Department for
Business, Energy
& Industrial Strategy

NATIONAL SECURITY AND INFRASTRUCTURE INVESTMENT REVIEW

Summary of responses to the Government's consultation on long-term reform proposals

July 2018

Contents

General information about the consultation

i. The National Infrastructure and Investment Review Green Paper was published on 17 October 2017.

ii. Chapter 7 outlined the Government's approach to short-term reform. The consultation on the short-term proposals closed on 14 November 2017 and the response was published on 15 March 2018. The Orders amending the share of supply threshold and turnover test in three key areas of the economy – military and dual-use, computing hardware, and quantum technology – came into force on 11 June 2018.

iii. Chapter 8 (and questions 7 to 30) of the Green Paper covered the Government's options for long-term reform. The subsequent consultation ran from 17 October 2017 to 9 January 2018.

iv. The Government received 45 written responses and met a further nine organisations. Responses were received from individuals, trade associations, law firms, investors, businesses and research bodies. A list of respondents is included at Annex A.

v. This document summarises the responses provided to the Government. The first section covers the overall response to the consultation for all three options for reform, the second section addresses responses to the proposal for a voluntary notification system, the third section analyses responses to the option for a mandatory notification system and the final section looks at responses to the wider considerations for any option of reform.

vi. The Government's response to the consultation is published in the form of a White Paper, 'National Security and Investment', published alongside this document.

The broad options for reform – voluntary, mandatory or a combination

The options in the Green Paper

1. A key issue on which the Government consulted was the broad approach that the new regime should take to ensure that it has sufficient powers to prevent acquisitions of entities and assets from undermining national security.

2. The Green Paper proposed three broad options:
    - an expanded version of the call-in power, modelled on the existing power within the Enterprise Act 2002, to allow the Government to scrutinise a broader range of transactions for national security concerns (detailed from paragraph 115 of the Green Paper);
    - the introduction of a mandatory notification regime for foreign investment in key parts of the UK economy (from paragraph 127 of the Green Paper); or
    - both of the above – a combination of both reforms (cited in paragraph 114).

3. The first option would retain the current voluntary notification approach. But these powers would be expanded to a broader set of transactions as described later in this summary. There are obvious potential benefits for business in the Government continuing in the tradition of a wholly voluntary approach, including ensuring that the majority of mergers that do not raise national security concerns are not held up by unnecessary notification. As the Enterprise Act 2002 already operates under a voluntary system, businesses and investors should be familiar with the process of notification if this first option is implemented for the new legislation.

4. The second option for long-term reform was the introduction of a mandatory notification regime. This approach would require mandatory notification of foreign investment into the provision of a focused set of ‘essential functions’ in key parts of certain sectors of the economy, for example the civil nuclear and defence sectors. Mandatory notification could also be required for foreign investment in key new projects and/or foreign investment in specific businesses or assets. Several other developed and open countries have introduced a mandatory regime. Like elsewhere, if introduced to the UK, a mandatory regime would provide greater transparency and certainty to all businesses and investors around the process of intervention and would ensure that all transactions that might pose a national security concern, are properly scrutinised.

5. The third option proposed was a combination of the first two options. The Green Paper argued that combining the two options for reform could provide the best balance between the Government's need to know and ability to act where needed, certainty for businesses and investors, and the burden placed on businesses in complying with the regime.

6. The Green Paper sought views about the relative merits of these options through the following questions:
    - Question: 14 How could the Government best ensure that the expanded call-in power is exercised in a proportionate way and to provide sufficient transparency and clarity to businesses?
    - Question 15: What are your views on the merits of a mandatory notification regime? What are your views on the potential benefits and costs of a mandatory regime?
    - Question 22: What are your views on the relative merits of introducing either an expanded call-in power or a mandatory notification regime for specific businesses or assets, or both an expanded call-in power and a mandatory notification regime?

Summary of overall responses to this issue

7. Overall, there was a narrow preference expressed by respondents in favour of the option of voluntary notification over a mandatory notification system for foreign investment into specific parts of the economy.

8. Respondents from across different areas of the economy in favour of an expanded call-in power stressed that this option was the most proportionate way forward and would be the most effective at minimising administrative burdens to businesses, investors and Government.

9. The option of mandatory notification was favoured by some respondents, including businesses, primarily because of the certainty they considered it to provide. This was because the changes would be focused on:
    - the areas of the economy where national security risks were most concentrated - described in the Green Paper as 'essential functions';
    - the types of transaction most likely to give rise to these – foreign investments over certain thresholds related to votes, shares or other means of influence or control.

10. However, those opposed to the second option raised concerns about the 'deadweight' loss – that is, the cost and time (for businesses and the Government) that would be taken up with the notification and screening of transactions with no national security interests. Others emphasised the risk that a mandatory notification regime would undermine the UK's reputation as an open economy.

11. There was very little support voiced for the third option combining both components – instead, respondents described this as having the costs of the mandatory regime without the certainty it provides given that the Government would reserve the right to intervene into any part of the economy.

12. Respondents favouring all three options agreed about a number of other issues such as that, regardless of whether the regime was voluntary and/or mandatory, it needed to operate in a transparent and predictable fashion. These issues are covered later in this document.

Respondents' views about an expanded call-in power

13. Respondents indicated a narrow preference for an expanded version of the current call-in power. Respondents from law firms were particularly in favour of this option.

14. Of those who favoured a voluntary notification regime, most did so on the basis that it was a more proportionate approach than a mandatory regime. This was, they felt, because it would permit the Government to pinpoint its interventions only on those small number of transactions that give rise to rational security risks. The vast majority of other investments, raising no such concerns, could continue without Government intervention. This would, in turn, provide greater certainty for businesses who would know (assuming there's no need for a specific intervention) they could proceed with their investment.

15. Stakeholders identified a voluntary regime as a more attractive option to investors and advised it would help retain the UK's reputation as an open economy.

16. Respondents favouring a voluntary regime almost universally did so with an emphasis that, to provide certainty, it needed to be accompanied by clear and concise guidance. One respondent stated that "in the interests of investor confidence such a power must be accompanied by clear guidance".

Respondents' views about a mandatory notification regime

17. Many respondents expressed a preference for the introduction of a mandatory notification regime. Support for mandatory notification was split across respondents from different areas of the economy, including businesses and investors.

18. Respondents in favour of this option explained their preference by highlighting that a mandatory approach might ensure that any and all screening is carefully and tightly defined, thus potentially eliminating ambiguity as to where the Government's national security interests lie. However, respondents advised that this would only be the case if a mandatory regime is drawn as narrowly as possible and the test for assessing whether a notification is required is absolutely clear.

19. All those respondents who indicated a preference for a mandatory regime expressed the absolute necessity for it to be very well defined with an explicit set of rules around foreign direct investment into essential functions.

20. Without this focus and clarity, respondents also advised that a mandatory regime may also create uncertainty. If the test for assessing whether a notification is required is not simple and clear, there is scope for differing views on the test. This means businesses are likely to notify transactions even if they might not fall into scope, adopting a 'better safe than sorry' approach to notification. This would lead to a negative effect on business investment and would be likely to create a substantial burden on Government as a result of notification volumes, due to the propensity for a mandatory regime to capture a large number of deals.

21. In the same vein, stakeholders identified a major cost of a mandatory regime would be the amount of information the Government would receive. Respondents felt that this would be burdensome to assess and unlikely, in most cases, to raise any national security risks.

22. These costs would also fall on business. Some respondents felt that this would be particularly difficult for small businesses, who might also be disproportionately affected – their inclusion in a mandatory notification regime could make it more difficult to raise private finances needed to expand. One respondent set out that "for small companies this would be a terrible administrative burden".

23. Law firms were particularly opposed to a mandatory notification regime, arguing that that the existing merger regime is voluntary, so the Government might be best placed to bring the new regime in line to keep things clearer for businesses and investors.

Respondents' view about a combined regime

24. Very few respondents expressed a preference for both an expanded call-in power and a mandatory notification regime. Those that did cited that the former component would give the Government the power it requires, whilst the latter would provide certainty to the specific sectors of concern. This combined approach would, they considered, provide a balance of flexibility and certainty.

25. This support was heavily outweighed by those who concluded that the combined option would, in fact, be 'the worst of all worlds' involving unnecessary administrative burdens in relation to foreign investments that did not raise national security concerns, while retaining the uncertainty of the Government being able to intervene using an expanded range of powers that applied across the economy.

26. However, stakeholders also indicated that a hybrid option would increase the complexity and uncertainty of the entire regime. Law firms highlighted that a regime combining both call-in and mandatory notification create an unnecessary regulatory burden. Other respondents opposed to this option felt that the

Government had not provided enough evidence of how a combined system would work in practice, which would lead to increased uncertainty.

Respondents with no preference between the broad options

27. Certain stakeholders expressed no outright preference for either approach, but advised that, whatever the decision, transactions need to proceed with certainty. Any regime developed needs to provide clear parameters for parties to assess whether a potential transaction is likely to be accepted and Government powers should be exercised in an objective manner. Furthermore, any legislative proposals will require a clear and acceptable timetable for Government approval to avoid delaying transactions. In either of the options the priority has to be the clarity of scope and process for the benefit of investors, businesses and Government.

28. A very small number of respondents, representing different areas of the economy, stated that they did not consider a case for reform had been made and so were opposed to any of the proposals.

Issues related to any option for reform

29. The Green Paper sought views about some issues that would apply irrespective of the overall shape of the new regime – i.e. whether it included voluntary notification, mandatory notification or both.

The trigger events into which the Government could intervene

30. The consultation document sought views on these issues through the following questions:
    - Question 9: Do you agree that the definitions for those investments into which the Government can intervene should be (1) more than 25% of shares or voting rights and/or (2) other means of significant influence or control?
    - Question 10: What do you think should constitute significant influence or control in this regime? Can you give examples to support this view?

Consultation proposal

31. The Green Paper outlined that the Government was minded to use 25% of a company's votes or shares as the threshold that would constitute a trigger event for the regime. This would be in line with the figure used by the Competition and Markets Authority (CMA) when assessing whether a merger may raise competition concerns. Alongside this would be a 'second limb' to the test for any other transaction that gives (directly or indirectly) significant influence or control over that company or over its assets or businesses in the UK.

32. The Government would want to ensure that businesses are clear about the scope and implications of any new transaction test. Government considered doing so by producing a list of indicative, but not exhaustive, alternative means by which an investor can obtain significant influence or control.

33. The Government welcomed views on the scope and definition of significant influence and control.

Consultation responses

34. The Government received a range of views about these complex issues.

35. Of those that offered a view, some respondents expressed support for the 25% threshold, recognising that its consistency with other existing regimes and practices would be useful. A small number of respondents (including a trade association and some legal stakeholders) proposed that the 30% threshold, used by the Takeover Panel, would be a more useful precedent on which to draw.

36. Some respondents, law firms in particular, whilst recognising the value of a 25% threshold, argued that it should not relate to shares alone. Instead, they argued it should be limited to 25% of voting rights as including shares could catch purely financial, passive investors with no (or very limited) voting rights.

37. Most respondents recognised the need for a second ‘limb’ alongside votes and shares. Of these, all stressed the importance of clear and detailed guidance describing the Government’s concerns in order that businesses and investors could assess whether their transaction would be covered by the legislation. This was particularly important if applied within a mandatory notification regime.

38. The material influence test, used in the UK merger control regime, was recommended by several respondents as most appropriate in the context of voluntary reforms. Some respondents, including law firms, advised that the definition for significant influence or control should draw from the existing regime, established under the Enterprise Act 2002, as these are well-established definitions from competition legislation.

Policy issues related to an expanded call-in power

39. The Green Paper sought respondents' views about a number of specific policy options and issues that would be relevant in the event that it implemented an expanded call-in power.

40. A small number of respondents felt that any expansion of the existing powers in the Enterprise Act 2002 was disproportionate and the Government has not provided enough evidence of a case for change. The rest of this section sets out consultation feedback on the specific questions in relation to the detail of the expanded call-in power.

Separating national security and competition assessments

41. The Green Paper sought views on extending Government's powers for intervention in relation to national security through the following question:
    - Question 7: What are your views about the benefits and costs of amending the current voluntary regime to more clearly separate national security concerns and the competition assessment?

Consultation proposal

42. Under the option of an expanded 'call-in' power, the Secretary of State would be able to make a special "national security intervention" where they reasonably believed that national security risks were raised by the acquisition of significant influence or control over any UK business entity by any investor (either domestic or foreign). These reforms would separate national security concerns from the competition assessment.

43. The Government welcomed views about how key stakeholders felt about a separation of the competition assessment and issues of national security and extending the scope of Government's powers in relation to national security.

Consultation response

44. Of those respondents who agree with the principle of the reforms in general, there was a consensus that separating national security concerns from the competition assessment is a pragmatic approach and will provide clarity for those affected by the new legislation.

45. Law firms, in particular, emphasised a preference for standalone reforms that are entirely outside the Enterprise Act 2002 and in which the CMA plays no role.

Period for intervention after the event

46. The Green Paper sought views about whether, and for how long, the Government should be able to intervene after a trigger event had taken place:

- Question 11: Do you agree that, if it pursued an expanded 'call-in' power, the Government should retain the ability to intervene in an investment after the event for national security reasons? Is three months an appropriate period for this?

Consultation proposal

47. The Green Paper highlighted, as with the current Enterprise Act 2002, under the proposed legislation investors would potentially be able to voluntarily notify the Government if they thought a transaction might raise national security concerns. Again, in line with the current Act, the Government would be minded to introduce a call-in 'window' in order to intervene in a transaction after it had occurred.

48. The Government welcomed views on whether a three-month window would be appropriate, which would be similar to the current provision under the Enterprise Act 2002.

Consultation response

49. It should be noted that only a small number of respondents submitted views for this question.

50. Of those stakeholders who did respond, the majority acknowledged that a power for retrospective intervention would be appropriate, if not essential, within the context of voluntary reform, in order to pick up on relevant transactions where the parties concerned failed to notify. Respondents advised that exact details need refining and clear guidance needs to be issued, including when the three-month window would start and finish.

51. However, a small number of respondents argued that retrospective powers of intervention did not seem consistent with the Government's aim for the UK to remain open to trade and investment. These respondents advised that post-deal intervention by Government might create an extremely unstable environment as any retrospective actions increase regulatory and political risk.

New projects and bare asset sales

52. The Green Paper sought views about the Government's powers being extended beyond mergers and acquisitions to additional forms of control that might raise national security concerns:

- Question 12: What are your views about any 'call-in power' being expanded to new projects?

- Question 13: What are your views about any ‘call-in power’ being expanded to bare asset sales?

Consultation proposal

53. In the consultation document, the Government considered whether to extend any call-in power to include new projects. In particular, widening the scope of the reforms to include developments and other business activities that are not yet functioning enterprises but can reasonably be expected to, in the future, become businesses whose activities may have national security interests.

54. Furthermore, the Government also considered extending any call-in power to the sale of bare assets (i.e. assets such as machinery or intellectual property transferred without the other elements of a stand-alone business). The Government welcomed respondent’s views about the proposed extension of the call-in power to include new projects and bare assets.

Consultation response

New projects

55. On the whole, respondents recognised the national security concern in new projects but advised that the definition must be refined if included in the new legislation. Law firms, especially, opined that the current wording on new projects was far too wide and ‘catch-all’; which would create business uncertainty. Therefore, if included, new projects must be clarified, and detailed guidance provided. One respondent set out that the call-in power should be applied consistently to both new projects and asset sales as otherwise this could lead to “market distortion and the structuring of projects in such a manner to ensure the legislation does not apply”.

Bare asset sales

56. As with new projects, respondents, including law firms, (whilst recognising the rationale for the proposal) concluded that the concept of including bare asset sales within the scope of a call-in power raises some complex issues that have potential to cause substantial uncertainty unless tightly defined. Again, they felt this proposal needs to be refined further.

57. A small number of law firms suggested that in designing powers to cover bare assets sales, the Government should ensure it avoids overlapping with the UK’s existing export control regime. Assets that are already controlled by the export control regime would not be covered by the Government’s call-in power. One business proposed that national security risks would be more effectively mitigated through the export control regime.

How an expanded call-in power should be implemented

58. In the event that the Government pursued an expanded-call-in power, the Green Paper sought views about how this could be implemented:

- Question 14: How could the Government best ensure that the expanded call-in power is exercised in a proportionate way and to provide sufficient transparency and clarity to businesses?

Consultation proposal

59. The consultation document acknowledged that any expansion to the call-in power would increase uncertainty for businesses and would remove the "safe harbours" currently provided by the jurisdictional thresholds in the Enterprise Act 2002.

60. It is the Government's intention that any proposed expanded powers would only be used in respect of national security and to intervene only in the very small number of cases where it considered there were national security risks. As is the case now, businesses and investors would be able to make their own assessment as to whether a transaction would be likely to raise national security concerns and therefore to voluntarily notify the Government prior to completion. The Green Paper suggested that a way to further reduce uncertainty would be for the Government to provide informal advice to businesses about whether it has national security concerns in particular investments.

61. The Government welcomed views as to how it could best operate an expanded call-in power in a proportionate manner, and in a way which provides sufficient transparency and clarity to businesses and investors.

Consultation responses

62. Of those respondents who expressed a preference for an expanded call-in power, a majority emphasised the need for reforms to be exercised in a clear and proportionate manner, and the need for the Government to provide clarity and certainty to businesses and investors. Law firms advised that the regime must be fair, proportionate, reasonably predictable, depoliticised, independent and transparent. A small number of respondents, including a legal firm and research body, proposed that the new regime should be administered by an independent body or secretariat (rather than the Government) to ensure transactions are assessed objectively.

63. Almost all respondents highlighted the important role that guidance would play in providing this clarity. Respondents recommended that such guidance would plainly set out circumstances for intervention and the process businesses need to follow should they fall within the guidelines, including timelines for assessment and decision-making. One law firm suggested that it was important that the

Government ”publish as much as possible” about transactions previously called-in or produce case studies to help inform others’ assessment.

64. Furthermore, stakeholders highlighted that the Government must ensure that any call-in power is only exercised when there is a substantive and relevant national security concern. Setting out clear statements of the intention that these powers only be used in the protection of national security will give investors confidence that these reforms are not the first step in the direction of a protectionist and interventionist regime.

Policy issues related to a mandatory notification regime

65. The Green Paper sought respondents' views about a number of specific policy options and issues that would be relevant in the event that it implemented a mandatory notification regime.

The proposed scope of a mandatory notification regime – the essential functions

66. The Green Paper sought views about the scope of any future mandatory notification regime:

- Question 16: Do you have views about the draft definitions of essential functions in Annex C? Would they be appropriate for the scope of any future mandatory regime?
- Question 17: Do you have views on whether certain parts of the Government and Emergency services sector should be covered by a mandatory regime?
- Question 18: Are there other sectors to which any mandatory notification regime (if introduced) should apply?

Consultation proposal

67. The Green Paper outlined the Government's proposal that mandatory notification would be proportionate only for certain part of key sectors and that the current assessment is that these sectors should include, as a minimum, civil nuclear, defence, energy, telecommunications, transport, military and dual-use and advanced technology. It is in these parts of the economy where Government is minded to conclude that the risks are such that mandatory reforms, if introduced, would be (part of) a proportionate response.

68. The consultation document identified a set of 'essential functions' which would narrow the areas where mandatory notification should take place to the particular activities where national security risks from investments are most pronounced. Annex C in the Green Paper provided draft definitions for the 'essential functions' of civil nuclear, communications, defence, energy, transport, emergency services and Government. The Government welcomed views on these draft definitions.

69. The Government also considered the case for including other key parts of the economy, including the Government and emergency services sectors. The Government was interested in seeking respondents' views on what, if any, additions should (from the Government and emergency services sectors, and elsewhere) appropriately be made to the scope of mandatory notification, if introduced.

Consultation response

70. It should be noted that these questions were not answered by most respondents.

71. In summary, those who did respond advised that the draft essential functions definitions need clarifying, with expansion needed in some cases and justification for others. This included concerns that it is difficult to draw clear, quantifiable definitions for some functions. They also pose a challenge to keep updated, given evolution in technology. Overall, including essential functions in any mandatory reforms was not a popular option. A small number of respondents (including an investment association and a law firm) proposed that the Government could publish lists of businesses performing essential functions to provide clarity over whether specific businesses would be in scope. Respondents including a trade association, legal professionals and businesses sought clarity in the definitions on the extent to which businesses involved in the supply chain could be captured by the scope of the essential functions.

72. Respondents also stated that the Government needed to clarify why the proposed sectors identified are more at risk than others.

73. Respondents offered no views about whether a mandatory notification regime should apply to the Government, emergency services or any other sector of the economy. Respondents felt that the Government was best-placed to establish the sectors that raised national security risks.

The proposed scope of a mandatory notification regime – designation of individual businesses or assets

74. The Green Paper also sought views about other means by which businesses or assets could be brought into scope of a mandatory notification regime

- Question 19: What are your views about the potential power for Government specifying to which businesses or assets a mandatory regime should apply? How could this power best be designed?

Consultation proposal

75. In the consultation document, the Government argued a case for certain individual businesses or assets to be included in the scope of mandatory notification. This could ensure the tightest possible focus for the reforms, while still giving certainty about where its national security interests lie.

76. The Government welcomed views on whether it should be able to exercise a power to bring certain named individual businesses or assets within scope of mandatory notification and how best this power could be designed.

Consultation response

77. It should be noted that this question was not answered by many respondents.

78. Whilst there was limited support for this proposal based on its potential to alleviate uncertainty, respondents called for detailed evidence to justify the reasoning behind any business or asset named and the ability for inclusions to be challenged if necessary.

79. Certain law firms completely disagreed with the proposal, arguing it is disproportionate and risks negative impact on the businesses who are specified within the new legislation. Such a power, they suggested, might demonstrate a lack of fairness and objectivity.

The proposed scope of a mandatory notification regime – land

80. The Green Paper also sought views about land being brought into scope:
    - Question 20: What are your views about the potential power for Government to bring specific plots of land into scope of a mandatory regime?

Consultation proposal

81. The Government sought views on the merits of having a power to bring plots of land in the UK into scope of mandatory notification, where that land was in proximity to a national security-sensitive site and where foreign ownership or control of such land, buildings or other fixed structures was considered to give rise to a potential national security risk.

Consultation response

82. Very few responses were received to this question.

83. In summary, those who responded indicated that there was insufficient detail provided at this stage. If the Government did pursue this option, respondents suggested that it would need considerable further definition, consultation and, if implemented, guidance.

A sanctions regime

84. The Green paper asked the following question regarding sanctions in the context of a mandatory notification regime;
    - Question 21: Do you have any views about how sanctions for non-compliance with a mandatory regime should operate, including how compliance could best be incentivised?

Consultation proposal

85. The consultation paper acknowledged that the introduction of mandatory notification would require clear sanctions to be attached to non-compliance. These could include, for example, criminal offences, financial penalties and/or director disqualification. The Government welcomed views on how these sanctions should operate, including how compliance could be incentivised.

Consultation response

86. Whilst a small minority of respondents agreed that “criminal offences, financial penalties and director disqualification are all appropriate” sanctions for these reforms, respondents broadly advised caution with the scope of sanctions. Certain stakeholders, including law firms, advised that criminal sanctions and director disqualification would be “disproportionate”, and the Government would be best placed to implement financial penalties only.

87. Respondents acknowledged that mandatory notification can only operate effectively if there are consequences for non-compliance. However, other respondents highlighted that, if sanctions are to be imposed, then the thresholds for mandatory notification must be absolutely clear. Mandatory notification can become hard to enforce when sanctions hold little gravitas if there is a lack of clarity on the thresholds for notification; potentially giving those who may fall within the thresholds for notification immunity from failure to notify or comply.

88. Therefore, respondents advised that compliance could best be incentivised by clearly defining the scope of the reforms, notifying companies who may fall within scope and widely publicising the regime so people/businesses know to comply.

Considerations relevant to a mandatory or voluntary notification regime

89. The Green Paper also sought views about policy issues and components that would relate to any new regime.

Information-related power

90. The Green Paper sought views about the means by which the Government could acquire information necessary to operate a new regime:
    - Question 23: Do you have any views about the introduction of an information-related power?

Consultation proposal

91. The consultation document advised that, to accompany any package of reforms, the Government would require powers to request information that came within the legislation's scope where there are necessary and proportionate reasons for the purposes of protecting national security. The Government welcomed stakeholders' views about the introduction of an information related-power.

Consultation response

92. Respondents agreed that information-related powers do seem a necessary supplement to any package of reforms, with the stipulation that they be accompanied by a strict level of confidentiality and non-disclosure. Some stakeholders advised that Government should model any information-gathering powers on those used by the CMA in their merger control regime, as this is a tried and tested framework.

93. Some respondents, including businesses, instructed that an information-related power needs to be "clearly defined, reasonable and proportionate" with guidelines about how information is used and protected.

Guidance about the assessment process

94. The Government sought views about what information would most helpfully accompany any new regime:
    - Question 24: Would public guidance about the assessment process be useful? If so, what issues could it most usefully cover?

Consultation proposal

95. The Government recognised that investors and businesses will wish to be clear about the process it will follow and the timing of the scrutiny procedure for any package of reforms. The consultation documents emphasised that it is the

Government's intention to set out a clear, short timeframe for investors to receive a decision. The Government welcomed views about whether public guidance would be useful and what it should cover.

Consultation response

96. Of those stakeholders who responded to the question, all advised that guidance is an absolute necessity for both mandatory and voluntary notification.

97. Most stakeholders, particularly law firms, provided detailed advice about what the guidance should cover. In summary, respondents advised the guidance should include an explanation of scope, the assessment process, timescales, sanctions and appeals process. Respondents highlighted the importance of the Government to make clear which businesses or transactions would fall in scope of the regime and what criteria they will use to assess whether a transaction would raise national security issues. Guidance would also need to give a clear guide of the information needed when making a notification. Stakeholders highlighted the necessity of sticking to a legally binding timetable.

Intervention in transactions – remedies and judicial oversight

98. Should the Government conclude that a trigger event gave rise to national security risks, the Green Paper proposed that it have powers to remedy this. It sought views about this approach:
    - Question 25: Do you consider the proposed approach to Government intervention to be appropriate for a wholly national-security related regime?

Consultation proposal

99. The consultation document laid out the Government's intention that the new reforms mirror the powers available to the Secretary of State under the existing public interest regime – namely the ability to impose conditions on a deal or, in extremis, block it altogether following the Government's national security assessment of a transaction. In addition, for transactions that took place before Government consideration of national security issues, it would have the power to unwind deals.

100. The Green Paper also stated that there would be appropriate mechanism for judicial review of any Government intervention.

Consultation response

101. There were very few specific responses provided to this question.

102. Of those who did respond, many respondents agreed with the Government's broad approach and that it was reasonable for the Government to be able to impose remedies or block a deal.

103. Respondents emphasised, however, that the power must be national security-focused so as not to be used for any other policy objective.

104. Respondents also emphasised the importance of judicial review being available.

Interaction with public interest regime and other corporate requirements

105. Any new regime would need to sit alongside other statutory and non-statutory processes, the Government sought views about how this could be implemented:

- Question 26: Do you have any views about how any new reforms can best be designed to interact effectively and in an administratively efficient manner alongside any competition assessment being conducted by the CMA, the existing public interest regime and other corporate reporting requirements?

Consultation proposal

106. Any of the proposals within the Green Paper would involve a significant amendment of the Enterprise Act 2002. Under any option, the Government would wish to retain the independence of the CMA and a clear separation between competition and national security-related assessments.

107. The Green Paper sought views about how the new regime's processes could be designed and implemented to operate efficiently alongside the wider competition and public interest regime, and any other corporate requirements such as the Takeover Panel's Code on Takeover and Mergers.

Consultation response

108. A majority of respondents agreed with the Government's intention of ensuring efficient co-ordination. Some stressed the need for alignment of timeframes, processes and information requests to reduce administrative burdens on parties. However, many respondents agreed with the separation between competition and national security assessments. These should be run, in one respondents' view, which reflected many others', "in parallel but aligned".

Transparency

109. The Government sought views about the degree and areas of transparency in relation to a new regime:

- Question 27: Do you have any views about how the reforms can be designed to be as transparent as possible for investors and companies given the national security focus?

Consultation proposal

110. The Green Paper emphasised that the Government wishes to design a new regime that is as transparent as possible for investors and businesses, whilst

recognising that national security-related issues must allow for a degree of confidentiality.

Consultation response

111. There were a limited number of specific answers to this question.

112. Respondents' responses to other questions, however, emphasised the need for as much transparency as possible. This was important to ensure the powers were used in the manner claimed and to help inform businesses and investors to understand where the Government's national security interest lie.

113. A number of respondents also emphasised the importance of clear guidance.

114. Others, including legal stakeholders, suggested that the regime needed to allow for 'confidential soundings' to be taken from the Government prior to a transaction in order for investors to establish whether there could be national security concerns. This could avoid any costs to businesses associated with unnecessarily notifying the Government of a transaction.

Other costs and benefits

115. The Green Paper's last three questions sought respondents' views about other costs and benefits associated with any new regime:

- Question 28: If you have experience investing in countries with foreign investment regimes, could you describe the costs and benefits involved, including familiarisation, administrative and legal costs and the costs of any delays?
- Question 29: What impact, if any, do you anticipate these proposals having on the capital market or UK infrastructure businesses' ability to raise financing?
- Question 30: Are there any other important costs and benefits you haven't already discussed from adopting these reforms that could inform the Government's analysis?

Consultation proposal

116. The Green Paper described the Government's intention to design a regime that minimises costs to businesses whilst also having the maximum benefit to both businesses and society. It sought respondents' views about what further costs and benefits it should take into account when deciding what shape this reform should take.

Consultation response

117. The Government did not receive any specific responses to Questions 28 or 30.

118. In response to Question 29, respondents raised a number of potential risks that might arise from a poorly designed regime – including the risk of deterring foreign

investment. This was particularly the case if the regime was not focused on national security.

119. A small number of respondents described some of the costs to businesses that need to be taken into account. One trade association sought clarity on the size of any fees that could be charged by the Government for undertaking a national security assessment. A few respondents, including a law firm and an individual business, suggested that the changes could lead to significant familiarisation costs to businesses, including legal and administration costs and this could disproportionately impact on small businesses.

120. On the whole, respondents recognised the Government's need to protect national security. Some respondents stated that the proposals for enhanced powers of scrutiny in areas of 'critical infrastructure' are reasonable, with one respondent highlighting that other countries, like the US and Australia, have already taken measures to tighten their powers.

121. Despite broad agreement with the Government's proposals to expand their powers for national security, there was some disagreement about how far the reforms should extend. For example, some businesses advised that the criteria that informs the need to notify is too wide and would create an unnecessary administrative burden for the businesses affected. There was also a call for Government to make sure any reforms do not inhibit the free play of capital markets for reasons other than national security. Therefore, respondents advised Government should reassure investors that the exercise of enhanced powers will not be used for any purpose beyond national security.

122. Conversely, respondents from certain sectors indicated that enhanced powers are not appropriate at all. For example, certain energy companies advised that their sector is already subject to a detailed regulatory regime and new reforms may create an extra, unnecessary barrier to investment. These respondents were concerned that any new measures are counter-productive and ultimately may deter foreign investment.

Annex A – Organisations that responded

Legal and advisory firms

- Allen & Overy
- Baker McKenzie
- Berwin Leighton Paisner
- City of London Law Society Competition Committee
- Clifford Chance
- Deloitte
- Freshfields Bruckhaus Deringer
- Herbert Smith Freehills
- Law Society of Scotland
- Linklaters LLP

Trade associations and industry groups

- British Venture Capitalist Association
- EEF
- Oil & Gas UK
- UK Competitive Telecommunications Association
- UK Major Ports Group
- UK Petroleum Industry Association
- Water UK

Businesses

- Boeing
- Centrica
- Dynex
- EDF Energy
- Electricity North West
- Heathrow Airport
- Huawei Technologies (UK) Co Ltd
- Maxeler Technologies
- National Grid
- Northern Power Grid
- Scottish Power
- Sembcorp
- Telefonica
- Valero Energy
- Vodafone
- Westinghouse UK Ltd

Investors (including groups/associations)

- Global Infrastructure Investor Association
- Hastings Fund Management
- Legal & General Investment Management
- The Investment Association
- USS Investment Management Ltd

Accountancy bodies

- Institute of Chartered Accountants in England and Wales

Research bodies

- Queen Mary University of London, Institute for Global Law
- University of East Anglia, Centre for Competition Policy

Regulatory bodies

- Civil Aviation Authority
- Competition and Markets Authority
- Ofcom
- Ofgem

Government bodies

- Australian Treasury
- European Commission
- Japanese Embassy and the METI Department
- Northern Ireland Executive
- Scottish Government
- Welsh Government

Department for Business, Energy & Industrial Strategy
www.gov.uk/beis