**NATIONAL SECURITY AND INVESTMENT BILL**

**AMENDMENTS TO BE MOVED AT COMMITTEE STAGE**

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| Clause 6, page 4, line 11 | After “may” insert “following consultation with relevant stakeholders” |
| Clause 8, page 6, line 38, | Insert at end “(10) For the purposes of this section, a person acquiring a right or interest in or in relation to an entity by way of security does not constitute that person obtaining control over the entity, and any such rights or interests held by way of security do not constitute any of the cases described in this section.” |
| Clause 9, page 7, line 2, | Insert at end “(3) For the purposes of this section and section 11 a person acquiring a right or interest in or in relation to an asset by way of security does not constitute that person obtaining control over that asset, and any such rights or interests held by way of security do not provide the ability to either (a) use the asset or (b) direct or control how it is used.” |

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Clause 6, page 4, line 11 After “may” insert “following consultation with relevant stakeholders”

Effect

This amendment would impose a duty on the Secretary of State to consult relevant stakeholders when making regulations as specified.

Reason

Consultation provides for an additional layer of scrutiny by stakeholders. A requirement on the Secretary of State to consult will help to ensure openness and transparency of the Secretary of State’s actions. Imposing a duty to consult will ensure any draft statutory instrument is exposed to critical comment from stakeholders, which may improve an instrument and help to avoid future difficulties when it is progressing through Parliament.

The provision as currently drafted gives the Secretary of State very wide discretion to amend the scope of “notifiable acquisitions” as per the drafting of 6(5). This could have far-reaching consequences, not least because, as set out in 6(6), it may be used to extend the scope of notifiable acquisitions to acquisitions of qualifying assets. In particular, we note that clause 13 states that where a notifiable acquisition takes place without the approval of the Secretary of State, this transaction will be “void” (although under clause 15(2) and (3), the defect can be “cured” retrospectively).

We are concerned that this could leave certain lacunae in relation to the impact on third parties. In particular, if the qualifying asset in question is land and it were to be established that a transaction had been void and that the ownership or other interest in land had not been properly transferred, there may be questions around liability. This could arise, for example, in relation to environmental or insurance liabilities. Although it appears the third party would have an action under clause 16, we are concerned that this could be both burdensome upon that third party and unnecessarily complicated. We are also concerned that it might not solve all the relevant problems.

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| Clause 8, page 6, line 38, | Insert at end “(10) For the purposes of this section, a person acquiring a right or interest in or in relation to an entity by way of security does not constitute that person obtaining control over the entity, and any such rights or interests held by way of security do not constitute any of the cases described in this section.” |

Effect

To ensure that transactions are only constitute a trigger event where the person gains actual control of a qualifying entity and to exempt securities or other situations where no effective control is obtained.

Reason

Generally, we note that the definition of 'control' in clause 8(1) is framed in very wide terms. The 25%, 50% and 75% shareholding/voting thresholds correspond to those which are applied in the context of the People with Significant Control (PSC) regime and clause 8 also includes provisions adapting the above scenarios to cater for entities that do not have a share capital (eg partnerships).Section 8 must be read alongside Schedule 1, which provides for particular cases in which a person is to be treated for the purposes of the Bill as holding an interest or right. In particular, paragraph 7 of Schedule 1 states that:

*"Rights attached to shares held by way of security provided by a person are to be treated as held by that person:  
(a)        where apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in accordance with that person’s instructions, and  
(b)        where the shares are held in connection with the granting of loans as part of normal business activities and apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in that person’s interests."*

However, this clarification does not fully account for to the situation where a lender becomes the registered holder of shares in security, as is the case with a legal mortgage over shares (England and Wales) or a shares pledge (Scotland). Where the shares in an entity are transferred in security to a lender, that lender may find that it has (1) gained control of the entity under scenario 1 notwithstanding that, under the terms of the security, actual control remains with the security provider, eg through the voting rights being exercisable only in accordance with the security provider's instructions (as envisaged by paragraph 7 in Schedule 1); and (2) triggered the second limb of the notifiable acquisition test.

As paragraph 7 of Schedule 1 only refers to “rights attached to shares held by way of security”, it arguably only covers the “rights” attaching to shares, and not the ownership of those shares itself. As a legal mortgage over shares is unusual in England and Wales, but a shares pledge is the only way to obtain fixed security over shares under Scots law, this issue disproportionately affects Scots law fixed security over shares – i.e. fixed security over shares in Scottish companies. Accordingly, as drafted, there is a risk that taking a fixed security over Scottish shares could trigger this provision, which would be highly disadvantageous to the Scottish economy.

Given that a notifiable acquisition that is completed without the approval of the Secretary of State is void, paragraph 7 of Schedule 1 should be extended to cater for the situation where shares are held in security by a lender.  Paragraph 7 should similarly be extended to carve out security over qualifying assets since a security could be read as giving the security holder rights equivalent to those set out in Section 9. We therefore consider it would be helpful to include an express carve-out that nothing here is triggered by the act of holding any asset in security.

In a situation where the borrower defaults, the terms of the security will usually dictate that the asset will be sold. This transaction will therefore form a trigger event in the same way as any other transfer. In rare circumstances, the holder of the security (ie the lender) might seek to appropriate the asset. We are of the view that such appropriation would similarly be caught within the meaning of a trigger event. If it were determined that the lender in question was not a suitable person to acquire ownership and control of the entity, we consider that it would be possible for the conditions to attach to the transfer to stipulate that the new owner would be obliged to sell their shares. They would thus be compensated for the value of the shares, and any national security risk avoided.

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| Clause 9, page 7, line 2, | Insert at end “(3) For the purposes of this section and section 11 a person acquiring a right or interest in or in relation to an asset by way of security does not constitute that person obtaining control over that asset, and any such rights or interests held by way of security do not provide the ability to either (a) use the asset or (b) direct or control how it is used.” |

Effect

To ensure that transactions only constitute a trigger event where the person gains actual control of a qualifying entity and to exempt securities or other situations where no effective control is obtained.

Reason

Where a lender holds as asset in security, that lender may find that it has gained control of that asset notwithstanding that, under the terms of the security, actual control remains with the security provider where they are in possession of the security. Accordingly, the second limb of the notifiable acquisition test may be triggered, even where no effective control of the asset has passed. Under Scots law, fixed security over incorporeal moveable property (known under English law as intangible property) can only be achieved by transferring the asset to the creditor. This includes (amongst other things) shares, insurance policies, contractual rights and intellectual property. For those assets where a real right in security can be created without the transfer of ownership (such as land), a new real right is still being created in favour of the creditor. This right contains certain inherent negative controls (e.g. a prohibition on sale), and certain positive controls (often, the borrower must insure the property). Accordingly, as drafted, there is a risk that taking a fixed security over a Scottish asset could trigger this provision, which would be highly disadvantageous to the Scottish economy.

We therefore consider it would be helpful to include an express carve-out that nothing here is triggered by the act of holding any asset in security.

As set out in relation to the suggested amendment to clause 8, in a situation where the borrower defaults, the terms of the security will usually dictate that the asset will be sold. This transaction will therefore form a trigger event in the same way as any other transfer. In rare circumstances, the holder of the security (ie the lender) might seek to appropriate the asset. We are of the view that such appropriation would similarly be caught within the meaning of a trigger event. If it were determined that the lender in question was not a suitable person to acquire ownership and control of the asset, we consider that it would be possible for the conditions to attach to the transfer to stipulate that the new owner would be obliged to sell the asset. They would thus be compensated for the value of the asset, and any national security risk avoided.