

# **NATIONAL SECURITY AND INVESTMENT BILL**

## **Memorandum from the Department for Business, Energy and Industrial Strategy to the Delegated Powers and Regulatory Reform Committee**

### **A. INTRODUCTION**

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the National Security and Investment Bill (“the Bill”). This memorandum identifies the provisions of the Bill that confer delegated powers. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

### **B. PURPOSE AND EFFECT OF THE BILL**

2. The Bill creates a new screening mechanism enabling the Government to intervene in transactions and other acquisitions resulting in control over entities and assets which may pose a risk to national security.
3. The Government’s current powers to screen transactions on national security grounds, as provided by the Enterprise Act 2002, are limited to intervening in mergers between enterprises which (subject to very limited exceptions) meet certain turnover or market share thresholds, as part of a competition-focused regime. The Bill creates a separate screening regime, while at the same time expanding the Government’s powers by empowering the Secretary of State to intervene in a wider range of acquisitions of control over qualifying entities and qualifying assets, which it terms “trigger events”.
4. In summary, the Secretary of State will be able to “call in” completed or anticipated trigger events for a formal national security assessment. The Secretary of State will need to publish a statement setting out how he expects to exercise this power before being able to use it.
5. Proposed acquirers of certain shares or voting rights in specified qualifying entities will be required to notify the Secretary of State and receive clearance before completing their acquisition. This is to ensure that the Government is informed of potentially sensitive acquisitions before they take place and thus able to take action ahead of time to address any risk to national security that would arise on completion. Outside of the mandatory notification regime, parties to trigger events will be able to voluntarily notify the Secretary of State in

order to receive a call-in decision. The Secretary of State will also be able to exercise the call-in power on his own initiative.

6. The Secretary of State will have powers to require information or evidence to be provided to him both before and after call-in, to assist him in performing his functions under the Bill.
7. During a national security assessment, the Secretary of State will be able to make an interim order for the purpose of ensuring that the assessment process and any action that might be taken at the end of it are not undermined.
8. Following a national security assessment, the Secretary of State will be able to make a final order imposing proportionate remedies in relation to any identified national security risk.
9. The Bill also includes a number of criminal and civil sanctions for non-compliance with the regime.

### **C. DELEGATED POWERS**

#### ***Clause 1: Statement about exercise of call-in power***

*Power conferred on: Secretary of State*

*Power exercisable by: Statement*

*Parliamentary procedure: Negative*

#### Context and purpose

10. Under clause 1 the Secretary of State has the power to call in completed or anticipated trigger events for a formal national security assessment. Pursuant to clause 14 proposed acquirers of certain shares or voting rights in specified qualifying entities must give a mandatory notice to the Secretary of State. Upon receipt of a valid and complete mandatory notice, the Secretary of State must decide whether to call in the proposed acquisition or clear it to proceed. Where the mandatory notification regime does not apply, pursuant to clause 18 parties to trigger events are able to voluntarily notify the Secretary of State in order to receive a call-in decision. Again, the Secretary of State is required to decide whether to call in or clear the trigger event on receipt of a valid and complete voluntary notice. The Secretary of State may also call in trigger events on his own initiative.

11. Clause 3 permits the Secretary of State to publish a statement that sets out how he expects to use the call-in power. Pursuant to subsection (6) of clause 1 the Secretary of State may not give a call-in notice unless such a statement has been published, and pursuant to subsection (7) he must have regard to this statement when exercising the call-in power. However, subsection (8) provides that nothing in the statement limits the Secretary of State's power to give a call-in notice. Subsection (3) of clause 3 provides that the statement may among other things include: details of the particular sectors of the economy in relation to which the Secretary of State considers that trigger events are more likely to give rise to risks to national security; details of the trigger events, qualifying entities and qualifying assets in respect of which the Secretary of State expects to exercise the call-in power; and, details of factors that the Secretary of State expects to take into account when deciding whether to do so. Pursuant to clause 3(5) a published statement may be amended or replaced by a subsequent statement.
12. A number of procedural requirements apply in relation to the statement. Pursuant to subsection (1) of clause 3, before the Secretary of State may publish a statement: he must carry out such consultation as he thinks appropriate in relation to a draft of the statement; following such consultation, he must make any changes to the draft statement that appear to him to be necessary in view of the responses to the consultation; the Secretary of State must then lay the statement before Parliament. Pursuant to subsections (2) and (3), if either House of Parliament resolves not to approve the statement during a period of 40 sitting days (i.e. ignoring any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than 4 days), the Secretary of State must withdraw the statement. Pursuant to clause 3(5) the same requirements apply if the Secretary of State wishes to amend or replace a published statement.
13. The purpose of the statement is to provide additional predictability and transparency in relation to the Secretary of State's expected use of the call-in power. In particular, it is intended to assist actors and their advisers to foresee which acquisitions are more likely to be called in for scrutiny. The statement is also intended to assist parties in deciding whether to voluntarily notify the Secretary of State of their trigger events.

#### Justification for taking the power

14. Due to the wide-ranging and evolving nature of national security risks, a broad call-in power is necessary in order for the Secretary of State to be able to safeguard national security. As such, it would not be appropriate to further limit the scope of the call-in power, for example by

setting out an exhaustive list of sectors of the economy within scope of the power in the Bill or in delegated legislation.

15. Furthermore, clause 1(8) provides that the statement does not limit the power of the Secretary of State to call in trigger events. In particular, the purpose of the statement is not to set out conditions that must be satisfied in order for the Secretary of State to be able to exercise the call-in power. Rather, its purpose is to set out the circumstances in which the Secretary of State envisages being more likely to exercise the call-in power and the factors that he envisages taking into account when deciding whether to call in. This sort of detailed guidance is better suited to being contained in the envisaged statement than in the Bill. In addition, the Secretary of State's focus is likely to change over time, so it seems more appropriate to set out how he expects to exercise the call-in power in the statement, which is likely to be more straightforward to amend, than in the Bill.

#### Justification for procedure selected

16. The Government considers that the negative resolution procedure is appropriate. The Government does not consider that it is necessary for Parliament to approve the statement because the statement does not prescribe or limit the Secretary of State's exercise of the call-in power. Rather, it provides guidance on his expected use of the power. Furthermore, as the Secretary of State may not use the call-in power unless a statement has been published, and as national security may be placed at risk if he is not able to exercise the call-in power, a procedure involving parliamentary approval of a draft before publication would not be in the interests of national security. In addition, the Secretary of State may need to make swift changes to the statement to reflect new and emerging national security risks.

#### **Clause 6: Notifiable acquisitions**

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by statutory instrument*

*Parliamentary procedure: Draft affirmative*

#### Context and purpose

17. Clause 6 sets out the notifiable acquisitions that must be approved by the Secretary of State before they may take place. Pursuant to subsection (2) these are acquisitions of certain shares

or voting right (amounting to actual or potential acquisition of control) in the qualifying entities described in regulations made by the Secretary of State. Pursuant to subsection (4) any such description must be by reference to the qualifying entity carrying on activities in the United Kingdom which are to be specified. It may also be by reference to other things.

18. Pursuant to subsection (5)(a) the Secretary of State may by regulations amend clause 6 in relation to the circumstances in which a notifiable acquisition takes place or does not take place. Pursuant to subsection (6) these regulations may in particular include provision about the circumstances in which the acquisition of control over a qualifying asset of a description specified in regulations is a notifiable acquisition. Pursuant to subsection (5)(c) these regulations may make consequential amendments of other provisions of the Bill. The purpose of these regulations is to enable the Secretary of State to amend the mandatory notification regime to require acquisitions of control over specified qualifying assets to be approved by him before they take place. They also allow for the notification regime in relation to qualifying entities to be amended, for example to change the types of acquisition that need to be pre-approved.

19. Pursuant to subsection (5)(b) the Secretary of State may make regulations exempting acquirers with specified characteristics from the mandatory notification regime, meaning that they would not need to notify or obtain prior approval for acquisitions that are otherwise within scope of the regime. This power enables the Secretary of State to exempt from the mandatory notification regime (but not from the screening regime as a whole) acquisitions which would ordinarily be likely to involve an elevated national security risk but which are considered to be less likely to do so in practice given the characteristics of the acquirer. This power could be used to exempt passive investors, for example.

20. Pursuant to clause 63(5) regulations made under clause 6 are subject to the draft affirmative procedure.

#### Justification for taking the power

21. As explained above, the purpose of regulations under subsection (2) of clause 6 is to define the qualifying entities in relation to which relevant acquisitions will be notifiable and thus subject to approval from the Secretary of State before they may take place. Pursuant to subsection (4) these qualifying entities must be defined by reference to them carrying on certain activities in the United Kingdom to be specified in the regulations. The Government

considers that these activities are better suited to being set out in delegated legislation than primary legislation as there are a significant number of sensitive activities of interest, and as specified activities will need to be defined in sufficient detail for it to be clear to investors whether their acquisitions fall within the regime. The types of qualifying entity that are relevant to these specified activities may differ from activity to activity and will also therefore need to be specified in the regulations. It is likely that the specified activities will need to be updated regularly, as new sectors of interest, particularly in the sphere of advanced technology, emerge, and this will be easier to achieve through the use of delegated legislation.

22. As stated above, the purpose of regulations under subsection (5)(a) is to enable the Secretary of State to amend the mandatory notification regime to require acquisitions of control over specified qualifying assets to be approved by him before they take place. They also allow for the notification regime in relation to qualifying entities to be amended, for example to change the types of acquisition that need to be pre-approved. The Government considers that these powers are necessary. They could be needed if it is discovered that hostile actors are targeting specific sensitive assets, or it transpires that they have found a way to structure their acquisitions to avoid the regime, for example. The power to make consequential amendments to other provisions of the Bill is required as amending the acquisitions which are notifiable is likely to require consequential amendments to other provisions, such as to clause 14(1), which sets out the requirement to notify by reference to the provisions of clause 6.

23. As set out above, the purpose of regulations under subsection (5)(b) is to enable the Secretary of State to exempt from the mandatory notification regime (but not from the screening regime as a whole) acquisitions which would ordinarily be likely to involve an elevated national security risk but which are considered to be less likely to do so in practice given the characteristics of the acquirer. This power will contribute to ensuring that the regime operates in a proportionate manner.

#### Justification for procedure selected

24. The Government considers that regulations made under clause 6 should be subject to the draft affirmative procedure to provide appropriate parliamentary oversight of proposed amendments to, or exemptions from, the mandatory notification regime. This procedure is doubly appropriate given that these regulations may amend primary legislation.

#### ***Clause 11: Exceptions relating to control of assets***

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by statutory instrument*

*Parliamentary procedure: Draft affirmative*

#### Context and purpose

25. Pursuant to clause 1 the Secretary of State may call-in completed or anticipated acquisitions of control over qualifying assets for a formal national security assessment. Pursuant to clause 7 a qualifying asset is an asset of any of the following types: land; tangible (or, in Scotland, corporeal) moveable property; ideas, information or techniques which have industrial, commercial or other economic value. Clause 9 provides that a person gains control of a qualifying asset if the person acquires a right or interest in, or in relation to, the asset and as a result the person is able to use the asset, or use it to a greater extent than prior to the acquisition, or to direct or control how the asset is used, or direct or control how it is used to a greater extent than prior to the acquisition.
26. Clause 11 provides that a person is not to be regarded as gaining control of a qualifying asset by reason of an acquisition made by an individual for purposes that are wholly or mainly outside the individual's trade, business or craft. This means that the Secretary of State will not be able to call in such an acquisition for scrutiny under the Bill. This is intended to exclude consumer purchases from the regime. Subsection (2) provides that acquisitions of land or of an asset that falls within the specified export control provisions are nevertheless not excluded from the call-in power, given that these may still be sensitive acquisitions even if made by an individual outside of their trade, business or craft. Subsection (3) gives the Secretary of State a power to amend the list of assets in subsection (2) by regulations subject to the draft affirmative procedure (see clause 63(5)). The purpose of this power is to ensure that the export control provisions are kept up-to-date, or to add any further qualifying asset whose sensitivity becomes apparent over time. Subsection (3) also gives the Secretary of State a power to make regulations prescribing other circumstances in which a person is not to be regarded as gaining control of a qualifying asset, again subject to the draft affirmative procedure.

#### Justification for taking the power

27. The Government considers that it is appropriate to take these powers as over time the export control provisions may need to be updated, or operational experience may indicate that

consumer purchases involving other qualifying assets should be brought within scope of the call-in power on the basis that they could pose a risk to national security, or that other qualifying asset acquisitions which should be excluded from the call-in power. Regulations are a quicker and more straightforward mechanism for making such changes than primary legislation.

#### Justification for procedure selected

28. The Government considers that these regulations should be subject to the draft affirmative procedure to provide appropriate parliamentary oversight of proposed changes to the qualifying asset acquisitions within scope of the call-in power.

#### **Clause 14: Mandatory notification procedure**

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by statutory instrument*

*Parliamentary procedure: Negative*

#### Context and purpose

29. Under clause 1 the Secretary of State has the power to call in anticipated trigger events for a formal national security assessment. Clause 14(1) requires a person who proposes to make a notifiable acquisition (as defined in clause 6) to notify the Secretary of State of the proposed acquisition. This is done by giving the Secretary of State a mandatory notice. Following receipt of a valid and complete mandatory notice, the Secretary of State must decide whether to issue a call-in notice in relation to the proposed acquisition or to clear it to proceed.

30. The purpose of regulations made under subsection (4) of clause 14 is to prescribe the form and content of a mandatory notice, to ensure that the Secretary of State receives the information he needs to decide whether to issue a call-in notice in relation to a proposed notifiable acquisition. Pursuant to clause 63(4), these regulations are subject to the negative resolution procedure.

#### Justification for taking the power



31. Given the level of detail that will be required, the Government considers that the form and content of a mandatory notice are matters better suited to being set out in delegated legislation than in primary legislation. Furthermore, the Secretary of State may need to amend the required contents of mandatory notices over time, if operational experience reveals that he requires different or additional information in order to decide whether to exercise the call-in power, for example.
32. Merger notices under section 96 of the Enterprise Act 2002 perform a similar function under the merger control regime to mandatory notices. The required form and contents of merger notices are not set out in the Enterprise Act 2002 or in delegated legislation; rather, the Competition and Markets Authority is authorised to prescribe the required form and contents by notice published in the London, Edinburgh and Belfast Gazettes.

Justification for procedure selected

33. The Government considers that the negative resolution procedure will provide Parliament with sufficient oversight while also providing the Secretary of State with the flexibility he needs to amend the required contents of a mandatory notice at relatively short notice. The Government notes that the prescription of the form and contents of merger notices under section 96 of the Enterprise Act 2002, which as already stated perform a similar function to mandatory notices under the merger control regime, is not subject to any form of parliamentary procedure.

**Clause 16: Application for retrospective validation of notifiable acquisition**

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by statutory instrument*

*Parliamentary procedure: Negative*

Context and purpose

34. Under clause 1 the Secretary of State has the power to call-in completed trigger events for a formal national security assessment. Pursuant to clause 13(1) a notifiable acquisition (as defined in clause 6) that is completed without the approval of the Secretary of State is void. Clause 16 provides a mechanism for any person who has been materially affected by the voiding of a notifiable acquisition to apply to the Secretary of State for a validation notice. Pursuant to clause 15(3) the effect of a validation notice is that the acquisition is to be treated

as having been completed with the approval of the Secretary of State, and it is therefore not void. Following receipt of a valid and complete application, the Secretary of State must either issue a call-in notice in relation to the void acquisition or a validation notice.

35. The purpose of regulations made under subsection (3) of clause 16 is to prescribe the form and content of a validation application, to ensure that the Secretary of State receives the information he needs to decide whether to issue a call-in notice in relation to a void acquisition. Pursuant to clause 63(4) these regulations are subject to the negative resolution procedure.

#### Justification for taking the power

36. Given the level of detail that will be required, the Government considers that the form and content of a validation application are matters better suited to being set out in delegated legislation than in primary legislation. Furthermore, the Secretary of State may need to amend the required contents of validation applications over time, if operational experience reveals that he requires different or additional information in order to decide whether to exercise the call-in power, for example.

37. Merger notices under section 96 of the Enterprise Act 2002 perform a similar function under the merger control regime to validation applications. The required form and contents of merger notices are not set out in the Enterprise Act 2002 or in delegated legislation; rather, the Competition and Markets Authority is authorised to prescribe the required form and contents by notice published in the London, Edinburgh and Belfast Gazettes.

#### Justification for procedure selected

38. The Government considers that the negative resolution procedure will provide Parliament with sufficient oversight while also providing the Secretary of State with the flexibility he needs to amend the required contents of a validation application at relatively short notice. The Government notes that the prescription of the form and contents of merger notices under section 96 of the Enterprise Act 2002, which as already stated perform a similar function to validation applications under the merger control regime, is not subject to any form of parliamentary procedure.

## **Clause 18: Voluntary notification procedure**

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by statutory instrument*

*Parliamentary procedure: Negative*

### Context and purpose

39. Under clause 1 the Secretary of State has the power to call in completed or anticipated trigger events for a formal national security assessment. In circumstances where the mandatory notification regime does not apply, clause 18 provides for a voluntary notification procedure under which the seller, acquirer or any target entity concerned may notify the Secretary of State of a trigger event that has taken place or is in progress or contemplation. This is done by giving the Secretary of State a voluntary notice. Following receipt of a valid and complete voluntary notice, the Secretary of State must decide whether to call in or clear the trigger event.
40. The purpose of regulations made under subsection (3) of clause 18 is to prescribe the form and content of a voluntary notice, to ensure that the Secretary of State receives the information he needs to decide whether to call-in notified trigger events. Pursuant to clause 63(4) these regulations are subject to the negative resolution procedure.

### Justification for taking the power

41. Given the level of detail that will be required, the Government considers that the form and content of a voluntary notice are matters better suited to being set out in delegated legislation than in primary legislation. Furthermore, the Secretary of State may need to amend the required contents of voluntary notices over time, if operational experience reveals that he requires different or additional information in order to decide whether to exercise the call-in power, for example.
42. Merger notices under section 96 of the Enterprise Act 2002 perform a similar function under the merger control regime to voluntary notices. The required form and contents of merger notices are not set out in the Enterprise Act 2002 or in delegated legislation; rather, the Competition and Markets Authority is authorised to prescribe the required form and contents by notice published in the London, Edinburgh and Belfast Gazettes.

#### Justification for procedure selected

43. The Government considers that the negative resolution procedure will provide Parliament with sufficient oversight while also providing the Secretary of State with the flexibility he needs to amend the required contents of a voluntary notice at relatively short notice. The Government notes that the prescription of the form and contents of merger notices under section 96 of the Enterprise Act 2002, which as already stated perform a similar function to voluntary notices under the merger control regime, is not subject to any form of parliamentary procedure.

#### **Clause 31: Interaction with CMA functions under Part 3 of Enterprise Act 2002**

*Power conferred on: Secretary of State*

*Power exercisable by: Directions*

*Parliamentary procedure: None*

#### Context and purpose

44. Clause 31 gives the Secretary of State a power to give directions to the Competition and Markets Authority if a final order under the Bill is in force, or if a final notification that no further action is to be taken under the Bill has been given, in relation to a trigger event which is also a qualifying merger under the merger control regime in Part 3 of the Enterprise Act 2002. The Secretary of State will only be able to use this power if he reasonably considers that the direction or directions are necessary and proportionate for the purpose of addressing a national security risk. The main purpose of this power is to ensure that once the national security screening regime is separated from the merger control regime, the Secretary of State will still be able to ensure that competition remedies are not inconsistent with the interests of national security. This power could also be exercised to require the Competition and Markets Authority to disapply its duty to investigate a merger for competition issues where the Secretary of State considers that the merger is in the interests of national security and that this outweighs any potential anti-competitive outcome it might have.

#### Justification for taking the power

45. Where a trigger event is also a merger within scope of the competition regime under Part 3 of the Enterprise Act 2002, it may be necessary to balance competing national security and competition interests. Although the national security screening and competition regimes will

be separated once the Bill is enacted, this power will maintain the status quo in allowing the Secretary of State to determine how any conflicts should be resolved on a case-by-case basis.

46. The Government recognises that in certain circumstances this could constitute a 'Henry VIII' power as it enables the Secretary of State to require statutory duties set out in primary legislation to be disapplied, but considers that this power is essential to ensure national security interests can still be prioritised over competition concerns. The use of the power will be subject to appropriate safeguards. Subsection (2) of clause 31 prevents the Secretary of State from issuing a direction unless he reasonably considers that it is necessary and proportionate for the purpose of addressing a national security risk. Subsection (3) also requires the Secretary of State to consult the Competition and Markets Authority and such other persons as he considers appropriate before giving a direction. A direction must also be published.
47. The now repealed section 94(3) of the Telecommunications Act 1984 provides a precedent of a similar power.

#### Justification for procedure selected

48. The exercise of this power will not be subject to any parliamentary procedure. The Government considers that this is appropriate because it is consistent with existing arrangements. The Secretary of State is currently able under the merger control regime in Part 3 of the Enterprise Act 2002 to balance competing public interest considerations without recourse to Parliament. Furthermore, the use of this power will be subject to appropriate safeguards, as detailed above.

#### ***Clause 36: Offences by bodies corporate etc***

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by statutory instrument*

*Parliamentary procedure: Negative*

#### Context and purpose

49. The Bill creates a number of criminal and civil sanctions for failure to comply with its provisions. Given its focus on protecting national security, it is appropriate that persons who fail to comply

with the regime face the risk of significant sanctions. Therefore, the Government considers that criminal sanctions should be available for non-compliance with the regime. For most of the offences it creates (those not relating to the unauthorised use or disclosure of regime information), the Bill also provides the Secretary of State with the option of imposing a monetary penalty as an alternative to criminal enforcement. This is to ensure that the enforcement toolkit is flexible and proportionate.

50. Pursuant to clause 36 persons in authority in bodies (termed “officers”) which commit regime offences will also be guilty of the offence where the offence was committed with their consent or connivance, or through their neglect. Subsection (5) contains a power for the Secretary of State to make regulations, subject to the negative resolution procedure (see clause 63(4)), which provide for the modification of any provision of this clause in its application to a body corporate or unincorporated association formed or recognised under the law of a country or territory outside the United Kingdom.

#### Justification for taking the power

51. Due to the cross-border nature of trade and investment in today’s world, foreign entities may be parties to trigger events within scope of the call-in power. Foreign entities may also be involved in information gathering or sharing under the regime. Therefore, regime offences apply to certain foreign entities.

52. This power will allow for the modification of the provisions which provide for the concurrent criminal liability of persons in authority in bodies which commit regime offences in their application to foreign entities, for example to reflect differences in corporate structure or terminology in foreign jurisdictions, to ensure effective enforcement of the regime with respect to foreign entities.

53. The taking of this power is considered to be appropriate, as modifications will be technical in nature, and therefore not best suited to primary legislation. It is also possible that the need for modifications may emerge over time, and that modifications may need to be amended from time to time, so the flexibility provided by delegated legislation is desirable.

#### Justification for procedure selected

54. The Government considers that the negative resolution procedure is appropriate given that the regulations will involve modifications of a technical nature.

55. Section 341(7) of the Gambling Act 2005 provides a precedent of a similar power which is subject to the negative resolution procedure.

***Clause 41: Permitted maximum penalties***

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by statutory instrument*

*Parliamentary procedure: Draft affirmative*

Context and purpose

56. Clause 40 provides that the Secretary of State may impose a monetary penalty on a person if the Secretary of State is satisfied beyond reasonable doubt that the person has committed an offence under clause 32 (offence of completing notifiable acquisition without approval), clause 33 (offence of failing to comply with an interim or final order) or clause 34 (offences in relation to supplying information or the attendance of witnesses). Clause 41 sets out the maximum penalties for the different offences. In relation to businesses, the maximum penalties are, depending on the offence, either a specified amount or a percentage of the worldwide turnover of the business and of any businesses it owns or controls. In relation to non-businesses, the maximum penalties are all specified amounts. Subsection (8) provides the Secretary of State with the power to make regulations, subject to the draft affirmative procedure (see clause 63(5)), which:

- a) provide that a person of a specified description is or is not a business for the purposes of this clause;
- b) make provision for determining when a business is to be treated as controlled by another business;
- c) make provision for determining the turnover (both in and outside the United Kingdom) of a business; or
- d) amend any of the maximum penalty amounts or percentage rates.

### Justification for taking the power

57. As the maximum penalty amounts and rates are set out in the Bill, it is considered appropriate that the Secretary of State should be able to amend these upper thresholds through delegated legislation should they prove inadequate or otherwise inappropriate over time. In addition, it is considered appropriate to leave to regulations the more complex and technical details relating for instance to determining the turnover of a business, rather than setting them out on the face of the Bill.

### Justification for procedure selected

58. The Government considers that these regulations should be subject to the draft affirmative procedure given that they relate to the specification or calculation of the maximum civil penalties for non-compliance with the regime. This procedure is doubly appropriate given that these regulations may be used to amend primary legislation, namely the maximum civil penalties set out in the Bill.

### ***Clause 53: Procedure for service, etc.***

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by statutory instrument*

*Parliamentary procedure: Negative*

### Context and purpose

59. Clause 53 enables the Secretary of State to make regulations, subject to the negative resolution procedure (see clause 63(4)), prescribing the procedure for giving notices and serving orders under the Bill. In particular, the regulations may specify how a document must be given or served, the address to which it should be sent and whether it may be sent electronically. They may also specify the date and time a document is to be regarded as given or served (this may be important, for example, in determining when a time limit begins to run). The regulations may also make particular provision for cases where the recipient is not an individual (for example, in the case of a limited company or partnership) or is outside the United Kingdom.

### Justification for taking the power



60. The Government considers that the level of detail these provisions will involve is most appropriately dealt with in delegated legislation. This will also allow the provisions to be modified more easily if changes are deemed appropriate, in light of operational experience for example.

Justification for procedure selected

61. The negative resolution procedure is considered appropriate as the provisions will be technical and procedural in nature.

62. The Government notes that section 414 of the Financial Services and Markets Act 2000 contains a similar regulation-making power subject to the negative resolution procedure.

**Clause 66: Short title, commencement and extent**

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by statutory instrument*

*Parliamentary procedure: None*

Context and purpose

63. Clause 66 contains a standard power for the Secretary of State to bring provisions of the Bill into force by commencement regulations. Subsection (2) lists the provisions that will come into force on the day on which the Bill is passed. Not all of the provisions in the Bill will need to be in force immediately on the Bill being passed. For this reason, a power is taken in subsection (3) to enable the Secretary of State to appoint, by regulations, a day (or different days) for the coming into force of the remainder of the provisions contained in the Bill. Pursuant to subsection (4) these regulations may also make transitional, transitory or saving provision.

Justification for taking the power

64. Some parts of the Bill will need to be commenced earlier than others. For that reason, where commencement is not already expressly provided for by clause 66(2), this power will enable the Secretary of State to make regulations to commence particular provisions for when they are needed. Although clause 62 makes some transitional provision in relation to the current

merger control regime under Part 3 of the Enterprise Act 2002, with respect to trigger events that take place after the introduction of the Bill, it is likely that further transitional, transitory or saving provision will be needed when Bill provisions are brought into force, for example in relation to remedies accepted or imposed under the Enterprise Act regime.

Justification for procedure selected

65. As is usual with commencement powers, regulations made under this clause are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions of the Bill to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at the appropriate time.

**Department for Business, Energy and Industrial Strategy**

**10 November 2020**