



Law Society  
of Scotland

# Consultation Response

National security and investment: proposed  
legislative reforms

October 2018



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Competition Law Sub-committee welcomes the opportunity to consider and respond to the Government's white paper: *National security and investment: proposed legislative reforms*.<sup>1</sup> We previously responded<sup>2</sup> to Parts 1 and 2 of the earlier green paper consultation.

The Sub-committee has the following comments to put forward for consideration.

## General remarks

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We welcome the recognition of the importance of structural services in terms of national security. It is a complex task to create a system which will balance the need to maintain an open business environment and promote fair competition with the need to protect national security. We welcome distinction between national interest and national security and the clear focus on the latter which should guard against risk of stifling competition or being viewed as protectionist – it is important to encourage business and investors and promote open competition and markets

Furthermore, we agree that it is appropriate for changes to the existing regime (which derives from the Enterprise Act 2002) to be set out in primary legislation; scrutiny will be an important part of ensuring that the final product is fit for purpose and welcome ongoing stakeholder engagement.

<sup>1</sup> <https://www.gov.uk/government/consultations/national-security-and-investment-proposed-reforms>

<sup>2</sup> [https://www.lawscot.org.uk/media/359138/comp-lss-response-to-national-security-and-infrastructure-review\\_part-1\\_nov-17.pdf](https://www.lawscot.org.uk/media/359138/comp-lss-response-to-national-security-and-infrastructure-review_part-1_nov-17.pdf) and [https://www.lawscot.org.uk/media/359423/comp-lss-response-to-national-security-and-infrastructure-review\\_part-2\\_jan-18.pdf](https://www.lawscot.org.uk/media/359423/comp-lss-response-to-national-security-and-infrastructure-review_part-2_jan-18.pdf)

We also note that the EU Proposal for a Regulation establishing a framework for screening of foreign direct investments into the European Union.<sup>3</sup> The proposal seeks to establish a screening process for foreign direct investment on the grounds of security or public order following concerns around acquisitions of strategic assets by foreign state-funded companies.

We consider that the introduction of a voluntary notification system is positive and less burdensome than a mandatory system: this works well in competition law and allows a degree of “common sense”. At the same time, we agree that there should be call-in powers if there are concerns regarding a transaction which has not been notified.

The promised guidance on how the Government expects national security concerns likely to arise will be helpful.

In terms of the national security assessment itself, we support the need for transparent processes. However, a number of questions remain to be answered. Above all, we note that it is difficult to carry out a full assessment of the proposed guidance until we have had the opportunity to consider this in the context of the primary legislation which it accompanies.

We are also concerned that the new process could lead to significant delays if the new body is not properly resourced.

## **Response to questions**

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### **1. What are your views about the proposed tests for trigger events that could be called in for scrutiny if they met the call-in test?**

We note that the threshold of 25% and concept of significant influence or control which apply in the context of investment or activity that involved the acquisition of control, correlates to the tests applied in the context of the recently introduced People with Significant Control (PSC) regime.

### **2. What are your views about the proposed role of a statement of policy intent?**

We are not aware of many other contexts in which a statement of policy intent is used and therefore we consider that the role of the statement requires further clarification. At the same time, we note parallels with, for example, the Strategy and Policy Statement under the Energy Act 2013, or the National Planning Statements under the Planning Act 2008. These operate as formal statements of ‘relevant considerations’,

<sup>3</sup> See [https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-487\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-487_en)

typically subject to periodic review and rather formal, parliamentary requirements, for approval – i.e. aiming at achieving a balance between policy transparency/certainty and policy flexibility.

In our view it would be preferable to have as much of the policy and the principle set out in statute. This gives greater legal certainty and predictability to stakeholders. As a matter of principles, as much of the substance of the matter as possible should be set out in legislation. Even then, important guidance of this kind could usefully be subject to Parliamentary scrutiny and review to take account, amongst other things, of court decisions and changing circumstances.

Nevertheless, we consider that official guidance of how the law will be applied in practice can be very helpful for stakeholders: lawyers can use this guidance to inform the advice they give to clients. An existing example is the European Commission which has issued guidance on how it will in practice approach the enforcement of EU competition law.<sup>4</sup> As can be seen from this document, the Commission emphasises that this is not a statement of the law, but rather provides an account of the Commission's approach to the analysis of issues arising under Article 82 and of the Commission's priorities.

### **3. What are your views about the content of the draft statement of policy intent published alongside this document?**

In terms of page 12, para 22 Imposition of remedies it would be helpful to have more information as to what remedies are envisaged.

We consider that the wide scope of “asset” to include eg contractual rights seems sensible.

### **4. Does the proposed notification process provide sufficient predictability and transparency? If not, what changes to the proposed regime would deliver this?**

As noted in our general remarks, we consider that the introduction of a voluntary notification system is positive and less burdensome than a mandatory system. The voluntary system which operates in the context of competition law works well. However, there is greater transparency in the competition law regime. The guidance relating to significant influence or control seems helpful.

At the same time, we agree that there should be call-in powers if there are concerns regarding a transaction which has not been notified.

Given the voluntary process, we would be content with a six-month period for the call-in power to be exercised as this would allow time for any irregularities to be identified and we anticipate that most cases which might raise security questions, would be notified in any case.

<sup>4</sup> See eg [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0224\(01\)](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0224(01))

**5. What are your views about the proposed legal test for the exercise of the call-in power? Does it provide sufficient clarity about how it would operate?**

We support the introduction of an expanded call-in power. Individuals or entities seeking to threaten national security are more likely to try and “fly under the radar” and avoid the screening process.

At the same time, we emphasise the need for a clear test to be set out in primary legislation to meet the requirements of legal certainty.

While we recognise that there may be situations in which the need to investigate trigger events taking place outside the UK, we note that there may be practical problems in carrying out the call-in in these circumstances.

**6. What are your views about the proposed process for how trigger events, once called in, will be assessed?**

We understand that the full national security assessment itself will take up to 30 working days (extendable by up to a further 45 working days where more detailed scrutiny is needed, or longer if the parties agree and/or fail to respond to information requests in the time period prescribed). As such, this timeline is not entirely congruous with the timeline of a CMA's competition-based merger control review.

**7. What are your views about the proposed remedies available to the Senior Minister in order to protect national security risks raised by a trigger event?**

Further detail as to how this will be dealt with in practice would be helpful, particularly if, in practice, a new body or department is to be established to deal with the screening process.

We understand that at present the Secretary of State responsible for decision-making in this area is the Business Secretary.

**8. What are your views about the proposed powers within the regime for the Senior Minister to gather information to inform a decision whether to call in a trigger event, to inform their national security assessment, and to monitor compliance with remedies?**

We have no comment on this question.

**9. What are your views about the proposed range of sanctions that would be available in order to protect national security?**

We have no comment on this question.

## **10. What are your views about the proposed means of ensuring judicial oversight of the new regime?**

It is not clear what approach is being taken to the appeal process. The paper indicates that it will not look at the merits of a decision, but rather at its lawfulness, based on judicial review principles, but the process will not be quite the same as judicial review. It is not clear why this is the case. There may be a good reason for that, but it has not been explained. In particular, it is unclear whether the process will offer more or less oversight than judicial review.

We note from para 10.09 of the consultation document that it is envisaged that the High Court should have jurisdiction. Yet if the case is concerned with a Scottish registered company, for instance, we consider that jurisdiction should lie with the Court of Session. We understand that BEIS is considering this issue and we look forward to further details on the proposed approach.

Furthermore, para 10.15 of the consultation document refers to the Attorney General appointing Expert Special Advocates to represent claimants' interests in the determination of what material can be disclosed. Yet in a Scottish case it should be for the Advocate General to make any such appointment - or an alternative policy option would be for the Court to make the appointment from a pool of Counsel whom the Advocate General has had "developed vetted" beforehand.

In practical terms we note time and resources are needed to ensure that staff and Counsel are appropriate vetted, as well as physical facilities and equipment, to ensure that highly classified information and documents could be handled securely. It may be that there will be few cases in the area now under consideration, but if one does arise there will be a need to move swiftly. Therefore, all arrangements will have to be made in advance and coordination with lawyers in the Office of the Advocate General is required from the outset. We anticipate that OAG would in turn consult the Office of the Lord President (Rules of Court are likely to be required, amongst other considerations) and the Scottish Court Service.

## **11. What are your views about the proposed manner in which the new regime will interact with the UK competition regime, EU legislation and other statutory processes?**

We welcome that the Government aims to ensure that this review and the CMA's review take place in a co-ordinated fashion.

We understand that when a transaction is scrutinised in parallel by the Government and by the CMA, the Government may request that the CMA pauses its competition assessment pending the outcome of the national security assessment. Given the impact that this would have on the timetable of the competition assessment, we would welcome guidance on when a Senior Minister could require the CMA to pause its competition assessment.



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