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BRIEFING PAPER

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National Security and Investment Bill 2019-2021

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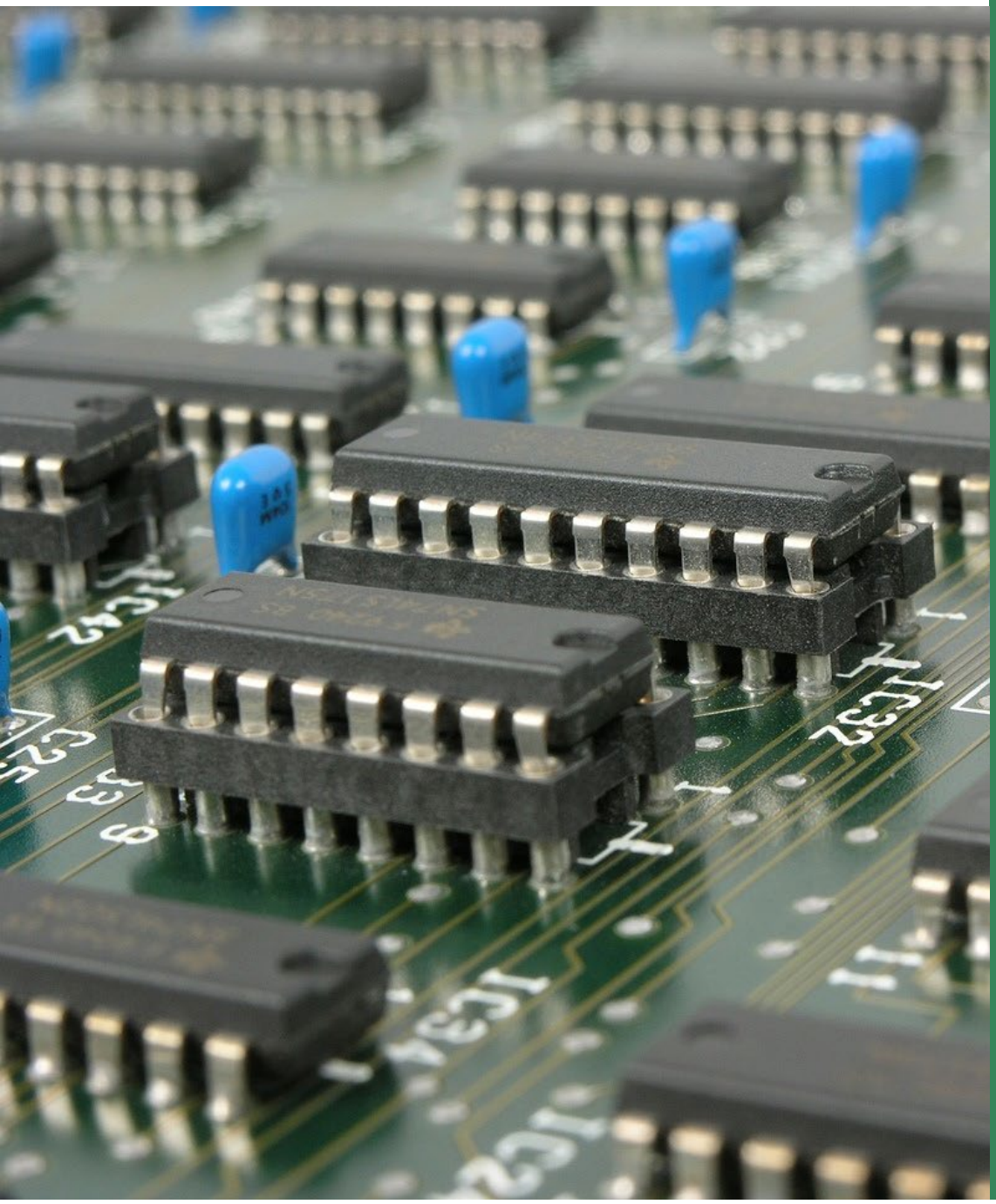

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Summary

The *National Security and Investment Bill 2019-2021* was introduced in the House of Commons on 11 November 2020. Its Second Reading is scheduled for 17 November 2020.

The Bill aims to introduce a new regime for reviewing and intervening in business transactions, such as takeovers, that might raise national security concerns. It would:

- enable the Secretary of State to "call in" acquisitions of sensitive entities and assets ("trigger events") to undertake a national security assessment. This can happen up to 5 years after a trigger event has taken place;
- establish a requirement for proposed acquirers of sensitive entities and assets to seek authorisation and to obtain approval from the Secretary of State before completing their acquisition;
- create a voluntary notification system to encourage notifications from parties who consider that their trigger event may raise national security concerns; and
- create a power to impose remedies to address risks to national security, sanctions for non-compliance with the regime and mechanisms for legal challenge.

The Bill would extend to all of the United Kingdom. Its provisions would come into effect from 12 November 2020.

Rationale for the Bill

The Competition and Markets Authority (CMA) is currently responsible for investigating national security concerns through a wider process for reviewing "relevant merger situations" that might give rise to public interest considerations.

Concerns have grown about the effectiveness of the current regime in managing the national security risks arising from investment in, or control of, companies and assets in a range of sectors. Technological developments have further widened the potential scope of national security concerns to include such areas as data and intellectual property.

Policy development

In 2017, the Government launched a national security infrastructure investment review. This involved an initial consultation on potential future arrangements and resulted in reductions of the thresholds that would trigger a CMA investigation and some widening of the types of economic activity covered (such as inclusion of quantum technology), as well as a wider definition of the types of transaction that would be covered.

A White Paper and a further consultation (launched in 2018 with a Government response published on the same day as the Bill) followed. These clarified that the Government wanted to more extensively overhaul its ability to scrutinise and intervene in investments that raise national security concerns. It proposed to become directly responsible for national security assessments and be able to intervene in a much broader set of situations that might lead to national security risks.

It proposed draft definitions of 17 sectors of the economy and associated activities that might be encompassed by a mandatory reporting scheme. A consultation launched alongside the Bill will run until 6 January 2021, after which the Government would set out "robust and proportionate" definitions in secondary legislation made under the Bill. The proposed new approach would also remove existing thresholds for notification.

Response from stakeholders

The Foreign Affairs and Defence Committees both launched inquiries in 2020 touching on concerns related to the current CMA regime. Comments from the Chairs of the inquiries indicate that there could be support for a strengthened regime in order to protect national security. However, neither committee has yet reported in full.

Press and stakeholder reactions so far have tended to acknowledge the need to update the existing regime to take account of new and evolving threats. However, they have also raised concerns about the implications of broad (or non-existent) definitions of relevant concepts, particularly given the wider set of proposed trigger events and the removal of existing thresholds. Some have questioned the need for such a radical overhaul, particularly given that there had only been 12 national security investigations undertaken within the existing regime.

There are also concerns that the expanded notification system will lead to a dramatic increase in cases subject to review, leading to bureaucracy as well as delay and doubts for potential investment decisions – a situation that might discourage investment. Some observers fear that pressure from interest groups might lead to the system being used for protectionism. The impact assessment published alongside the Bill indicates that there could be 1,000 to 1,830 transactions notified under the new system each year.

However, the Government has insisted that the new regime will focus strictly on national security concerns. Its impact assessment suggests that similar regimes in other countries do not play a major role in investment decisions. It notes that any potential negative impact may be offset by the increased security and economic stability in the country as a result of the regime.

1. Overview

The December 2019 Queen's Speech announced the Government's intention to introduce a *National Security and Investment Bill* in order to:

- Strengthen the Government's powers to scrutinise and intervene in business transactions (takeovers and mergers) to protect national security.
- Provide businesses and investors with the certainty and transparency they need to do business in the UK.[1]

The Government asserted that the Bill would help to defend the UK's national security while promoting free trade and investment. It would achieve this by upgrading the Government's powers to scrutinise cases where "hostile parties" might acquire ownership of, or control over businesses or other entities and assets with national security implications. The new approach would also ensure that such parties could not use approaches other than simply taking over a business and so circumvent the law to acquire assets with national security implications.

The Government intended that its approach would enhance transparency for business. It argued that this would support growth and ensure "that the UK remains one of the most open countries in the world for innovative and dynamic investment."[2]

The *National Security and Investment Bill 2019-2021* (Bill 201 of 2019-2021) was introduced on 11 November 2020 and its second reading is scheduled for Tuesday 17 November 2020. The Explanatory Notes described the Bill:

> The Bill will establish a new statutory regime for Government scrutiny of, and intervention in, investments for the purposes of protecting national security. The regime makes provision for:
>
> a) a power to issue "call-in" notices that the Secretary of State may use to call in acquisitions of control over qualifying entities or assets ("trigger events") to undertake a national security assessment whether or not they have been notified to the Government;
>
> b) the Secretary of State to publish a statement on how he expects to use the power to give a call-in notice;
>
> c) a mandatory notification system requiring proposed acquirers of certain shares or voting rights in specified qualifying entities to obtain clearance from the Secretary of State for their acquisitions before they take place;
>
> d) powers which enable the Secretary of State to amend by regulations the acquisitions which fall within scope of the mandatory notification system;

1 Prime Minister's Office, Queen's Speech December 2019 – background briefing notes, 19 December 2019 (p104-105)
2 Ibid.

e) a voluntary notification system which is intended to encourage notifications from parties who consider that their trigger event may raise national security concerns;

f) the statutory process that is to be used to assess specific trigger events for national security concerns;

g) remedies to address risks to national security, sanctions for non-compliance with the regime and the mechanism for legal challenge; and

h) interaction with the Competition and Markets Authority.

In addition, clause 59 of the Bill amends the overseas disclosure gateway in the Enterprise Act 2002 removing the restriction on UK public authorities disclosing information that comes to them in connection with a merger investigation under that gateway.

The Bill as published and associated explanatory notes are available.

In addition, the Department for Business, Enterprise & Industrial Strategy (BEIS) has published a range of documents related to the Bill, including:

- A Statement of policy intent, setting out how the Secretary of State expects to apply the proposed call-in powers
- An Impact assessment of the new approach
- A Public consultation document that gives details of sectors and activities that might be covered under the proposed mandatory notification scheme
- A response to the consultation on proposals set out in the 2018 White Paper on the national security and investment regime.

There was a National security and infrastructure investment review (Green Paper) consultation in 2017, followed by a consultation on proposed legislative reforms (White Paper) in July 2018.

The Bill and associated issues are the subject of continuing inquiries by the Foreign Affairs Committee and the Defence Committee.

The provisions of the Bill would cover the whole of the United Kingdom. Primary and associated secondary legislation would come into effect from 12 November 2020, that is, the date of publication of the Bill.

2. The current regime

The *National Security and Investment Bill* would replace the national security aspects of the current regime, which is based on the provisions in the *Enterprise Act 2002*. This section outlines the current regime and is adapted from the explanatory notes to the Bill:

In addition to competition issues, the Government may intervene in mergers (and acquisitions) in three types of case:

- Public interest cases
- Special public interest cases
- European merger cases

Further discussion of the background to the current regime and proposals to update it are available in our briefing paper Contested mergers and takeovers, 17 August 2018

2.1 Public interest cases

What it covers

This applies to actual or potential "relevant merger situations" (see below) that give rise to "public interest considerations" in relation to:

- National security
- Media plurality
- Stability of the UK financial system
- Capability to combat and to mitigate the effects of public health emergencies.

A "relevant merger situation" arises where two or more enterprises cease to be distinct. Until 2018 such situations had to meet one of the following thresholds:

- the enterprise taken over has a UK **turnover** of more than £70 million (the "turnover test"); or
- the merger has resulted in the creation or enhancement of at least a 25% **share of supply or purchase** in, or in a substantial part of, the UK of goods or services of any description (the "share of supply test").

Two amendment orders[3] came into force on 11 June 2018 and lowered the threshold for each test, as follows:

- The **turnover threshold was reduced** from £70 million to £1 million for "relevant enterprises" active in the fields of "military or dual-use goods subject to export control; computer processing units; or quantum technology".
- The **share of supply test threshold** would also be met if the takeover is of a "relevant enterprise" that already had at least a 25% share of supply or purchase in, or in a substantial part of, the UK of goods or services **before** the merger. The goods or

[3] *Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018* (S.I. 2018/578) and *Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018* (S.I. 2018/593)

services must be connected to the activities by virtue of which it qualifies as a "relevant enterprise".

Two further amendment orders[4] came into force on 21 July 2020. They extended "relevant enterprises" to include those working in artificial intelligence, cryptographic authentication technology and advanced materials.

Process

The Secretary of State gives an intervention notice (commonly known as a "public interest intervention notice") to the Competition and Markets Authority (CMA). The CMA then undertakes a Phase 1 investigation of the merger and advises the Secretary of State on any jurisdictional or competition issues. In national security cases the CMA also provides a summary of any representations relating to national security that it have received about the case, including any from other Government departments.

After issuing the intervention notice, the Secretary of State may also issue an interim order to prevent any action that might prejudice the intervention or impede any eventual remedial action.

The Act requires the Secretary of State to accept the CMA's advice on jurisdictional and competition matters and to consider any competition issue identified by the CMA as being contrary to the public interest unless this is outweighed by other public interest considerations.

After receiving the CMA's Phase 1 report – and concluding that the merger may be or may risk becoming a relevant merger situation, and so might operate against the public interest – the Secretary of State may either:

- make a "reference" to the CMA that requires it to carry out a more detailed "Phase 2" investigation; or
- accept appropriate "undertakings in lieu" from the parties concerned to address the public interest issues identified. These undertakings can be replaced with an order imposing remedies if they won't be fulfilled or were accepted on the basis of false or misleading information.

After receiving the Phase 2 report, the Secretary of State must make a final decision about whether the merger is against the public interest and take whatever remedial action s/he considers "reasonable and practicable" to address the public interest issues identified. This might involve final undertakings from the parties or an order imposing remedies, which might require "a person to do, or not to do", particular things.

2.2 Special public interest cases

In limited cases the Secretary of State may intervene when neither of the standard thresholds has been met. For example, this might apply to mergers involving Government defence contractors authorised to hold

[4] *Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2020* (S.I. 2020/748) and *Enterprise Act 2002 (Turnover Test) (Amendment) Order 2020* (S.I. 2020/763)

or receive confidential information. The process is similar to that for standard public interest cases, except that there is no competition assessment.

2.3 European merger cases

The UK is still subject to the European system. This will continue to apply in the UK until the end of the Brexit Transition Period. It gives the European Commission exclusive jurisdiction within the European Union to assess mergers (including outright acquisitions) if they have an EU dimension (that is, where the parties meet certain global and EU-wide turnover thresholds) for any competition issues. The Secretary of State may intervene in these mergers on the basis of the public interest considerations[5] specified in the *Enterprise Act 2002*, including national security. The Secretary of State activates the process by giving the CMA a European intervention notice ("EIN"). The subsequent process is similar to the public interest intervention procedure set out above, except that it does not involve any competition assessment by the CMA.[6]

5 Except for matters relating to the stability of the UK financial system.

6 Most of the procedure in European merger cases is set out in the *Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003* (S.I. 2003/1592) rather than in the Act itself.

3. The rationale for reform

While many countries have opened up their economies to international capital flows and liberalised ownership and transfer of assets over recent decades, this process has also led to the identification of further risks. As the OECD has stated:

> Most countries have had some arrangement to review, assess, and address potential national security risks arising from specific foreign direct investments for decades. However, as international investment largely took place among allies and the ratio of FDI [foreign direct investment] to GDP was much lower than it is today – only 7% in 1990 against around 40% now– the amount of FDI covered by such mechanisms was likely relatively low. Correspondingly, the mechanisms enjoyed limited attention in most countries.
>
> […]
>
> By the mid-2000s, these open advanced economies were growing concerned about new prospective owners of certain assets or industries, as they feared that malicious owners could sabotage or withhold access to "critical infrastructure". Investments by Sovereign Wealth Funds (SWFs) and government-controlled investors (GCIs), then on the rise, contributed to these concerns, as these acquirers were often less transparent, and were suspected of being driven by political motivations.
>
> […]
>
> Soon after, around 2015, interest on the intersection of foreign investment and essential security interests began to rise again. Ever more countries began to complement, expand, or replace traditional authorisation requirements in sectors considered sensitive with new, more comprehensive policies that seek to address the security risks associated with inward investment. The reasons why this policy area has regained attention is – in part – reminiscent of the early 2000s:
>
> - Concerns about investment originating in less than transparent economies and the involvement of foreign State-controlled entities. Concern that foreign ownership could threaten a State's security by limiting the diversity of suppliers of certain products or services, in addition to the more traditional risks of espionage and sabotage.
> - Technological changes and the growing sensitivity and quantity of sensitive data.
> - The more assertive stance of some countries in global economic and strategic competition. (p6-7)

3.1 National security and infrastructure investment review

In 2017, the Government launched a green paper consultation on managing potential national security concerns in investments and takeovers. In the short term, the Government proposed to **lower thresholds for intervention** in these two areas:

- the **military** use and dual use (civilian and military) sector;

- parts of the **advanced technology** sector such as quantum computing.

In 2018 the Government lowered the UK turnover threshold for intervention from £70 million to £1 million, and to change the share of supply threshold so that the threshold is met if a target has 25% or more share of supply, with no need for the merger or takeover to increase that share.[7] The necessary secondary legislation came into force on 11 June 2018.[8]

The green paper consultation had also sought views about potential long-term reforms in this area. The Government published white paper proposals on 24 July 2018. Consultation on these proposals closed on 16 October 2018, but the response was not published until 11 November 2020, along with the *National Security and Investment Bill* itself. In the original consultation:

- The Government **wanted to overhaul its capacity to scrutinise and intervene in investments that raise national security concerns.** It would be directly responsible for national security assessments, and would be able to intervene much more widely in the economy.[9] There would also be a much broader set of "trigger events" that the Government could call in, such as when parties gained significant influence over a company or a sensitive asset of the company (such as intellectual property or key infrastructure).[10]

  The Government expected that about 100 notifications each year would be subject to a full national security assessment.[11] The Government expected to impose some remedies in about half of the cases subject to a full national security assessment[12], compared with fewer than one a year under the existing regime[13].

- The proposals **would expand the range of circumstances where the Government has powers to intervene**, in addition to the turnover and market share thresholds discussed earlier. The new "trigger events" would cover the range of means by which a hostile actor might acquire the ability to undermine national security in the short or long term.[14]

The Government said that the proposals did not seek to reintroduce some wider public interest test or to create new grounds for intervention by the Secretary of State. They were exclusively focused on national security.[15]

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7 BEIS, National Security and Infrastructure Investment Review: Government response to first consultation, March 2018, p3
8 *Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018* (S.I. 2018/578) and *Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018* (S.I. 2018/593)
9 BEIS, National security and investment: a consultation on proposed legislative reforms, p54
10 Ibid., p30
11 Ibid., p12
12 Ibid.
13 See recent public interest interventions by the CMA.
14 BEIS, National security and investment: a consultation on proposed legislative reforms, p30
15 Ibid., p9

Not everyone agreed though. John Fingleton, formerly CEO of the Office of Fair Trading and Chair of the International Competition Network, argued that the proposals were a radical departure from the existing regime and would allow much greater Government intervention over a wide range of areas:

> First, they would create an entirely new merger review regime which by-passes existing institutions, structures and the transparent processes that accompany them. Second, they greatly expand the number and types of transactions over which the government has the right to intervene. Third, while much of the language is around national security and the threat from foreign actors, they apply to any takeover, not just those involving foreign companies, and the concept of national security is not adequately defined. Fourth, while focussed on certain sectors of the economy, they would enable the government to intervene in any sector.
>
> The government envisages examining 200 cases per year under the new regime. This would be a vast increase, considering it has used existing powers to intervene on national security grounds fewer than ten times since 2003. Although the consultation does not point to a single historic case where national security was impaired but where the government was unable to intervene, the consultation envisages that under the new regime 50 or so cases a year will need to be remedied or blocked to protect national security. By contrast, the CMA currently only remedies approximately 20 cases a year on competition grounds.
>
> In addition to greatly expanding the size and scope of the government's interventions in the market, the changes are likely to have two further harmful effects.
>
> First, they would introduce a much more restrictive approach towards foreign investment into the UK. […] Second, the changes provide a mechanism by which the government can use the threat of a national security intervention to extract commitments related solely to continued economic activity in the UK, and not to national security. This is not a theoretical concern; the government has shown an increased appetite for doing so recently. In March 2018, the government extracted substantial commitments from Melrose in respect of its purchase of GKN. This takeover did not involve a foreign business and any impact on national security was at best limited. National security powers can and will be used to intervene for politically motivated reasons.[16]

3.2 Rationale for the new regime

The response to the 2018 consultation[17] reiterated the Government's earlier general position, even if the proposals had "evolved". The Government said that it "remained committed to the key principles of the White Paper" including "providing certainty, transparency and predictability of the regime and ensuring that the UK is a good place to invest in a business."

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16 John Fingleton, Mergers and the public interest: a wolf in sheep's clothing?, 16 October 2018

17 BEIS, National Security and Investment White Paper: Govemment response, 11 November 2020 (accessed 14 November 2020)

Responding to concerns that the regime would disproportionately expand the Government's powers to intervene in the market, the Government reiterated "that the new regime will only relate to national security." The response went on to note that:

- the Secretary of State's "quasi-judicial" role would allow independent scrutiny;
- the legislation would provide "a clear test" for call-ins, involving "reasonable suspicion" that a trigger event has occurred;
- remedies would have to be "necessary and proportionate" and would be subject to judicial review;
- the Government would only "routinely publish information at the final decision stage and usually only in relation to trigger events where final remedies (including blocking orders) are imposed".[18]

The Government further noted wider contextual changes, including the launch of the Integrated Review of Security, Defence and Foreign Policy, the effect of the COVID 19 pandemic and the introduction of strengthened screening regimes by various allies. There had been further changes to the threshold tests in 2020[19], but they had been intended to be temporary.

The Government therefore concluded that the original proposals put forward in 2018 would not go far enough in addressing national security risks:

> While the proposals put forward in the 2018 White Paper would achieve longer-term reforms, they do not go far enough in addressing the national security risks arising from a small number of transactions in particularly sensitive sectors, nor reflect the full gravity of the current situation. In particular, they do not do enough to prevent the few determined hostile actors from evading scrutiny and acquiring critical businesses or assets under the radar.

The response covers proposals in the Bill and justifications for them in great detail. Some of the most important aspects are set out in "The proposed new regime", below.

The *Telecoms Security Bill*

Recent concerns about the involvement of Huawei in the UK's 5G network clearly resonate in discussion of the *National Security and Investment Bill*, although the eventual scope of the legislation is yet to be determined. In the case of Huawei, though, in July 2020 the Culture Secretary, Oliver Dowden, announced that a forthcoming *Telecoms Security Bill* would deal with the risks associated with the involvement of high risk vendors in the telecommunications network. Further details of that Bill are not yet available.

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18 BEIS, National Security and Investment White Paper: Govemment response, 11 November 2020 (accessed 14 November 2020)

19 *Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2020* (S.I. 2020/748) and *Enterprise Act 2002 (Turnover Test) (Amendment) Order 2020* (S.I. 2020/763)

4. The proposed new regime

As discussed above, the current regime is part of the CMA's mergers framework. In short, the *National Security and Investment Bill* would remove from that framework, which would otherwise remain intact, the process for dealing with cases that have national security concerns.

Unlike the *Enterprise Act 2002*, Government intervention in transactions under the Bill **would not be limited by a minimum turnover or share of supply threshold**.

Another important aspect of the new regime – the sectors that it would cover, and how they are defined – would be included in secondary legislation after conclusion of a public consultation.

It also introduces a mandatory reporting regime.

BEIS has also published a Statement of policy intent that sets out how the Secretary of State expects to use the call-in power.

4.1 Overview

The Explanatory notes that accompany the Bill provide the following overview of the proposed new regime.

> **National Security and Investment framework**
>
> The Bill provides powers for the Secretary of State to scrutinise and, where necessary, impose proportionate remedies on specific acquisitions of control of qualifying entities and assets. It also sets out a statutory process for the exercise of these powers.
>
> The Secretary of State may scrutinise specific acquisitions of control of qualifying entities and assets by issuing "call-in notices". The acquisitions which are within scope of this function are collectively known as "trigger events". The Secretary of State may issue a call-in notice up to 5 years after a trigger event has taken place, so long as that 5 years does not reach back before the introduction of this Bill.
>
> The Bill provides for the Secretary of State to publish a statement setting out '[how] he expects to exercise the call-in power. The Secretary of State will not be able to call in any trigger events until such a statement has been published. Nothing in the statement will limit the Secretary of State's exercise of the call-in power.
>
> **Mandatory notification**
>
> The Bill provides for a mandatory notification requirement for acquisitions of certain shares or voting rights in the qualifying entities to be specified in regulations made by the Secretary of State, which are termed "notifiable acquisitions". Proposed acquirers must notify the Secretary of State of notifiable acquisitions before they take place in order to obtain clearance to go ahead.
>
> A notifiable acquisition that is completed before being approved by the Secretary of State is void and of no legal effect. Additionally, the acquirer may be subject to criminal or civil penalties for completing the acquisition without clearance. The Secretary of State may retrospectively validate a notifiable

acquisition. Regulations will specify how to notify the Secretary of State of notifiable acquisitions.

The Bill provides a power for the Secretary of State to amend the acquisitions which are notifiable through regulations. The Secretary of State may also make regulations exempting acquisitions from the mandatory notification regime on the basis of the characteristics of the acquirer. These powers collectively allow the regime to reflect changing national security risks.

Voluntary notification regime

Businesses and other entities who do not meet the criteria for mandatory notification may submit a notification to the Secretary of State if they consider that their trigger event could raise national security concerns. To help inform their assessment as to whether a voluntary notification should be issued, they make reference to the statutory statement about the exercise of the call-in power.

National security assessment

The Secretary of State may give a call-in notice in respect of a trigger event that has taken place or is in progress or contemplation. The notice may be given up to 5 years after the trigger event took place, subject to this being done within 6 months of the Secretary of State becoming aware of the trigger event. While a trigger event is being assessed, the Secretary of State will be able to impose interim remedies in an order to ensure that the effectiveness of the national security assessment or subsequent remedies is not prejudiced by action taken by the parties. For example, the Secretary of State might prohibit activities which would result in the integration of two businesses, or act to safeguard assets, until the national security assessment is complete.

To facilitate assessments, the Secretary of State will have powers for gathering information. There will be safeguards on the use and disclosure of such information.

If, following an assessment, the Secretary of State determines that a risk to national security has arisen or would arise from the trigger event, the Secretary of State has the power to impose proportionate remedies in a final order to prevent, remedy or mitigate that risk. Breach of any requirement in a final order may lead to a civil or criminal sanction.

Civil and criminal sanctions will also be available in the event of non-compliance with interim orders and information requests.

Decisions under the Bill will be subject to judicial review or appeal. The Government will be able to apply for a closed material procedure to protect sensitive matters in these proceedings.

4.2 Major changes to the current approach

As noted earlier, the proposed new regime includes some major changes to the current approach.

The proposed regime dispenses with the earlier threshold tests altogether. The Government's response to the White Paper consultation sets out a range of proposed changes and justifications for them in detail. Some of the most important areas are discussed below, **but this is by no means an exhaustive review**.

Trigger events

The response set out an updated approach to proposed "trigger events":

> The Government has decided that the following acquisitions should constitute trigger events that the Secretary of State can examine, and form the basis of the regime. These give the Government the necessary flexibility but also provide greater clarity to businesses and investors than the proposals put forward in the White Paper.
>
> The legislation will include:
>
> - the acquisition of more than 25% of the votes or shares in a qualifying entity;
> - the acquisition of more than 50% of the votes or shares in a qualifying entity;
> - the acquisition of 75% or more of the votes or shares in a qualifying entity;
> - the acquisition of voting rights that enable or prevent the passage of any class of resolution governing the affairs of the qualifying entity;
> - the acquisition of material influence over a qualifying entity's policy
> - the acquisition of a right or interest in, or in relation to, a qualifying asset providing the ability to:
>   - use the asset, or use it to a greater extent than prior to the acquisition; or
>   - direct or control how the asset is used, or direct or control how the asset is used to a greater extent than prior to the acquisition.

Mandatory notification in specified sectors

The earlier consultation had focused on a system of voluntary notification, but the response and the Bill introduce an additional mandatory notification regime. This will be applied to certain "specified sectors where risks are most likely to arise". The Government stated that this would mean that it "will be informed of proposed transactions in these crucial areas, and able to take action accordingly to investigate and address any national security risks." It went on:

> Acquisitions covered by mandatory notification must be notified and receive clearance from the Secretary of State before they can take place.
>
> **Trigger events that require mandatory notification**
>
> As explained in Chapter 2, the Government wants to ensure that mandatory notification applies to objective situations where parties can reasonably self-assess that they meet the criteria.
>
> The Government is therefore introducing mandatory notification within specified sectors (detailed below) for the following trigger events at the point at which they are in progress or contemplation in the specified sectors:
>
> - the acquisition of more than 25% of the votes or shares in an entity;

- the acquisition of more than 50% of the votes or shares in an entity;
- the acquisition of 75% or more of the votes or shares in an entity;
- the acquisition of voting rights that enable or prevent the passage of any class of resolution governing the affairs of the entity. (para 67-70)

The Government explained the reasons for these criteria:

> The Government's rationale for introducing mandatory notification for these trigger events is the same as for the trigger events themselves. That is to say that acquiring over 25%, over 50%, or 75% or more of votes or shares represent thresholds at which parties can respectively block a special resolution, pass an ordinary resolution, or pass a special resolution.
>
> In the specified sectors, the Government believes that acquiring such control over an entity may raise sufficient risk that mandatory notification of such transactions is required to ensure that the Government can act where to necessary to address any national security concerns.[20]

As the specified sectors are "highly likely to change over time", and so will need to be amended, the Government will set them out in secondary legislation. (para 78) Recognising the potential reporting burden of the regime, the Government would separately consult on the sectors and definitions to be covered, leading to "refined, robust and proportionate definitions" to be included in secondary legislation. (para 79-81)

[20] It would also apply the mandatory regime to "the acquisition of 15% or more of the votes or shares in an entity" in a specified sector (para 73). This is a type of "notifiable acquisition" rather than a trigger event in its own right (para 74).

Differences between the existing and new regime

The following table is very closely based on that in the Explanatory notes (p11-14). It does not necessarily highlight detail of changes (such as those to thresholds and areas covered).

Comparison between national security interventions under the *Enterprise Act 2002* and the National Security and Investment regime		
Aspect	**Current system under the *Enterprise Act 2002***	**National Security and Investment regime**
Acquisitions within scope	The Secretary of State may intervene in qualifying mergers between enterprises which raise specified public interest concerns, including on national security grounds.	The Secretary of State may intervene where he reasonably suspects that a 'trigger event' has taken place or is in progress or contemplation, and this has given rise to, or may give rise to, a national security risk. Trigger events include: acquisitions of certain shares or voting rights in a qualifying entity; acquisition of material influence over such an entity; the acquisition of a right or an interest in a qualifying asset enabling the acquirer to use the asset or to control or direct how it is used.
Notification to Government	Parties may submit a merger notice to the CMA to notify them about a relevant merger situation. Under the Public Interest Regime, the Secretary of State may intervene in a merger whether or not there has been a notification. Following receipt and acceptance of a complete merger notice, the CMA must decide whether the duty to refer the merger for a Phase 2 investigation applies within 40 working days.	Pre-notification to the Secretary of State required for certain acquisitions, via a mandatory notice. Where this does not apply, parties to trigger events may submit a voluntary notice to the Secretary of State. The Secretary of State may intervene in a completed or anticipated trigger event whether or not there has been a notification. Following receipt and acceptance of a complete mandatory or voluntary notice, the Secretary of State must decide whether to issue a call-in notice within 30 working days.
Government assessment	If a merger situation meets the criteria for intervention on the grounds of national security, the Secretary of State may issue a 'Public Interest Intervention Notice' (PIIN) to the CMA to initiate a Phase 1 investigation. Following receipt of the CMA's report on the merger, the Secretary of State has the option to clear the merger, clear the merger subject to undertakings offered by the parties to address the national security risks (see cell below on interventions and remedies), or refer the merger for a Phase 2 investigation. A Phase 2 investigation is undertaken by an Inquiry Group formed by the CMA. Following the completion of the investigation they would provide their recommendations to the Secretary of	The Secretary of State will call in trigger events to undertake a national security assessment. The Secretary of State will use this process to determine whether to clear the trigger event either outright or subject to remedies, or (where this is necessary and proportionate) block or unwind it. The Secretary of State has an initial 30 working days to conduct a national security assessment. This may be extended by the Secretary of State by 45 working days if certain conditions are met. If further assessment is required, the Secretary of State may agree an additional voluntary period with the acquirer if certain conditions are met.

	State. The Secretary of State would then have the option to clear the merger, clear the merger subject to undertakings offered by the parties to address the national security risks or an order imposing remedies, or to block/unwind the merger. The Secretary of State must make the decision to refer a merger for a Phase 2 investigation or to accept undertakings instead of making the reference within four months of the merger completing or, if it is completed without being made public, within four months of the merger being made public.	
Intervention and remedies	After intervening in a national security case, the Secretary of State may issue an interim order (by means of a statutory instrument subject to the negative resolution procedure) to prevent or reverse "pre-emptive action" by the parties which might prejudice the intervention. Such an order can come into force with immediate effect, where justified for the protection of national security. The CMA also has power to make a pre-emptive action order. The Secretary of State or the CMA (as the case may be) may subsequently grant derogations from a pre-emptive action order on application by the parties. As part of a Phase 1 investigation, if the national security concerns arising from a relevant merger situation are such that the Secretary of State would otherwise refer the merger for a Phase 2 investigation, the Secretary of State may accept undertakings as a remedy for the national security issues in lieu of making the reference. Following a Phase 2 investigation, the Secretary of State may accept undertakings or impose remedies by order, including blocking/unwinding the merger, to address a national security risk.	A notifiable acquisition must be approved by the Secretary of State before completing. A notifiable acquisition that is completed without prior approval is void and of no legal effect. The Secretary of State may during a national security assessment issue an interim order for the purpose of preventing or reversing action that might prejudice the exercise of his functions under the Bill. Interim orders will not necessarily be made public. The Secretary of State must before the end of the assessment period either notify the parties that no further action will be taken, or, where a national security risk has been identified, make a final order for the purpose of preventing, remedying or mitigating that risk. The Secretary of State must keep all orders under review and may vary or revoke them. Parties subject to an order may request that it be reviewed by the Secretary of State. When the Secretary of State makes, varies or revokes a final order, the Secretary of State must publish certain information about the trigger event and the order.
Judicial review	Litigants may apply to the Competition Appeal Tribunal (CAT) if aggrieved by a decision of the Secretary of State as part of the merger review process. The CAT will review the decision by applying the same principles as the High Court on an application for judicial review. Cases must be brought within four weeks of the date on which the applicant was notified of the disputed decision, or the date of publication if earlier.	Litigants may apply to the High Court for judicial review, with a closed material procedure available to ensure sensitive information is protected. Claims will need to be brought not more than 28 days after the grounds to make the claim first arose unless the court gives permission for the claim to be brought after the expiry of this time limit.

4.3 The concurrent consultation on sectors and definitions

On the same day the Bill was introduced, BEIS launched a consultation into "which sectors, and which parts of each sector" to include in the proposed mandatory regime.[21] Inclusion in that regime would "require acquirers making investments in those sectors to notify and receive approval from government before completing certain types of transactions."

The consultation focuses on the Government's proposed definitions of 17 "key sectors" in which certain types of transaction would be subject to mandatory notification. The approach is intended to "ensure that the Government is informed of potential acquisitions of control or ownership in these particularly sensitive areas, and can take action accordingly to investigate and mitigate any national security risks." The 17 sectors are:

1. Advanced Materials
2. Advanced Robotics
3. Artificial Intelligence
4. Civil Nuclear
5. Communications
6. Computing Hardware
7. Critical Suppliers to Government
8. Critical Suppliers to the Emergency Services
9. Cryptographic Authentication
10. Data Infrastructure
11. Defence
12. Energy
13. Engineering Biology
14. Military and Dual Use
15. Quantum Technologies
16. Satellite and Space Technologies
17. Transport

The Government stated that the "vast majority of the transactions will not be called in, and this process can therefore provide more certainty and confidence for businesses and investors that the Government will not intervene in their investment."

The results of the consultation would inform secondary legislation intended to come into force at the same time as the proposed legislation. The consultation closes on 6 January 2021.

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[21] BEIS, 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, 11 November 2020 (accessed 11 November 2020)

4.4 Impact assessment

The Government published an impact assessment of the proposed new arrangements on 11 November 2020.[22] While it acknowledged potential costs of the new regime to businesses, it noted:

> Evidence suggests that national security regimes do not play a major role in informing the investment decision-making process, provided that the regime is clear and predictable. Some studies have shown that the potential negative impact of regulatory uncertainty on investments may be offset by the increased security and economic stability in the country as a result of the regime.

The impact assessment presented estimates about costs associated with the new regime. The most striking figure – and the one most quoted in commentary on the Bill – is the estimate that there could be 1,000 to 1,830 transactions notified each year. (p22-23)

4.5 Statement of policy intent

BEIS also published a Statement of policy intent on 11 November 2020. This is a draft document that sets out how the Secretary of State would expect to use the new call-in powers, as required under Clause 4 of the Bill.

When reviewing notifications, the Secretary of State must consider

> a. the target risk – the nature of the target and whether it is in an area of the economy where the government considers risks more likely to arise
>
> b. the trigger event risk – the type and level of control being acquired and how this could be used in practice
>
> c. the acquirer risk – the extent to which the acquirer raises national security concerns.

Target risk

The draft describes "**core areas**" as those sectors of the economy more prone to national security risks and so trigger events: they are essentially "national infrastructure sectors defined by the Centre for the Protection of National Infrastructure, advanced technology, military and dual-use technologies, and direct suppliers to Government and the Emergency Services".

"**Core activities**" will primarily take place with core areas, and are those where national security risks are most likely to arise. Acquisition of **entities** is more likely to be subject to call-in than acquisition of **assets**.

The draft notes that other sectors and activities of the economy are unlikely to pose national security threats and so are unlikely to be called in.

Assets

The Bill would allow the Secretary of State to call in acquisition of land; tangible (or corporeal in Scotland) moveable property, and "ideas,

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[22] BEIS, National Security and Investment Bill: Impact assessment (IA), 9 November 2020 (accessed 14 November 2020)

information, or techniques which have industrial, commercial or other economic value". The draft sets out some examples of how this power might be applied in practice.

Trigger event risk

This relates to the potential of an event to undermine national security, or to allow an actor to move towards doing so. The draft gives such examples as controlling supply chains, gaining access to sensitive locations, outright destruction or disruption, espionage or using an investment to apply undue influence on the UK.

Acquirer risk

This refers to the matter of assessing whether the acquirer in a transaction does or potentially might represent a security risk. The Government notes that the "vast majority" of acquirers would be most unlikely to present a risk. Concerns are more likely to arise if they acquirer is "hostile to the UK's national security, or when they owe allegiance to hostile states or organisations". The Government emphasises that state-owned entities and sovereign wealth funds are not "inherently" more likely to pose a risk.

4.6 International aspects and comparisons

In a growing number of countries, the definition of which assets and transaction types are sensitive is getting broader. Earlier policies were concerned mainly with defence production, later with critical infrastructure. Now many countries are including advanced technology and personal data.[23]

OECD

In May 2009, the OECD adopted the Recommendation of the Council on Guidelines for Recipient Country Investment Policies relating to National Security promoting non-discrimination, transparency, proportionality and accountability in any member state's legislation. According to the OECD, many countries have been changing their legal frameworks but there is no uniform approach on how policies should be scoped and designed.

For more examples, see the OECD's research note Acquisition- and ownership-related policies to safeguard essential security interests: Current and emerging trends, observed designs, and policy practice in 62 economies.

European Union

In 2019 the EU adopted a framework for the screening of foreign direct investments into the Union. The framework sets up a mechanism for member states and the European Commission to exchange information on potentially sensitive investments, and for the Commission to be able to issue opinions when an investment poses a security threat. The final decision remains with member states, however.

[23] Acquisition- and ownership-related policies to safeguard essential security interests, OECD, May 2020

United States

The Committee on Foreign Investment in the US (CFIUS) deals with foreign investment in the US that may affect US national security. CFIUS is an interagency committee authorised to review certain foreign investment transactions including real estate transactions by foreigners.

The committee started life concentrating on defence equipment, but its role has gradually broadened. Since 2018 the system has been reformed to take account of new strategic concerns, such as rivalry with China and sensitive new technologies.

Recent changes

In 2018, the *Foreign Investment Risk Review Modernization Act* (FIRRMA) expanded the CFIUS's authority, adding four main new types of transaction that the CFIUS could look at investment in:

> real estate located in proximity to sensitive government facilities;
>
> U.S. businesses that afford a foreign person access to material nonpublic technical information in the possession of the U.S. business, membership on the board of directors, or other decision-making rights, other than through voting of shares; and:
>
> any change in a foreign investor's rights resulting in foreign control of a U.S. business or an "other investment" in certain U.S. businesses; and
>
> any other transaction, transfer, agreement, or arrangement designed to circumvent CFIUS jurisdiction.[24]

FIRRMA increased CFIUS funding, relaxed time limits on investigations, obliged companies to notify of cases involving state-owned investment, and allowed CFIUS to consider minority stakes in certain companies.

The legislation also invites CFIUS to consider the availability of security-related resources, technical and human, and whether a transaction:

> … is likely to result in a foreign government gaining a significant new capability to engage in malicious cyber-enabled activities against the United States…

With the Covid-19 pandemic health assets, including genomics, biotechnology, pharmaceuticals and personal protective equipment, came into sharper focus.[25]

Countries of concern

FIRRMA provides for CFIUS intervention when the transaction involves a "country of special concern."[26] Congress's original version of the legislation called for "countries of concern" to be listed, but the enacted legislation does not name any country.[27]

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24 US Treasury: Summary of the Foreign Investment Risk Review Modernization Act of 2018

25 'The coronavirus pandemic's latest victim: Foreign investors', *Fortune,* 15 April 2020

26 *Foreign Investment Risk Review Modernization Act of 2018*

27 Bryan, Cave, Leighton, Paisner, Top Takeaways from CFIUS Reform, August 2018

While China is not mentioned in the FIRRMA, the legislation was passed as part of the *National Defence Authorization Act 2019* (NDAA2019), which does describe China as a strategic competitor.

France

France has had legal mechanisms to check acquisitions for security concerns at least since 1966. The Minister of the Economy is responsible for applying the law.

The Code monétaire et financier contains a mandatory review mechanism for certain acquisitions by foreigners. The Code de commerce has provisions concerning mergers, regardless of nationality.

Reforms of the Code monétaire, particularly in 2014 and 2019, extended the sectors covered and significantly increased the number of reviews and strengthened and broadened the scope of sanctions for violations of the foreign investment laws. Interventions are increasing noticeably; official figures show that 14% of all transactions were called in for review in 2018.

In 2020 France further adjusted the foreign direct investment screening regime, partly in response to the pandemic. Firstly, information services, national food security-relevant products, quantum technologies and energy storage were added as "strategic sectors". The timetable for investigations was changed to provide for faster determinations but also to allow officials more flexibility.[28]

Later in 2020, France added biotechnology to the list of critical technology and lowered the shareholding threshold from 25% to 10%.

A reform in 2019 provided for the State to hold "golden shares" in strategic companies, including transport and utility companies. Golden shares allow the holder to influence a company's decisions beyond the level that its shareholdings would normally allow.[29]

[28] France amends its foreign investment regime, Clifford Chance, February 2020
[29] Acquisition- and ownership-related policies to safeguard essential security interests, OECD, May 2020

5. The Bill

This section provides a high-level summary of the Bill. **It does not describe each clause in detail.** Members should consult the Bill and the Explanatory Notes for full detail.

The Bill as introduced comprises 66 clauses in 5 parts and it contains two schedules.

Part 1 – the call-in power

Clauses 1 to 13 (chapters 1-3) establish a call-in power to enable a national security assessment of an acquisition. Clauses 14 to 22 (chapter 4) provide for the call-in power procedure.

Chapters 1-3 – the call-in power

Clause 1 allows the Secretary of State to issue a **call-in notice** where they believe that a **trigger event** has or will take place that may create a risk to national security.

The call-in notice must be given to the various parties involved and "other persons as the Secretary of State considers appropriate". The notice must describe the trigger event to which it relates and state the names of the persons to whom the notice is given.

Clause 2 provides certain limits on the issuance of call-in notices. These include that they can only be issued up to 5 years after the event occurred, unless the Secretary of State has been given false or misleading information.

Under Clause 2 (4) the Secretary of State will be able to issue a call-in notice for trigger events occurring from 12 November 2020, the day after introduction of the Bill.

Clause 3 provides for the publication of a **statement** that sets out how the Secretary of State will exercise the call-in power. The call-in power cannot be used until this statement has been made.

The statement will provide information including:

- the sectors to which the power can be applied;
- detail about trigger events;
- detail about the assets to which the power can be applied;
- the wider factors that the Secretary of State will consider when deciding if to issue a call-in notice.

Clause 4 requires the Secretary of State to conduct a consultation on a draft statement and then to lay the statement before Parliament.

The statement will not need active approval by Parliament. It will automatically remain in effect unless either House resolves not to approve the statement within 40 days of the laying date. Should the statement not be approved, the Secretary of State will be required to withdraw it.

Clause 5 defines the meaning of **trigger event** and **acquirer**. In short, a trigger event is when a person takes control of an entity or asset that falls under the national security regime.

Clause 6 describes **notifiable acquisitions**. These are acquisitions of entities that fall under the new regime. It also states that an acquisition is notifiable where someone increases their shareholding or voting rights in one of these entities from less than 15% to 15% or more.

The Secretary of State can make regulations under the affirmative procedure to vary what is considered to be a notifiable acquisition.

Clause 7 defines **qualifying entities**, such as companies that operate in the UK, and **qualifying assets**, such as trade secrets, databases and algorithms.

Clause 8 defines what is considered to be an act of gaining control of a qualifying **entity**. It includes circumstances where someone increases their shares, voting rights, or other forms of control over the entity.

Clause 9 defines what is considered to be an act of gaining control of a qualifying **asset**. It includes the acquisition of a right to use, direct or control the asset.

Clause 10 introduces **Schedule 1**, which describes different cases in which someone is to be treated as though they hold an interest or right. It covers, for example, where someone has an indirect controlling interest through their relationship with a person with a direct interest.

Clause 11 provides certain exceptions from the rules in relation to assets. It allows the Secretary of State to make regulations that describe circumstances in which a person is not to be regarded as if they have gained control of a qualifying asset. Under clause 63, these regulations will be subject to the affirmative procedure and therefore require approval by a resolution of each House.

Clause 12 makes supplemental provisions in relation to trigger events, such as determining what happens if a trigger event takes place over a number of days.

Clause 13 provides that a notifiable acquisition is void if it is completed without the approval of the Secretary of State and describes the ways in which the Secretary of State can approve an acquisition.

Chapter 4 – the procedure

Clause 14 requires a person subject to the regime to notify the Secretary of State before they make their acquisition through a **mandatory notice**.

The Secretary of State may make regulations under clause 14 (4) to prescribe the form and content of mandatory notices. These regulations will be made under the negative resolution procedure. The Secretary of State will be able to reject a mandatory notice, for a number of reasons including where insufficient information has been provided.

If a mandatory notice is accepted, the Secretary of State must notify the various parties and will have a 30 day **review period** to decide whether

to issue a call-in notice or to notify the relevant persons that no further action will be taken.

Clauses 15, 16 and 17 set out the procedure for **retrospective notifications** - notifiable acquisitions that are void because they were completed without the approval of the Secretary of State. Under clause 15 (2), the Secretary of State has 6 months from the day on which they became aware of the notifiable acquisition to either issue a call-in notice or to give a **validation notice** to notify the relevant persons that no further action will be taken. The issuance of a validation notice will mean that the acquisition is not void.

Clause 16 (1) provides that a person involved in a void notifiable acquisition can apply themselves to the Secretary of State for a validation notice. Such an application is called a **validation application**. The Secretary of State may make regulations under the negative procedure to prescribe the form and content of such applications. The Secretary of State will be able to reject a validation application, for a number of reasons including where insufficient information has been provided.

If a validation application is accepted, the Secretary of State must notify the various parties and will have a 30 day review period to decide whether to issue a call-in notice or to issue a validation notice and notify the relevant persons that no further action will be taken.

Clause 18 creates a **voluntary notification scheme** to enable parties to notify the Secretary of State of transactions that fall outside the requirements for mandatory notification but that may still give rise to national security risks. Parties will be able to submit a **voluntary notice** to the Secretary of State. The Secretary of State will be able to reject a voluntary notice, such as if insufficient information has been provided. The Secretary of State may make regulations under the negative procedure to prescribe the form and content of such notices.

If a voluntary notice is accepted, the Secretary of State must notify the various parties and will have a 30 day review period to decide whether to issue a call-in notice or to issue a validation notice and notify the relevant persons that no further action will be taken.

Clause 19 gives the Secretary of State the power to require relevant persons to provide relevant and proportionate information. This is in order to enable them to exercise their functions in relation to the regime. The Secretary of State will be able to issue an **information notice** requiring the provision of relevant information. The notice may include a time limit for responding.

Clause 20 gives the Secretary of State the power to take evidence from witnesses in cases where that would be proportionate. The Secretary of State would do this by issuing an **attendance notice**.

Clause 21 allows the Secretary of State to issue an information or attendance notice to relevant persons outside of the UK, if that person is: a UK national; normally resident in the UK; a body incorporated in the UK; or carrying out business in the UK.

Clause 22 provides that if false or misleading information has been given to the Secretary of State in relation to decisions on any of the notices or applications described above, the Secretary of State may reconsider their decision.

In such cases the Secretary of State will be able to revoke a previous decision and may issue a call-in notice. Any call-in notice must be issued within 6 months of discovering that the information was false or misleading.

Part 2 – remedies

Clause 23 and 24 define an **assessment period** in relation to call-in notices.

The Secretary of State will have an **initial period of 30 working days** after a trigger event has been called-in "to determine whether to issue a final order imposing remedies or a final notification confirming no further action is to be taken ("the initial period")."[30] This period can be extended by an **additional 45 working days** if they believe that there is a national security risk and more time is needed to assess the trigger event ("the additional period").

Any extensions beyond the initial and additional periods may be agreed between the acquirer and the Secretary of State ("the voluntary period").

Periods of time taken for persons to comply with information or attendance notices do not count towards the assessment period.

Clause 25 would allow the Secretary of State to issue an **interim order** during the assessment period to prevent action that would impact on the Secretary of State's functions under the Act. An interim order can do various things including providing for the appointment of a "person to conduct or supervise the conduct of activities on such terms and with such powers as may be specified or described in the order".

Clause 26 requires the Secretary of State to make a **final notification** or **final order** before the end of the assessment period. A final notification is a notification that no further action is going to be taken.

A final order may be made if the Secretary of State is satisfied "on the balance of probabilities" that a trigger event will lead to a risk to national security and that the provisions in the order are "necessary and proportionate for the purpose of preventing, remedying or mitigating the risk." The final order may include provisions such as requiring a person to not do particular things and the appointment of a person to conduct or supervise certain activities.

Clauses 27 and 28 would establish a process to vary or revoke interim and final orders.

Clause 29 requires the Secretary of State to publish details of final orders, excluding sensitive information.

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30 National Security and Investment Bill: Explanatory notes, 11 November 2020

Clause 30 permits the Secretary of State to give **financial assistance**, such as loans, to an entity in relation to a final order. If this assistance totals £100 million or more, "the Secretary of State must as soon as practicable lay a report of the amount before the House of Commons."

Clause 31 gives the Secretary of State the power to direct the **Competition and Markets Authority** (CMA). It provides for situations where a trigger event is also subject to consideration by the CMA under the merger control regime in Part 3 of the *Enterprise Act 2002*. The Explanatory Notes explained:

> This power will allow the Secretary of State to ensure that, when a risk to national security has been addressed via a final order under the Bill, the CMA does not inadvertently undermine this through any action it takes. The Secretary of State will also be able to use this power to ensure that a person is not subject to contradictory remedies under the two regimes.[31]

Part 3 – enforcement and appeals

The Explanatory Notes published with the Bill summarise in a simple table format, from page 25, the various offences under the Bill and their accompanying criminal and civil penalties. A high-level overview of these offences and penalties is provided here.

Clauses 32 to 36 create a series of offences under the act including:

- an offence of completing a notifiable acquisition without approval from the Secretary of State (clause 32);
- an offence of failing to comply with an interim or final order (clause 33);
- an offence of failing to comply with an information notice or attendance notice (clause 34).

Clause 37 sets out which enforcement agencies are responsible for prosecuting offences and **clause 38** provides for proceedings against partnerships and other associations.

Clause 40 gives the Secretary of State the power to impose monetary penalties (a **penalty notice**) for certain offences**. Clause 41** provides for maximum permitted monetary penalties, which vary according to the offence. **Clause 42** requires the Secretary of State to keep monetary penalties under review, and gives them the power to vary or revoke the penalty notice.

Clause 43 provides that a person may not be subject to both a monetary penalty and a criminal sanction for the same offence.

Clauses 44 to 47 set out the procedure for **recovering unpaid penalties and costs**, to provide for interest to be incurred, and for enforcement.

Clause 48 provides for compliance with notices and orders under the Bill to be enforceable through **civil proceedings** by the Secretary of State.

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[31] National Security and Investment Bill: Explanatory notes, 11 November 2020

Clause 49 provides for **judicial review of decisions** under the Bill. Judicial review must be brought within 28 days of the issue unless the court considers that exceptional circumstances apply.

Clauses 50 and 51 provide an **appeal mechanism** against monetary penalties and costs. Appeals can be made to the court.

Clause 52 provides that the offences set out in clauses 32, 33, 34 and 35 "may be committed by conduct that occurs inside or outside the UK irrespective of the offender's nationality or, if a body, country of formation or recognition."[32]

Part 4 – miscellaneous provisions

Clause 53 enables the Secretary of State to make regulations prescribing the procedure for giving notices and serving orders under the Bill. These regulations will be made under the negative resolution procedure.

Clauses 54 and 55 provide the Secretary of State and public authorities with powers to disclose information to facilitate the delivery of the regime.

Clause 56 places a duty on the CMA to provide information and assistance to the Secretary of State in their delivery of the regime.

Clause 57 provides for **data protection** by specifying that information may only be used or disclosed for the purposes of this Bill if this does not contravene data protection legislation or the *Investigatory Powers Act 2016*.

Clause 58, 59 and schedule 2 make minor and consequential amendments and revocations to the *Enterprise Act 2002*. **Clause 59** amends Part 9 of the *Enterprise Act 2002* on information sharing gateways. It will remove the restriction on UK public authorities disclosing information that comes to them in connection with a merger investigation under that gateway.

Clause 60 seeks to protect the Secretary of State and the CMA against actions for **defamation** as a result of exercising functions under the Bill.

Clause 61 requires the Secretary of State to publish an **annual report** after the end of each financial year and to lay a copy of the report before Parliament. The report must provide a range of information including details of:

- any financial assistance given under the Bill;
- the sectors of the economy in relation to which mandatory notices were given;
- the number of call-in notices given; and
- the number of final orders made.

Part 5 – final provisions

Clause 62 covers trigger events that take place after the introduction of the Bill but before its commencement. It allows the Secretary of State to

[32] National Security and Investment Bill: Explanatory notes, 11 November 2020

continue to use powers of intervention under the *Enterprise Act 2002* on these trigger events after commencement. However, these powers will not apply to a trigger event if any action is taken in relation to it under this Bill.

Clause 63 provides for the parliamentary procedures to be used for the different regulations made as statutory instruments under the Bill.

Clause 64 provides for the provision of money.

Clause 65 provides **definitions of terms** used in the bill.

Clause 66 states that the Bill will extend to the whole UK.

6. Reaction

There has so far been comparatively little commentary on the content of the Bill as published; there was however some speculation about what the Bill might have contained before it was published. Some of those themes have continued to inform discussion. This section highlights some of the main issues raised at both stages.

6.1 Speculative reporting and themes

In the weeks running up to publication, various speculative articles suggested a number of potential inclusions in the Bill that did not ultimately materialise. For instance, in October Bloomberg reported on the **potential retrospective applicability** of the legislation:

> Among the most potentially controversial parts of the draft law is a proposal to allow the government to intervene retrospectively in circumstances where national security is an issue. That would mean allowing government officials to look at past takeovers and mergers where concerns have been raised.
>
> Darren Jones, an opposition Labour Party lawmaker who chairs Parliament's Business, Energy and Industrial Strategy Committee, said that while a bill is needed to update U.K. powers regarding foreign takeovers, the government "mustn't go so far as to scare off those who wish to invest in the future success of our country."
>
> "The U.K. economy benefits enormously from foreign direct investment because we're known as a country that's open for business," Jones said. "To suggest that ministers will 'unwind' existing arrangements -- other than in the most important of national security cases -- seems both impractical and shortsighted."[33]

On 5 November, Bloomberg reported that the Government would be unlikely to pursue such an approach:

> Business Minister Nadhim Zahawi told Bloomberg TV on Thursday that his department will introduce the National Security & Investment Bill "shortly."
>
> While he did not definitively rule out including retrospective powers to review and unwind foreign deals in the new law, he signalled such a move is not the government's policy.
>
> "Any retrospection on deals would send the wrong message," Zahawi said. "Our priority is to make sure that we send a message to the world that we are open for business."[34]

The Bill as published would limit the retrospective application of provision to 12 November 2020, although the potential consequences of this approach for investment decisions continue to be highlighted, as set out below.

Another major theme in earlier reporting was that of the relationship between the Bill and **wider controversies about trade with China**. In

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33 Bloomberg, "U.K. Plans New Law to Undo Foreign Deals on Security Grounds", 13 October 2020 (accessed 13 November 2020)

34 Bloomberg, "U.K. Minister Says 'Wrong' to Undo Foreign Deals Retrospectively", 5 November 2020 (accessed 13 November 2020)

particular, the Conservative China Research Group criticised delays in bringing forward the legislation:

> Ministers should 'urgently' bring forward rules to screen Chinese investment in UK, a report warns.
>
> Former UK diplomat Charles Parton said despite promises from the Government to take a tougher approach, rules aimed at protecting national security had failed to materialise.
>
> In a report for the new China Research Group of Tory MPs, he warned the approach to foreign investment 'needs reworking'.
>
> There is growing concern about China's stated aim to dominate fields such as artificial intelligence and microchips, with Beijing-linked hackers accused of stealing sensitive technology designs from Western countries and putting them to military uses.
>
> Parton said: 'Chinese investment is increasingly focused on companies which can make good its technological shortcomings.
>
> 'As new technologies increasingly can be used for both benign and military or repression purposes, we need to ensure that investment does not harm our long-term security.'
>
> Parton, one of the UK's top China watchers, said the Department for Business, Energy and Industrial Strategy had promised legislation to tighten up rules governing foreign investment by this summer but had missed this deadline.
>
> He added: 'This deadline has passed, the urgency has not.
>
> 'Not only should the bill be introduced as a matter of urgency, but mechanisms need to be established to ensure that investment or mergers and acquisitions do not allow the transfer of technology which conflicts with UK security, interests and values.'[35]

While the Bill is general in its applicability, commentary inevitably continues to reflect concerns and arguments about such recent high-profile cases, most notably Huawei.

6.2 Commentary since publication

Wider commentary on the published Bill has been limited and continues to emerge. This section highlights a range of emerging reactions.

The main issues and concerns raised so far include the following:

- How far a new regime is needed, and how stringent it should be – especially given the limited call-ins under the current regime;
- The limited definitions of "national security" and the specific areas to be covered (with the latter being subject to a concurrent consultation and eventual secondary legislation);
- The abolition of all thresholds, allowing intervention into any transaction;
- Potential bureaucracy and expansion of cases referred under both the mandatory and voluntary regimes;

[35] Thisismoney.co.uk, "Time to get tough on China investment, says UK expert: Concerns mount over Beijing's plans for digital domination", 2 November 2020 (accessed 13 November 2020)

- Eventual application of the provisions from 12 November 2020, leading to immediate uncertainty for potential transactions;
- Potential tensions between "national security" and "protectionism";
- Potential risks to the attractiveness of the UK as a country to invest in;
- The effectiveness or otherwise of the measures (and timing) to deal with existing concerns, notably regarding China.

Finsbury noted that the proposed regime would introduce "a process some fear could be as opaque and open to political influence as CFIUS [the US regime]".[36] They refer to the proposals as "among the most far-reaching national security review powers in the democratic world". Finsbury identified five specific challenges arising from the plans:

> **Volume.** The new regime is predicted to deliver a massive increase in the number of cases subject to review, originally estimated at around 200 each year, with 100 going to advanced review and 50 then being subject either to remedy or prohibition, but upwards of 1000 cases are now expected to come under review. In the 18 years since the Enterprise Act 2002, there have been only a dozen or so such national security interventions, all being cleared at the first stage and with zero prohibitions. So, from less than one review a year on average under the current regime, we are moving to potentially a thousand or more such reviews annually.
>
> **Opacity.** A definition of national security risk is not within the legislation, neither will there be any hierarchy of the security risk of countries. Indeed, theoretically even UK-UK deals will come under scrutiny. Although there is expected to be opportunity to seek Judicial Review, there are fears that the process itself will, like CFIUS and the Enterprise Act regime, struggle to offer the clarity and visibility important in deal-making.
>
> **Politicisation.** The buck will stop with a politician – specifically, the Secretary of State for Business, Energy and Industrial Strategy, currently Alok Sharma. While operating in a quasi-judicial role in making these determinations, he will be delivering what is although not a political decision as such, is still a decision by a politician. The fear will be that national security (as not defined) could over time merge into industrial policy or even electoral policy, depending on the target and the ability of interest groups to exert political pressure.
>
> **Retroactivity.** The legislation suggests transactions if not notified can then be subject to subsequent call-in by the Secretary of State for up to five years, in doing so providing a level of retroactive risk that will for some make what is meant to be a voluntary regime outside certain specific sectors, effectively mandatory.
>
> **Specificity.** There will be a higher bar set for specific sensitive sectors, with understandable candidates like AI and Quantum Technologies requiring mandatory filings. That this list will be determined by Ministers and approved by MPs, leaves open in

[36] Finsbury, "National Security and Investment Bill – Anarchy in the UK (for M&A)?", 11 November 2020 (accessed 14 November 2020

> time other sectors being brought in as a result of political factors, not risk.[37]

Although it recognised a "genuine and sincere desire" on the part of the Government to update processes, Finsbury feared that "once Ministers are in possession of a hammer, many transactions might look like a nail", and that this risk might ultimately be exacerbated by an interaction between "interest groups" and "the sheer volume of transactions".

Linklaters also noted the influence of other regimes on the Bill, most notably the development of a hybrid mandatory/voluntary regime, reflecting those in the United States and Germany. They note that the UK is finally falling in with a trend towards stand-alone foreign investment legislation, but that the Bill "also reflects a UK backdrop of domestic political concerns over technological sovereignty and opportunistic acquisitions of undervalued UK businesses", as featured in recent guidance for UK digital firms working with China. [38]

Overall, Linklaters highlighted the sudden expansion of the scope of the Bill in comparison with earlier signals from the Government, with potential implications for a wide number of transactions:

> The foreign investment regime envisaged by the Bill is, in many respects, more far-reaching than the original proposals made in the July 2018 White Paper. Whereas the White Paper had contemplated a voluntary regime with an expansive power for the Government to "call in" transactions for review; the Bill provides for a mandatory notification obligation for sectors perceived to be of highest national security risk, with a voluntary regime for others. Coupled with a very broad jurisdictional scope and no safe harbours, this will capture a very wide range of transactions. The Government's Impact Assessment estimates that the new regime would result in 1,000-1,830 transactions being notified per year; an eye-catching number given that only 12 transactions have been reviewed on national security grounds since the current regime was introduced in 2003.[39]

They add that the "wider jurisdiction" outlined in the Bill might be an "increasingly important consideration" for potential investors:

> If the 1,000-1,830 notifications per year forecast in the Impact Assessment is accurate, this would be more than the number of transactions reviewed by comparator regimes such as Germany and significantly more than the number of merger cases reviewed by the CMA which average around 60 per annum. As such, we anticipate that foreign investment rules (in the UK and internationally) will be an increasingly important consideration for international investors and will need to be factored into deal feasibility, contractual conditionality and transaction timetables at an early stage of the process.[40]

In addition, it noted that the Bill does not specify which areas would be covered, but instead defers such detail to secondary legislation that

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37 Finsbury, "National Security and Investment Bill – Anarchy in the UK (for M&A)?", 11 November 2020 (accessed 14 November 2020

38 Linklaters, "CFIUK? UK introduces National Security and Investment Bill", 11 November 2020 (accessed 12 November 2020)

39 Ibid.

40 Ibid.

would follow the separate consultation now underway. The Government would also retain the right to alter definitions and coverage in line with the changing national security context – although the Bill does not define "national security risk".

While Linklaters noted that while recent concerns about Chinese investment have been a major impetus for the Bill, the Secretary of State "also intervened in the past year in deals involving North American private equity and financial investors (such as *Cobham / Advent* and *Inmarsat / Connect Bidco*)".

It concluded by highlighting the importance of keeping national security concerns separate from those of "economic nationalism":

> In announcing the Bill, the Government has emphasised that the regime will address national security risks; not economic nationalism and that this will be enshrined in the Bill. This will likely be welcomed by businesses and wider stakeholders, given that there was a concern that government intervention on national security grounds in UK M&A activity was increasingly being used in a political context. This was evidenced in Advent / Cobham where the Government accepted commitments related to the preservation of UK headquarters, jobs and R&D spend in addition to conventional security related commitments. It remains to be seen whether the introduction of a standalone regime under the Bill will address these concerns by in fact delivering a swift and proportionate review for the majority of cases based on clear national security concerns.

Allen & Overy noted that the proposed new regime offers "real teeth", but that some areas remain open to further clarification, notably "national security" and the specific areas to be covered:

> The Government is clear that these powers will be used only to address national security concerns, but with "national security" intentionally left undefined in the Bill, it will have significant flexibility to intervene in transactions.
>
> The mandatory suspensory nature of the proposed new mechanism is a substantial departure from the voluntary UK merger control regime, and will apply to transactions involving entities operating in defined parts of the economy (backed by a 'call-in' power applying in all sectors). The scope of the notification obligation is not yet fully settled and will be set out in secondary legislation following a consultation running until 6 January 2021, but the Government envisages that it will apply to transactions involving entities operating in 17 sensitive sectors of the economy. Officials have indicated that they want to define these areas as clearly as possible. However, there is an obvious risk of uncertainty around the precise definition of these sensitive sectors.[41]

In an overview of the Bill for investors[42], Latham & Watkins also highlighted the potential immediate consequences of the changes, given the proposed retrospective applicability of the new regime to the

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41 Allen & Overy, "National Security and Investment Bill: a new frontier for scrutiny of investment in the UK", November 2020, accessed 13 November 2020

42 Latham & Watkins, "UK Government Publishes Draft Legislation for a New Foreign Direct Investment Regime", 11 November 2020 (accessed 12 November 2020)

date of publication of the Bill. It also emphasised the absence of jurisdictional thresholds:

> [T]he Secretary of State's ability to intervene in an investment is not limited by any turnover or asset value thresholds. There is no requirement for a target to have a UK subsidiary or assets for the regime to apply; the target simply needs to carry on relevant activities in the UK.

It emphasised the potentially broad coverage of the provisions and the consequent uncertainty for investors:

> The breadth of the draft NSI Bill indicates that the regime will impact a significant range of investments involving businesses with a UK nexus {…] Acquisitions of minority stakes and of assets are firmly within scope, and while the mandatory notification requirement is limited to certain sectors of the economy, these are still numerous and broadly defined. Furthermore, parties investing in any sector falling outside the mandatory regime will have to weigh the burden of a voluntary notification against the risk of a post-closing call-in if they choose not to notify the Secretary of State. While the regime is targeted at the small number of investments that could harm national security, it will have an impact on significantly more investments…

An editorial in *The Financial Times*[43] on 12 November 2020 warned of the risk of a "new protectionist mood". It said that the Covid-19 pandemic had "highlighted the importance of self-reliance and national control of essential industries for nations everywhere". The editorial noted the need for change:

> In the case of the UK, the pandemic, as well as Brexit, present an opportunity to set out a new regime. An overhaul has been long overdue. The 2002 Enterprise Act, the centrepiece of UK competition law, has not been fit for purpose for some time. In recent years ministers have, all too often, resorted to a case-by-case approach to takeovers, getting involved in everything from steel to cars. The result has been a lack of consistency, often marked by attempts to extract binding commitments on jobs or technology from foreign owners at the eleventh hour. Sweeping proposals in a national security and investment white paper under former prime minister Theresa May were widely condemned as too broad.
>
> […]
>
> Under the new rules, the threshold for intervention of £70m annual turnover for a takeover target (or 25 per cent combined market share) has been swept away — allowing officials to intervene in even the smallest of deals, including the buying of equity stakes and purchases of intellectual property. Any transaction in 17 sensitive industries will have to be automatically declared to a new investment security unit. The industries range from artificial intelligence to advanced materials. Widening the scope makes sense; the nature of what is "strategic" has changed from the tanks and submarines of previous decades to include robotics and AI.

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43 Financial Times, "The UK must guard against protectionism", 12 November 2020, accessed 12 November 2020

But it warned that the new, wider powers might be subject to wider lobbying and political interference:

> In practice, however, there are real risks of protectionism and bureaucracy. The absence of a threshold on deal size means the potential for intervention is large. The new "national security" test will probably allow for a wide range of issues to be taken into account and could lead to extensive lobbying. Officials said they expected as many as 1,000 transactions to be notified each year — a sharp increase given there have been only 12 public interest interventions by the government on national security grounds since 2002.
>
> Prospective investors will need to be confident the new regime is robust enough to stop individual politicians from being able to intervene on issues of personal interest. Entrepreneurs, too, may balk at the prospect of having their options limited by officials when selling their business — and choose to locate their headquarters elsewhere.
>
> The government knows a post-Brexit Britain will need to strike a balance between encouraging investment while fostering its own critical industries. Investors must hope that officials will not risk intervening in those transactions that are best left to the market.

The Times made similar points.[44] While lauding Britain's openness to investment, it noted that "openness brings risks". Referring to the Bill's "sweeping powers", the editorial cautioned:

> Used judiciously, it will give the government a weapon to fight back against the malign intentions of Beijing and Moscow. What it must not become is a bureaucratic drag on the country's economic dynamism or a covert excuse for protectionism.

It went on to note the relevance of the powers to changing circumstances, as well as the importance of using those powers:

> Indeed such powers are overdue. Legislation along these lines, albeit with a voluntary reporting mechanism, was first proposed by Theresa May in 2017. That was before the recent escalation of tensions between China and the West. Initially Britain's primary concern was China's access to new nuclear infrastructure, in whose construction it has played a leading role. Later attention turned to communications infrastructure, particularly Huawei's participation in Britain's 5G network. Now the scope of the legislation has been drawn even more broadly. Not only does it cover foreign takeovers but also investments in intellectual property, designed to prevent hostile powers stealing a march on innovative ventures in Britain's world-leading research and universities sector.
>
> Having armed themselves with these new powers, it is important that ministers use them. Since 2010 some 115 British companies have been wholly or partly acquired by Chinese businesses, according to research by the Henry Jackson Society. Huawei last year bought a small stake in Oxford Sciences Innovation, an Oxford University-linked company. Ministers did have powers already available to them under the 2002 Enterprise Act to block takeovers that threatened national security, yet rarely used them. In the past two decades, the government intervened in only 12

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44 The Times, "The Times view on the National Security and Investment Bill: Hard Sell", 12 November 2020 (accessed 12 November 2020)

> such transactions on security grounds, and never used them to block a takeover altogether.

The same day, however, *The Times* also reported on concerns that fears about China might undermine a recovery of investor confidence, notably in light of the Covid 19 pandemic and Brexit[45]:

> Critics in the City fear that as a result deal activity in one of the most open mergers and acquisitions markets in the world could be stymied.
>
> Mounting concerns about China, in particular, are thought to [be] driving the government's more interventionist approach.
>
> […]
>
> Yet barely three miles to the east of Parliament Square, among the corporate towers of the Square Mile, the talk is not so much of security concerns as the threat of protectionism. Sir Nigel Rudd, the City grandee, said: "I think we have been a little bit free in allowing companies to be taken over, but there is a balance here of having an open market and investors feeling that if somebody wants to buy their business they can sell it."
>
> Sir Nigel, 73, is a former chairman of Heathrow airport, which is 10 per cent- owned by China Investment Corporation, the sovereign wealth fund. "When I was on the [Heathrow] board, the Chinese were very good investors," he said.
>
> […]
>
> The Covid-19 pandemic has spurred some governments, including Australia, to clamp down even further amid concerns that falling share prices have left businesses vulnerable to bids.
>
> […]
>
> Some hope that Brexit, with the government's ambition of attracting foreign investment from beyond Europe, will mean that ministers do not adopt too aggressive an approach. "My suspicion is that the government will be careful not to be too interventionist," the investment banker said.
>
> A surge in takeover activity that has resulted in £22 billion of bids for listed British companies since August will accelerate further once Brexit has passed and Covid-19 worries fade, a leading stockbroking firm has predicted (Ben Martin writes).
>
> The onset of the pandemic led to a lull in mergers and acquisitions this year as companies and private equity firms took stock of the economic damage from the coronavirus.
>
> Yet there has been a sharp pick-up in bids since the summer as buyers seek to cash in on the cheap company valuations caused by fears related to the pandemic. In a note advising investors to "buy now while stocks last", analysts at Peel Hunt said that the surge in activity was "a classic indicator of an undervalued market".

The Times reported that the Henry Jackson Society had criticised the legislation for:

> "slamming the stable door after the horse has bolted". It added: "The government must make sure that it urgently reviews all of

[45] The Times, "Scale of intervention in foreign takeovers stuns City dealmakers", 12 November 2020 (accessed 14 November 2020)

> these prior acquisitions to ascertain the full extent of how compromised the UK might be by foreign corporate ownership."
>
> A government spokeswoman said: "We already have powers to intervene in mergers and acquisitions on national security grounds and recently lowered the threshold for intervention in three sensitive sectors of the economy."[46]

Forbes built on earlier questions about whether the new approach was actually needed, given the Government's existing ability to intervene. The commentary highlighted what it considered to be an "inconsistent" approach to dealing with such issues[47]:

> Cynics will argue that potential suitors have seldom needed to use the back door when courting domestic assets. The U.K. has already allowed many key assets, from nuclear power stations to the largest airport and parts of its telecoms network, to be sold off to foreign buyers.
>
> Huawei is a case in point and prime example of the government's struggle to balance its neoliberal economic ideology with guarding against potential threats to national security.
>
> Prime minister Boris Johnson initially defied strong pressure from both the U.S. and his own backbenches to stop using the Chinese telecoms giant for core communications infrastructure back in January.
>
> When attitudes to the perceived threat of Chinese influence hardened as the coronavirus took hold, the government U-turned on this decision. In July it said it would remove Huawei, suddenly deeming the firm a "high risk" 5G supplier. given its links to the Chinese authorities. Unpicking Huawei's kit from of the U.K.'s network will take years and cost billions.
>
> The country's relationship with Chinese investors has grown increasingly difficult over the past year. Previously happy to go cap in hand to Chinese developers to get funding for large capital intensive projects, Downing Street has more recently sought to reduce its inconsistent approach.
>
> Besides infrastructure, the defense and technology sectors have also seen government intervention.
>
> The culture secretary blocked Canyon Bridge, an investor in Imagination Technologies, backed by Chinese state funds, seizing control of the British microchip manufacturer's board in April.
>
> The move, on national security grounds, underlined the inconsistency in the government's approach. Canyon Bridge's acquisition of a stake in the business had been waved through the previous December, when the U.S. authorities had blocked it from buying an American chipmaker, Lattice Semiconductor.
>
> That same month the then business secretary Angela Leadsom intervened to prevent Chinese-owned Gardner Aerospace merging with Gloucester-based aviation components maker Impcross.

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46 The Times, "Chinese have swooped on 115 UK firms in a decade, Henry Jackson Society think tank finds", 12 November 2020 (accessed 12 November 2020)

47 Forbes.com, "U.K. Government Talks Tough With New Foreign Ownership Rules, But They've Already Sold The Crown Jewels", 12 November 2020 (accessed 13 November 2020)

> James Palmer, a senior partner at lawyers Herbert Smith Freehills, said the Imagination Technologies and Canyon Bridge cases question the rationale of the new proposals. In both incidences the government was able to successfully intervene on national security grounds under existing legislation.
>
> The government's inconsistent exercising of its powers do at least clearly spell out who it considers a threat.
>
> Johnson himself defended the controversial £4 billion sale of U.K. defence and aerospace company to Cobham to a U.S. private equity firm last December. Similarly, Britain's largest satellite group Inmarsat was sold to a consortium of American and British private equity players, and Canadian pension funds last March.
>
> However the new rules take shape, in the current environment they seem to be almost exclusively directed at one country. U.K. corporates likely remain up for sale to buyers from the country's historic allies.[48]

[48] Forbes.com, "U.K. Government Talks Tough With New Foreign Ownership Rules, But They've Already Sold The Crown Jewels", 12 November 2020 (accessed 13 November 2020)

7. Parliamentary committee activity – support for a strengthened regime?

The Foreign Affairs and Defence Committees both launched inquiries in 2020 touching on concerns related to the current CMA regime. Comments from the Chairs of the inquiries indicate that there could be support for a strengthened regime in order to protect national security. However, neither committee has yet reported in full.

7.1 Foreign Affairs Committee: The FCDO's role in blocking foreign asset stripping in the UK

The Foreign Affairs Committee launched an inquiry in April 2020 to examine how the Foreign, Commonwealth & Development Office (FCDO) assesses whether a potentially hostile party is seeking to secure significant influence or control over a UK company and in what circumstances the FCDO should intervene.

Tom Tugendhat MP highlighted the Committee's concerns over the current regime:

> Over the past few years, we've witnessed the UK Government seemingly sit back and watch as a number of our country's tech firms have been snapped up by other nations.
>
> Whilst busying ourselves with taking back control from Brussels, we've lost sight of how vital these companies are and how great the risk of losing them is. The transfer of some of our best tech firms into foreign hands comes at a great cost – innovation slips through our fingers and countless people's jobs are at risk.
>
> We want to see the Government sit up and pay attention, especially when these takeovers could be seen as a potential threat to national security or an attempt by a hostile party to gain leverage in key sectors of our economy. When do several small takeovers amount to the capture of a whole sector and what can we do to stop it?
>
> The Government's main concern right now is winning the battle against coronavirus and so it should be. However, we must not allow those who would seek to benefit financially or politically from this grave distraction the means to do so.

The Committee will also focus on what safeguards are required in the *National Security and Investment Bill* to ensure that the FCDO has a full role in the decision-making process in relation to interventions.

Written evidence on the Inquiry to date is available. Two sessions may be of particular interest:

- 8 September 2020
- 3 November 2020

7.2 Defence Committee: Foreign involvement in the defence supply chain

The Defence Committee launched an inquiry in November 2020 on Foreign Involvement in the Defence Supply Chain that touches on elements relevant to the Bill. The inquiry, which is led by a Sub-Committee, will scrutinise the vulnerabilities of the UK's defence supply chain. Focusing on the impact on SMEs and mid-sized companies, it will:

- assess the current level of foreign ownership, particularly by companies with links to states which could have "ulterior motives"
- explore the current and planned regulatory regime for government intervention to prevent foreign ownership of defence, or defence-related, companies
- examine the proposed National Security Investment Bill.

The Government already has a range of mechanisms to help secure the defence supply chain. These are explained in the consultation document on the coverage of the Bill and in written evidence submitted by the Ministry of the Defence to the Sub-Committee.

The Government holds special shares in several major defence companies, including BAE Systems and Rolls Royce Holdings, which gives them certain rights, including the ability to limit the ownership of a single foreign shareholder or foreign shareholders acting in concert.[49]

Paul Everitt, the Chief Executive of defence trade body ADS, told the Sub-Committee that "people trying to penetrate the systems and the networks that those companies hold" – industrial espionage – were of more concern to the defence sector than financial takeovers were.[50]

Richard Drax MP, the chair of the Sub-Committee, has welcomed the Bill, stressing the importance of addressing national security risks to the UK. He said:

> We are pleased that this long-awaited Bill has been introduced. The Bill, as proposed, envisages a much stronger foreign investment regime which Parliament will examine closely over the coming months.
>
> The Defence Committee has identified this as an area of critical importance to our security and defence, and has launched a Sub Committee on Foreign Involvement in the Defence Supply Chain. The Sub Committee's first evidence session on 9 November focused, in part, on the NSI Bill. We will continue our scrutiny of this important piece of legislation, with further sessions planned, including one on 23 November.
>
> The risks from hostile foreign involvement remain ever present, particularly in light of the financial impact of COVID-19, and in recent years it has become evident that state actors, such as Russia and China, are employing covert and increasingly creative methods to gain intelligence and to exert influence. We hope that

49 "Foreign involvement in the defence supply chain: written evidence submitted by the Ministry of Defence", Defence Sub-Committee, FSC0001, 13 October 2020

50 "Foreign involvement in the defence supply chain: oral evidence", Defence Sub-Committee, HC 699 2019-21, 9 November 2020, q11

this Bill will provide Government with the powers to respond to hostile challenges.[51]

[51] ibid

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