drafting Suggestion*
55	The proposed definition should be expressly limited to UK activities. As noted above, section 6(4) of the Bill provides that "*[a] description of qualifying entity that is specified must include provision that the entity carries on activities in the United Kingdom which are of a specified description (whether or not it also carries on other activities).*" The Consultation states that "*[w]e should be capturing entities that research and/or develop products which have authentication as a primary function and that employs cryptography in performing that function*." The Committee believes this should be reflected in the definition.	1. An entity that carries on activities in the UK that comprise or include designing, producing or creating technology with the primary function ~~to~~ of verifying the identification of a person, user, process or device, where the method of verification employs cryptography in performing that function to protect the authenticity, confidentiality or integrity of the information.
Data Infrastructure		
Page on Consultation Document	*Comment*	*Drafting Suggestion*
50	"Relevant data" is defined as "*data used for the operation of essential services or business continuity of any entity that falls under the mandatory notification regime of the National Security and Investment regime*." It may not be apparent, however, to the entity that "*hosts, stores, manages or processes or controls or transfers*" such data whether the data is used by a third-party entity that falls under the mandatory notification regime, let alone whether the data is used for "*the operation of essential services or business continuity*" of the third-party entity. It is likely that the only way for investors to be sure of not breaching the mandatory notification requirement would be to notify every acquisition involving a data infrastructure provider (or even a security service provider with access to such infrastructure). This would be unreasonably burdensome on investors, discouraging investment, and would also be an inefficient use of Government resources.	The Committee suggests that the definition of "relevant data" be amended to cover only specific categories of data that the entities caught by paragraph 1 would necessarily be aware they were handling. The Committee believes that the Government should engage proactively with data infrastructure providers to understand in what circumstances this might arise (e.g., if data infrastructure providers are required to certify compliance with certain procedures when handling information classified as TOP SECRET).

	The Committee therefore suggests that the definition of "relevant data" be amended to cover only specific categories of data that the entities caught by paragraph 1 would necessarily be aware they were handling. The Committee suggests that the Government engage proactively with data infrastructure providers to understand in what circumstances this might arise (e.g., if data infrastructure providers are required to certify compliance with certain procedures when handling information classified as TOP SECRET). By way of analogy, section 59 of the Enterprise Act defines "relevant government contractor" as a contractor "*who has been notified by or on behalf of the Secretary of State of information, documents or other articles relating to defence and of a confidential nature which the government contractor or an employee of his may hold or receive in connection with being such a contractor*."	
	The proposed definition should be expressly limited to UK activities. As noted above, section 6(4) of the Bill provides that "*[a] description of qualifying entity that is specified must include provision that the entity carries on activities in the United Kingdom which are of a specified description (whether or not it also carries on other activities)*." The mandatory regime could otherwise apply to entities with UK activities irrelevant to data infrastructure or any other sensitive sector.	1. An entity that carries on activities in the UK that comprise or include: […]
Defence		
Page on Consultation Document	*Comment*	*Drafting Suggestion*
53	The proposed definition should be expressly limited to UK activities. As noted above, section 6(4) of the Bill provides that "*[a] description of qualifying entity that is specified must include provision that the entity carries on activities in the United Kingdom which are of a specified description (whether or not it also carries on other activities)*."	1. An entity that carries on activities in the UK that comprise or include ~~is involved in~~ the research, development […]

Energy		
Page on Consultation Document	*Comment*	*Drafting Suggestion*
55	The proposed definition should be expressly limited to UK activities. As noted above, section 6(4) of the Bill provides that "*[a] description of qualifying entity that is specified must include provision that the entity carries on activities in the United Kingdom which are of a specified description (whether or not it also carries on other activities).*"	1. An entity involved in the ownership and operation in the UK of: a. […] c. Energy distribution and transmission networks ~~that deliver secure, reliable electricity and gas to customers, ensuring continued supply as far as possible in the supply chain~~; […] 2. In paragraph (1), "operation" refers to active operation at the point of, or in the 12 months leading up to, the notifiable acquisition.
	The mandatory regime should not extend to development assets with potential, inactive at the point of acquisition, capacity or output of the requisite level. Any transaction falling outside the scope of the proposed definition could be nevertheless reviewed under section 1 of the Bill.	
	In paragraph 1(c) of the definition, the Committee recommends deleting the additional wording "*that deliver secure, reliable electricity and gas to customers, ensuring continued supply as far as possible in the supply chain*", as, if this is intended to operate as a qualifying criterion, it appears to add nothing, but introduces uncertainty.	
Engineering Biology		
Page on Consultation Document	*Comment*	*Drafting Suggestion*
58	The proposed paragraph 1(b) – "*providing a service connected with engineering biology*" – is too vague to enable investors to assess whether a transaction would be caught. The separate definition of "engineering biology" is unnecessary and unhelpful, and the scope would be clearer if paragraphs 1(a) and 3(b) were combined in paragraph 1 as proposed in the adjacent column. It is not clear that any activity giving rise to national security concerns would be caught by "*innovating… [or] demonstrating and developing synthetic biology*" in paragraph 3(a) that would not be caught in paragraph 1(a) or 3(b) (with the addition to paragraph 3(b) of "*developing or…*" as proposed).	1. An entity undertaking activities in the United Kingdom which consist of or include: a. the research, development and production of synthetic biology; or ~~b. providing a service connected with engineering biology.~~ b. developing or making products consisting of or derived from synthetic biology.

		2. "Synthetic biology" means the design and fabrication of biological components and systems that do not exist in the natural world. This includes, but is not limited to, design and engineering of biological based parts such as enzymes, genetic circuits, and cells; novel devices and systems; redesigning existing natural biological systems; and using microbes to template materials, or cell-free systems. ~~3. "Engineering biology" means:~~ ~~a. the process of innovating, researching, demonstrating and developing synthetic biology;~~ ~~b. making products consisting of or derived from synthetic biology.~~
Military and Dual Use		
Page on Consultation Document	*Comment*	*Drafting Suggestion*
60	The proposed definition should be expressly limited to UK activities. As noted above, section 6(4) of the Bill provides that "*[a] description of qualifying entity that is specified must include provision that the entity carries on activities in the United Kingdom which are of a specified description (whether or not it also carries on other activities).*"	1. An entity the activities of which in the UK consist in or include: […]
Quantum Technologies		
Page on Consultation Document	*Comment*	*Drafting Suggestion*
62	The proposed definition should be expressly limited to UK activities. As noted above, section 6(4) of the Bill provides that "*[a] description of qualifying entity that is specified must include provision that the entity carries on activities in the United Kingdom which are of a specified description (whether or not it also carries on other activities).*"	1. An entity that carries on activities in the UK that comprise or include: […]

Satellite and Space Technologies		
Page on Consultation Document	*Comment*	*Drafting Suggestion*
65	The proposed definition should be expressly limited to UK activities. As noted above, section 6(4) of the Bill provides that "*[a] description of qualifying entity that is specified must include provision that the entity carries on activities in the United Kingdom which are of a specified description (whether or not it also carries on other activities).*"	1. An entity carrying on activities in the UK which […]:
Transport		
Page on Consultation Document	*Comment*	*Drafting Suggestion*
67	The proposed definition should be expressly limited to UK activities. As noted above, section 6(4) of the Bill provides that "*[a] description of qualifying entity that is specified must include provision that the entity carries on activities in the United Kingdom which are of a specified description (whether or not it also carries on other activities).*"	1. An entity which owns or operates a maritime port or harbour in the UK which handles at least 1 million tonnes of cargo annually in the most recent relevant year for which the Annual Port Freight Statistics records are published by the Department for Transport, which handles Category 1 goods as listed in paragraph (2.c) or is [specifically identified by the Government] ~~vessels capable of carrying at least 12 passengers~~. Within such maritime ports or harbours, a company which owns and operates terminals, wharves or other port related infrastructure except where that company does not handle Category 1 goods. 2. In paragraph 1: a. "entity" may include a private company, a Board governing a Trust port or a port owned by a local authority.
	Paragraph 1 of the proposed definition appears to include a maritime port or harbour which handles vessels capable of carrying at least 12 passengers. This category appears to be disproportionate to the other two that are covered (ports or harbours handling at least 1 million tonnes of cargo and those handling category 1 goods). If the Government has identified specific ports or harbours, for example on the west coast of Scotland, where it considers that ownership of the relevant port or harbour could give rise to a national security risk, it would be preferable to either identify these ports and harbours specifically, or qualify by reference to the importance of that port or harbour to a dependent island community.	
	In paragraph 2 of the definition, the Committee believes that "operates", in relation to a port or harbour, should be defined in the same way as that term is defined in relation to an airport as "*the entity with overall responsibility for its management*", which would be more appropriate since it identifies the entity with responsibility.	

	The definition of "relevant year" in paragraph 5(e) is inconsistent with the way that term is used in paragraph 3. It appears to suggest that the "relevant year" is not in fact the most recent year for which the Civil Aviation Authority has published records, but the relevant year the Government has selected (being 2018 or such later year specified in regulations). The Committee suggests amending this to delete paragraph 5(e).	b. "operates" means ~~to control the functioning of a machine, process or system~~ having overall responsibility for the management of the port, harbour, or other port-related infrastructure in question. 4. An entity which provides en route air traffic control services in the UK or which owns such a provider. […] 5. […] ~~e. "relevant year" means 2018 or such later year as may be specified in regulations made by the Secretary of State~~.

ANNEX

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 170,000 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 mergers and acquisitions and inbound investment.