House of Commons Public Bill Committee
National Security and Investment Bill 2019-21
Written evidence from the Company Law Committees of the City of London Law Society and the Law Society of England and Wales

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***) has reviewed the proposed national security and investment regime (the ***proposed regime***) set out in the National Security and Investment Bill (the ***Bill***) and associated documents.

The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. The Law Society is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. The Committee 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.

The Committee has prepared a paper, which accompanies this letter, summarising its principal views on the proposed regime.

The Committee understands and supports the Government's objective to protect national security from hostile foreign actors. However, as the Government has noted in the published materials which accompanied the Bill, investment – both domestic and foreign – makes a vital contribution to the UK economy and there are a small number of transactions which may pose a risk to national security.

It is very important for the UK that the proposed regime does not, on account of this small number of hostile transactions, deter the very wide range of beneficial investment in the UK or undermine clarity and predictability for investors.

The Committee has significant concerns in relation to the scope and technical detail of the Bill and as to the operation of the Bill in practice and is concerned that the proposed regime as currently proposed would have an adverse impact on the attractiveness of the UK for inbound investment. For instance, the Committee has identified potentially materially adverse effects on public market transactions involving listed companies (such as Takeover Code transactions and capital raisings), foreign investment by pension funds and sovereign wealth funds (which is particularly important in UK infrastructure projects), the efficient functioning of the London loan market, passive investments in private equity and venture capital funds, investment in key sectors in the UK (such as the technology sector) and on passive foreign investment, which has been providing much needed liquidity to UK companies in the current challenging economic conditions. The breadth of the proposed regime also goes beyond comparable regimes in other developed economies such as the US and Australia. Certain of the key concerns identified by the Committee are summarised in the attached table and described in further detail in the accompanying paper.

The Committee believes that there are implementable solutions in relation to the concerns which it has identified and wishes to put forward proposed solutions to create a better balanced regime. These proposed solutions are set out in a series of recommendations for narrowing the scope of the proposed regime in certain key areas in order to promote greater certainty and predictability but without undermining the key aims of the proposed regime. Those recommendations are summarised in the attached table and set out in further detail in the accompanying paper.

The Committee has also identified a number of concerns with some of the detail of the proposed regime and intends separately to share suggested drafting changes to address these concerns.

We would welcome an opportunity to discuss any questions you might have on the concerns we have raised and/or the recommendations we have put forward. Please feel free to contact Sam Bagot (sbagot@cgsh.com) or David Pudge (david.pudge@cliffordchance.com).

For and on behalf of

The City of London Law Society Company Law Committee

The Law Society of England and Wales Company Law Committee

2nd December 2020

NATIONAL SECURITY AND INVESTMENT BILL – SUMMARY OF KEY POINTS[1]

Topic	*Position in Bill (and associated documents)*	*Committee comments / proposals*
1. Context	While investment – both domestic and foreign – makes a vital contribution to the UK economy, a small number of investment activities have the potential to pose a risk to national security.	• The UK seeks to be an open and transparent economy and an international trading centre. It is in a different position from other countries (for instance, the resource based economies) which have adopted similar regimes. It is vital that the UK does not end up with a regime which adversely impacts investor confidence – otherwise investors will go elsewhere. • The Committee believes that the scope of the proposed regime is disproportionate in light of the small number of transactions which may give rise to national security concerns and will undermine foreign investment in the UK. • Changes to the proposed regime should be made to significantly reduce its scope and to promote certainty and predictability. The Committee believes that the recommendations set out below achieve this without undermining the key goals of the proposed regime.
2. Meaning of National Security and call in power	The term "national security" is not defined in the Bill. The draft Statement of Policy Intent gives certain guidance on the circumstances in which the call in power may be exercised.	• The clarity and predictability of proposed regime will be undermined if it is, or is seen to be, politicised particularly as the Government changes over time. • Recommendations: (1) At a minimum, the Bill should clearly state what "national security" is not: it should be clear that this is distinct from "national interest" and the powers under the proposed regime will not be exercised for the purposes of industrial policy, short term political expediency, other political or economic reasons (such as safe-guarding jobs in the UK) or in a manner which would undermine the legitimate benefits of foreign investment in the UK. (2) In order to promote clarity, the proposed regime should provide that the call-in power will only be exercised when all three risks (acquirer, target and trigger event risks) are present.
3. Scope of the mandatory regime	Mandatory notification is required in respect of transactions in 17 sectors defined in the draft secondary legislation.	• The combination of the broad definition of sectors subject to mandatory notification, the scope of the remedies (see below), the absence of a de minimis (see below) and the very broad foreign nexus provisions (see below) will force investors to take a safety first approach and either make filings or seek informal guidance. This will lead to the Government being inundated with filings and requests for guidance particularly on commencement of the proposed regime and more generally have an adverse impact on UK investment. • Recommendation: The scope of the 17 sectors the subject of the mandatory notification regime is excessive and should be cut back. In particular, certain of the sectors (such as artificial intelligence and communications) are defined so broadly that they could catch almost any business. This should be a key focus on the ongoing consultation on the relevant secondary legislation.
4. Scope of remedies	A notifiable acquisition is "void" if not approved before completion.	• This is inconsistent with the concept in the Bill of making a retrospective approval application. It will give rise to significant uncertainty, and it is likely to be unworkable, for such transactions to be deemed "void".

[1] This table summarises certain of the key comments and proposals made 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***) in relation to the proposed national security and investment regime (the ***proposed regime***) set out in the National Security and Investment Bill (the ***Bill***) and associated documents. Please refer to the Committee's paper on the Bill and associated documents for more context.

Topic	*Position in Bill (and associated documents)*	*Committee comments / proposals*
		• Recommendations: (1) The proposed regime should provide that: (a) interim orders and forced sales by the buyer to an appropriate third party will suffice in almost all cases; and (b) only as a last resort when other remedies are not possible, transactions will be "voidable", not "void". (2) In addition, it would seem exceptionally difficult and unfair to "void" or avoid (unwind) listed company public market transactions involving public market (including retail) investors. The Government should therefore provide an appropriate exemption (or safe harbour) from these remedies in relation to transactions subject to the Takeover Code and certain capital markets transactions involving listed companies (such as underwriting arrangements for placings and rights issues).
5. Foreign/UK nexus	Transactions relating to the following are subject to the proposed regime: • entities formed outside of the UK if they supply goods or services to persons in the UK; and • assets located outside of the UK if used in connection with supply of goods or services in UK.	• The extra-territorial scope of the proposed regime makes the UK a significant outlier (compared with regimes in Australia, Canada, France, Germany, Spain or the United States) and is disproportionate. Investors in a broad range of foreign business would have to perform extensive due diligence to determine if any goods or services are supplied directly or indirectly into the UK. • Recommendations: The proposed regime should apply only to the acquisition of UK entities and assets located in the UK. Specific concerns relating to off-shore assets should be dealt with through other regulation.
	Domestic acquirers are subject to the proposed regime	It is unnecessary and disproportionate to have UK acquirers in scope; other established regimes (e.g., Australia and United States) do not apply to domestic acquirers.
6. Absence of *de minimis* for small transactions	The Bill does not contain a *de minimis* threshold for small transactions.	• It is disproportionate for the proposed regime to apply to transactions which are very small and unlikely to give rise to national security concerns. The Committee is particularly concerned about the impact on the UK tech sector. • Recommendation: The Bill should introduce a *de minimis* threshold for the mandatory notification regime (or at least sector specific thresholds for each of the 17 sectors the subject of the mandatory notification regime). This would still leave the Secretary of State with discretion to be able to call-in certain transactions that are of specific concern.
7. Safe harbours and guidance	The proposed regime does not contain safe harbours in relation to the matters referred to opposite. This undermines clarity and predictability.	Recommendations: The proposed regime should introduce specific safe harbours for: 1. customary minority investment rights; 2. passive investments in private equity and venture capital funds; and 3. certain types of investors (such as investors from particular jurisdictions, regulated banks, investors with a pre-existing track record and investors with certain other characteristics such as retail investment funds).
	The Statement of Policy Intent provides that, although the overwhelming majority of loans are not expected to pose a threat to national security, loans are not exempt from the proposed regime	• Subjecting loans to the proposed regime – particularly without clarity as to when a loan would be of concern - will cause considerable uncertainty for the London loan market. • Recommendations: Loan agreements documented on LMA standard terms or substantially similar terms should be benefit from a safe-harbour. Debt securities and derivatives should benefit from a complete exemption from the proposed regime.

Topic	*Position in Bill (and associated documents)*	*Committee comments / proposals*
	The Statement of Policy Intent gives helpful guidance but it is not sufficient on its own.	Recommendations: • The new Government unit should be appropriately staffed to deal with a much higher number of filings and requests for guidance than the Government is currently anticipating. • Further guidance should be made available to the market including through an annual review and other guidance issued from time to time after material developments. Further detail is given in the longer paper.
8. Transitional regime	The proposed regime has retrospective effect to transactions which close after 12 November 2020 but before the commencement of the Bill.	• The proposed retrospective effect will give rise to considerable uncertainty for transactions closing after 12 November 2020. • Recommendations: (1) Transactions signed before 12 November 2020 should be exempt from the proposed regime. (2) Other transactions which close after 12 November 2020 should benefit from a safe harbour if they have been pre-vetted by BEIS.