National Security and Investment Consultation
Consumer and Competition Policy Directorate
Department for Business, Energy and Industrial Strategy
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By email: nsiireview@beis.gov.uk

16 October 2018

Dear Sir, Madam

Re: National Security and Investment (NSI) – BVCA response to the BEIS consultation

1. We are writing on behalf of the British Private Equity and Venture Capital Association ("BVCA"), which is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 700 firms, the BVCA represents the vast majority of all UK-based firms, as well as their professional advisers and investors.

2. Over the past five years (2013-2017), BVCA members have invested over £32bn into nearly 2,500 companies based in the UK. Our members currently back around 3,380 companies, employing close to 1.4 million people on a full-time equivalent basis (FTEs) across the world. Of these, around 692,000 FTEs are employed in the UK. Further information in relation to the BVCA and the private equity model can be found in our letter of 14 November 2017 in response to the consultation set out in Chapter 7 of the National Security and Infrastructure Investment Review Green Paper.

3. We welcome the opportunity to comment on the questions posed in the National Security and Investment consultation. We have responded only to those questions on which our members have a view or contribution to make.

Our overall view on the NSI proposals

4. The BVCA is supportive, in principle, of measures to protect the UK's national security interests and consider that such measures should be helpful in ensuring the UK remains an attractive location for investment and conducting business.

5. However, any such measures must strike a balance between protection of genuine areas of critical national security interest and unnecessary interference with foreign investment in UK infrastructure and businesses, and with economic activity benefiting the wider UK economy. Clarity, transparency, precision and proportionality are key.

6. We would like to make the following overall recommendations:

    - The call-in trigger should focus on parties that obtain "material influence" over the entities

or assets in question, rather than using the concept of "significant influence or control" from the PSC regime. The Enterprise Act 2002 test is properly focussed on control and influence (as distinct from the PSC regime, which is focussed on beneficial ownership as much as influence). This would also foster much greater certainty and reduce the need for unnecessary notification of transactions, as the Enterprise Act 2002 and its related body of law are well understood by advisers and the market.

- We expect the number of notifications will be larger than anticipated and in relation to core sectors, in particular, might not reduce significantly over time. The Government should therefore consider carefully methods of reducing the associated costs by legislating for safe harbours where possible. We suggest safe harbours for the following would be appropriate:
    - Passive investors such as limited partners in funds (see our response to Question 2 below).
    - De minimis transactions under a certain threshold (see our response to Question 4 below).
    - Targets with only a very limited UK nexus (see our response to Question 4 below).
    - Entities or assets in a supply chain beyond a certain connection to an entity that operates in a core sector or otherwise poses target risk (see our response to Question 3 below).
- The statement of policy intent should provide greater detail on which specific parts of certain of the core sectors are likely to give rise to target risk, in particular under the heading "some advanced technologies".
- It is very important that investors' confidentiality should not be compromised unless and until any remedies are imposed after a call-in.
- The Government should make the informal discussion channel as accessible and robust as possible, in order to reduce cost burdens on both Whitehall and industry.
- There should be targeted changes to parts of the proposed call-in procedures, such as the removal of the proposal to stop-the-clock whilst information is gathered, in order to limit the impact on deal timelines and the potential for parties to use the rules strategically.
- The Government should be conscious of the need for constantly strong messaging to counter any potential chilling effect on investment in the UK, including that well-understood regimes in other jurisdictions have been studied in detail, and the UK regime is intended to be no more onerous than those (although different security considerations may apply).

Responses to specific consultation questions

Question 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?

7. As we noted in our response to the Green Paper in January 2018, we favour a test focused on parties who have control or material influence over the activities in question, in line with the well understood definition in the Enterprise Act 2002 and the related body of case law to guide interpretation of the test. This is in comparison to the Register of People with Significant Control test (the PSC Register) which is focussed additionally on levels of beneficial ownership, which is not an appropriate test in the context of national security. Furthermore, it has limited guidance and has given rise to rise to confusion and uncertainty amongst market participants. It is our strong preference that the Enterprise Act test be used and consider it more appropriate in achieving the aims of the new regime. Given the familiarity of advisers with the Enterprise Act regime, as compared to the uncertainties of the PSC regime, we believe that the former will give rise to fewer precautionary (and unnecessary) notifications.

8. There is also merit, in conformity itself, of using the same test under the competition and NSI regimes. This is because it is much more straightforward for specialist lawyers, be they working for the Government, the judiciary or the private sector, to apply one well-established test rather than two different tests to assess the same transaction from competition and national security angles. Again, the efficiency fostered by this conformity would have positive cost implications for the Government and industry.

9. In the White Paper, the proposed 50% and 75% tests (for entities) and 50% (for assets) seem to us to be the appropriate levels, so long as (in the case of entities) it is related to voting rights and not economic rights. We believe that a 25% test is inappropriate; while there may be circumstances in which a 25% holding of voting rights may give rise to significant influence or control, particularly if coupled with other rights, the very limited veto rights which a 25% shareholding affords should not, in themselves, cause a trigger event. Any test of "significant influence or control" should (as is the case with the “material influence” test in the Enterprise Act 2002) be aimed at indicia of control over strategic decision-making rather than be focussed on economic interests or indeed minority protections. For example, many of our members manage or advise funds which are typically constituted as limited partnerships. These are controlled by a general partner, which will often delegate the management function to a manager. The majority of economic interests are held by limited partners, who are passive investors. In UK partnerships, in accordance with the Limited Partnerships Act 1907, limited partners lose their limited liability status if they take part in the management of the partnership business, and accordingly have no day-to-day control rights over the limited partnership, and no control or voting rights over the underlying portfolio companies. The regimes for limited partnerships in many other jurisdictions have similar restrictions on the rights of limited partners. Limited partners usually have limited contractual rights to receive certain information in respect of portfolio investments of the fund; such rights are usually restricted to financial performance information (such as consolidated financial information) and typically do not extend to a right to receive commercially sensitive operational information. Accordingly, we do not believe that the identity of limited partners is relevant, given their lack of day-to-day control. Such passive investors should be excluded clearly from the scope (as would be the case under the Enterprise Act 2002). This would also send a very important message to global investors that their passive investments in funds financing UK businesses are welcome.

10. We discussed the nature of the rights held by limited partnerships with BEIS when the PSC Register legislation was consulted on. BEIS recognised the role of limited partners as passive investors and included a safe harbour relating to limited partnerships contained in paragraph 25, Part 3, Schedule 1A of the Companies Act 2006. If the PSC Register test is used, rather than the preferable test of "material influence" under the Enterprise Act, a similar safe harbour must be included.

11. We welcome the guidance in Chapter 5 of the draft Statutory Statement of Policy Intent. However, we note our previous concerns in response to the Green Paper that we consider it wholly inappropriate and disproportionate to extend significant influence or control to lesser vetoes that provide minority protection. In particular, the statutory guidance for "significant influence or control" for the purposes of the PSC regime is not sufficiently clear in this context and has given rise to confusion and uncertainty already amongst market participants. Some of the indicia of "significant influence or control" in the statutory guidance (such as making additional borrowing or changing the nature of the business or establishing or amending any profit-sharing, bonus or other incentive scheme) are, in many circumstances, minority protections only, protecting an investor against a change in a fundamental tenet of the investment. For example, a veto over changing the nature of the business could be to protect an investor against having an interest in a business or sector that is prohibited or outside of such investor's target investment strategy. Such vetoes do not denote control, the ability to have any material influence over day-to-day operations, or control or influence over the strategy of the business. We continue to believe the widely understood "material influence" test in the Enterprise Act is more appropriate and will give greater certainty to both the Government and those affected by the proposed legislation.

12. In addition, we consider that there should be clarity that a non-executive director with the right to receive ordinary course board papers would not satisfy the test of "material influence" and therefore, as stated above, vetoes over strategic matters (or control over the ordinary board matters) would be required to satisfy this test.

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

13. Given that the proposed legislation is not limited in application to any sector(s) of the economy, we welcome the proposed role of a statement of intent to set out the areas of the economy in which the Government expects national security risks to occur and the circumstances in which it expects those risks to arise. Although we remain convinced that independent administrative responsibility would be preferable to political control of national security assessments (see also our response to Question 10 below), we also welcome that Senior Ministers will be required by statute to have regard to the statement of policy intent in exercise of their powers.

14. It is important that the statement of policy intent be reviewed and updated regularly in light of changing risks and the Government's experience in applying its principles. Market practitioners (in particular, legal advisers) are likely to place heavy reliance on this statement in advising clients and it is therefore crucial that it remains up-to-date. This process, as well as initial analysis presented to Senior Ministers to enable them to make a decision, should be carried out by specific and impartial expert civil servants in order to further the quality of decision making.

15. In addition, as proposed in the White Paper, we believe that it is necessary for there to be a confidential informal process to engage with officials in relation to potential transactions at an early stage to enable transaction parties to understand the potential risks of a transaction being called in. This is important given the inevitable imbalance of information relating to national security matters between the Government and transaction parties. Entities engaged in, or who are contemplating engaging in, M&A activity in the UK should also be able to consult with the Government generally, rather than just in relation to a particular transaction. For example:

    a. a potential buyer (for example, a sovereign wealth fund or family office) may wish to discuss the Government's assessment of the acquirer risk that it may present across a spectrum of transactions, so that it may understand which sectors it ought to be able safely to pursue and those, if any, which may give rise to scrutiny and a potential call-in;

    b. a seller intending to sell an entity/asset through an auction process (which is often the case for BVCA members) may wish to understand whether the particular entity/asset might give rise to concerns and, if so, whether there are any particular characteristics of potential buyers which might be problematic.

16. Above all, throughout the statement of policy intent and the informal engagement process, it is critical that Government effectively communicate the message that legitimate commercial investment in the UK remains welcome. Where possible, the Government should also seek to reassure investors that making a notification is a routine procedure and in no way an admission that the investor may pose any national security risk. It is also crucial that investors are convinced that their confidentiality will be respected during their engagement with the process (see our response to Question 6 below and our suggestion for a general pre-clearance set out in paragraph 23 below).

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

17. In relation to target risk, in most areas the draft statement of intent is relatively clear (if perhaps too high-level) as to certain parts of the economy that are likely to cause concern; for example, in relation to the national infrastructure sectors and military or dual-use technologies and the direct critical suppliers to those industries. It is likely to be relatively straightforward in most cases falling in those sectors for firms and their advisers to identify entities or assets that are engaged directly in those sectors, although the more detail the Government can provide the more certainty it will foster.

18. We are more concerned in relation to the other core sectors, in particular "some advanced technologies", where we feel that the statement should identify in much greater detail the specific areas that are likely to present national security risks. For example, the current broad definition of "artificial intelligence" would cover a huge range of increasingly ubiquitous yet innocuous applications (such as software designed to assist in litigation management) that are likely to pose no national security risks.

19. It becomes more problematic to identify whether there is a potential target risk the more removed the relevant entity is from the relevant sector, and it would be helpful to have a greater explanation of the extent of the supply chain which needs to be considered in

examining a particular transaction. For example, suppose that Company A operates gas generator plants. Company B is the exclusive supplier of gas turbines to Company A. Company C is a critical supplier of turbine blades to Company B. Company D is the sole manufacturer of the specialist metal alloy used to make the turbine blades. Will Companies C and D be caught within the scope of the legislation, even though they are not directly critical suppliers to a core sector?

20. The draft statement is not helpful in relation to acquirer risk and how the Government will assess that. While we understand that this is a sensitive issue, it would be at least helpful to include examples of the types of acquirer that are unlikely to be problematic in relation to particular sectors/asset classes.

21. As regards sensitive land, we suggest that the Government establishes a service that allows parties to check (speedily and with low cost – similar to an insolvency register search service) whether specific areas of land in the UK pose any target risk. This would give parties a simple mechanism for ruling certain land in or out of consideration, thereby creating a simple safe harbour for transactions that seem to pose no other national security threat, but may nonetheless be unexpectedly considered to do so due to a real estate element of the target. Any such service would have to be fast, effective and inexpensive, in order to avoid unnecessary delays to transactions involving land (which includes a very high proportion of the total number of corporate deals). We consider this would be a difficult system for hostile actors to abuse, but if the Government had concerns in this regard they might be allayed simply by requiring users to present some kind of satisfactory identification.

22. The Government should also not overestimate the usefulness of the statement as a means of reducing the number of voluntary notifications that parties will make. As non-exhaustive guidance, the statement might not discourage parties to deals in sectors that lie outside the core sectors from making precautionary notifications.

23. It would also be very helpful to have a process whereby institutions such as BVCA members (who are typically managers of funds regulated by the FCA or equivalent national regulators) would be able to obtain general clearance that as an institution they are an acceptable acquirer of assets. We appreciate that the Government might need to reserve its position for particularly sensitive sectors but we firmly believe that general comfort would be instrumental in reducing the number of precautionary filings and unnecessary interference in the ordinary course M&A activity of our members and other similar institutions.

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

24. As a general comment, we are sceptical about the suggestion that there will be around 200 notifications per year. Our expectation is that, at least for a few years following the implementation of the legislation, the Government is likely to receive many more than 200 notifications, given the inevitable uncertainty that there will be as to the scope of the legislation and the targets/acquirers that may present a national security risk.

25. We believe that many parties will seek from the outset to eliminate any uncertainty by making voluntary notifications in respect of every transaction in which they are involved. In non-core sectors, over time, the number of notifications may well reduce as parties become more

confident in their understanding of the Government's concerns. In other sectors, particularly core sectors, like critical infrastructure, the parties are likely simply to notify every deal they are involved in, due to the not-inconsiderable cost implications nevertheless being relatively small in the context of larger investment groups participating in very large transactions. This has been our members' experience in jurisdictions with existing national security frameworks, particularly as regards infrastructure investments. This also highlights the risk that smaller investors will be disproportionately affected, as the costs of notifying will be relatively more burdensome to them. It therefore also strengthens the case for as streamlined a notification process as possible, particularly where the Government identifies early on that national security concerns are absent.

26. In order to minimise the extra cost burden that the volume of notifications will impose on Government and market participants, we believe that the Government should consider including targeted safe harbours in the legislation (in addition to the safe harbour for limited partners proposed in our response to Question 1). These should include a de minimis transaction size and a requirement for a stronger UK nexus than is currently proposed. As regards the latter, we suggest that a target, in order to fall within the scope of the rules, must at least supply goods and services in the UK directly (not merely indirectly). However, given also the enforcement challenges related to transactions involving entities or assets not located in the UK or owned by UK persons, the Government should consider further ownership or location criteria, which could reduce the number of notifications to a more manageable and less costly amount for both Government and parties to transactions.

27. We consider that the proposed process for assessing whether to call in a trigger event within 15 working days is generally reasonable and proportionate. For cases that are straightforward and concern sectors or potential acquirers that do not present any obvious risk to national security, we consider that this should be a sufficient period during which to determine that no further assessment is required. We note that the White Paper estimates that it expects to call in approximately half of the notifications that it received. However, as explained above, significantly more than the White Paper's estimated 200 transactions per year are likely to be notified on a cautionary basis. As such, we expect (and would hope) that a much larger proportion of these notifications could be resolved at this early stage and not be called in for further assessment.

28. With regard to the possible further 15 working day extension for consideration of whether to call in a transaction, while we welcome attempts to avoid a longer review process where possible, it is difficult to envisage circumstances in which, provided that complete information has been provided by the parties, a transaction would be considered so complex that a decision could not be made as to whether to call it in within 15 working days, but nonetheless not sufficiently complex as to merit a full assessment. Indeed, such concerns could be addressed effectively through an informal consultation process as explained below. As such, it would provide greater certainty to begin the 30 working day assessment and, if possible, resolve this quickly, rather than add further delay to the overall process. That said, if the Government's intention is to publish details of all cases that are called in regardless of whether they raise material national security concerns (which, as set out below, we would disagree with), we consider that it would be beneficial to retain the possibility of utilising a longer period if necessary, during which any concerns could be resolved without negative publicity.

29. The information required in a notification should be defined as clearly as possible. In the experience of our members, certain regulators can employ informational requirements to extend artificially a clearance deadline by deeming a notification to be incomplete. To seek to minimise this risk and to maximise the efficiency of the process for both Government and others, an informal "pre-clearance" dialogue would be helpful. In addition, the Government should be required to respond to the relevant parties within, say, two working days of receipt of a notification if it considers it to be incomplete.

30. If the Government decides to call in a trigger event then there should be a "cooling off" period of time allowed for the parties to decide (subject to the contractual arrangements between them) whether or not to proceed with the proposed transaction (perhaps 10 working days). For example, the seller of an entity may require a quick sale, and so the parties may have agreed that the transaction is conditional upon the call in power not being exercised.

31. It is critical that the Government respects investors' confidentiality during their engagement with the whole screening process, and does not publish the fact of a call-in (which may be unexpected) unless and until remedies are announced, after the in-depth security assessment. This is due to the negative impact of publicity as regards the purchaser's credibility as a purchaser in future transactions and the chilling affect that the risk of an unexpected call-in could have on investors' willingness to consider certain transactions in the first place (see also our response to Question 6).

Question 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?

32. The proposed legal test for the exercise of the call in power, on its face, appears appropriate. However, the legislation must also make it clear that the Senior Minister may only call in a particular transaction if all three types of risk are present, and specifically identified (i.e. there must be a clear concern under each of the target, trigger and acquirer risks).

33. We are, however, concerned that the call-in power might be used for political reasons (even if the transaction is ultimately cleared). "Reasonable suspicion" is a low bar and is unlikely, in itself, to be challenged in the courts (see also our response to Question 10 below).

34. There remains a risk, arising largely from the asymmetry of information between the Government and the public) that parties and their advisers may make an incorrect assessment of a transaction's risk to national security and refrain from making a notification. While we agree that it is necessary for the Government to be able to intervene following completion of a transaction in the context of a voluntary regime, it should have a limited period of time in order to minimise uncertainty. We consider the proposed six month time period for a post-trigger call in power to be excessive. We favour alignment with the four month period that applies (and will continue to apply) to merger control reviews under the Enterprise Act 2002. Unlike the current system of public interest interventions, the CMA would not, under the proposed regime, prepare a report for the Minister so there is no reason why the Minister and the CMA could not coordinate the timing of their initial reviews of those transactions and the resulting decisions (i.e. for the CMA, whether to open a Phase 2 investigation and, for the Minister, whether to call in the transaction), as well as their gathering of intelligence to identify potentially relevant transactions for review.

35. The White Paper does not indicate what events (other than closing of a transaction) would start the clock running on the period during which a transaction can be called in for review under the national security regime. If it is envisaged that similar trigger events will be adopted as under the Enterprise Act 2002 (i.e. notice of material facts to the Minister or publicity in the national or trade press) this could lead to significant uncertainty. Many of the transactions which may be caught by the proposed regime (such as IP transfers and licensing, foreign transactions, real estate deals and acquisitions of assets) are not routinely publicised. Such transactions would therefore be exposed to the risk of being unwound or subject to remedies due to national security concerns many years after the event. In order to mitigate this risk, the Government should provide greater clarity in relation to the trigger events for the timing of a review, or, preferably, ensure that this time period starts to run on the date that the relevant transaction completes.

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

Timing

36. In relation to timing for assessment once a trigger event has been called in, a 30 working day initial period appears reasonable and generally aligns with a number of other foreign investment and competition regimes. In addition, the further 45 working day period may be necessary in order to consider any identified national security risk and determine possible remedies. However, while it seems sensible to provide for the possibility of a voluntary extension to the review period, we consider that this should be time-limited (e.g. a single extension of up to 15 working days) and that such extensions should be used only rarely and in exceptional circumstances.

37. In general, the suggested timetable for review results in an overall timeframe of approximately 21 weeks (including the initial assessment of whether to call in a trigger event) which is a significant period in the context of an M&A transaction. Our expectation is that parties will make notifications on many transactions as a precautionary step and such transactions will be conditional on obtaining clearance given the broad range of remedies and in particular the power to unwind the transaction. Such a long potential review period would significantly increase the cost of acquiring finance to fund an acquisition, which is a particularly important issue for the private equity industry. Typically private equity transactions are partly debt funded and availability/commitment fees are payable once the debt is committed (usually once the buyer is committed to fund the transaction when the transaction documentation is signed) until drawn down at closing. This long "gap" would also create additional risk and uncertainty, as the parties will need to allocate business and market risk for this period. In short, the longer the gap, the higher the cost of finance.

38. These effects could have a cooling effect on investment into the UK. As such, it will be important to establish a reasonable threshold, on the basis of clear and objective criteria, for any extension of the review beyond the initial 30 working day period.

Transparency

39. We do not consider that the Government should publish any decision to call in a trigger event. Rather, we consider that publication should only be necessary if genuine national security

concerns are found to arise in relation to the proposed transaction. Importantly, we consider that publication of the identity of investors being assessed under the national security regime will discourage entities from investing in the UK, as it would be likely to raise concerns about the ability of those investors to complete future transactions quickly and with certainty. This is particularly relevant for many of our member private equity funds who undertake numerous transactions every year.

40. Importantly, if the fact of the investigation is published at the point that a trigger event is called in, it is necessary that if a transaction is called in on technical grounds, rather than based on serious national security concerns regarding the sector to which it relates or the identity of the acquirer, that this reasoning is made clear in any announcement. In addition, we agree that, as suggested in the White Paper, the Government should be able to delay publication of a decision for a period of time in order to allow transaction parties to be able to plan and prepare for that information becoming public knowledge. However, we suggest ten working days rather than five, in order to allow investors, particularly larger global ones, to develop a communications strategy and gain internal clearance. Moreover, in the case of private transactions, we consider that the Government should be obliged to delay such publication unless it is publicly disclosed by the transaction parties.

Information gathering

41. In relation to information gathering, we strongly disagree with the proposal that the issuance of an information notice will automatically "pause the clock" until the required information is supplied (see further our response to Question 8 below).

Question 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?

Legal test for remedies

42. Paragraph 8.12 of the White Paper describes the legal test for the imposition of remedies as being where "necessary to impose a remedy for purposes connected with preventing or mitigating a national security risk". That test seems to us to be unduly vague. In our view, remedy powers should instead be available where "necessary to impose a remedy in order to prevent or mitigate a national security risk." With this exception, we generally agree that the proposed remedies available to the Senior Minister are appropriate, so long as all of the conditions in paragraph 8.12 are met.

43. We believe that it is important that the legislation expressly states that the Senior Minister should only be able to block or unwind a transaction if no other remedy is reasonably available, and that (in relation to other remedies), the Minister may only impose a remedy which, out of the possible remedies, is the least disruptive to the transaction parties while satisfying the national security concerns.

Power to unwind trigger events

44. It is unclear to us whether the proposed power to "unwind" a transaction is intended to refer to a requirement that the seller of an entity or an asset resumes ownership of that entity/asset or is instead (as implied by the reference to the "similar powers" under the Enterprise Act 2002)

simply referring to a power to require the target entity or asset to be divested in its entirety to a third party. If it is the former, that would greatly complicate contractual sale and purchase arrangements, particularly if unwinding can be ordered several years after the transaction takes place, due to breach of a condition. If the value of an asset has fallen, must the seller assume that loss? Who would be responsible for liabilities incurred during the buyer's period of ownership? If a trigger event arises in the context of loan arrangements, must the underlying loan be repaid? If the shares or assets that must be returned to the seller have been charged to a lender, how are the lender's interests affected?

45. We consider that the use of such an unwinding power (if that is what is intended) should not aim to reverse the specific legal arrangements that constituted the trigger event, but should instead be treated as specific form of divestment remedy in which the original seller is to acquire the target entity or asset, in a new transaction. As the White Paper recognises, such a remedy should be available only as a last resort. We consider this to be where:

    a. the buyer (or a divestment trustee) has been unable to find an alternative purchaser for the target that meets the Government's requirements for a suitable purchaser, i.e. one that the Government is satisfied does not itself give rise to acquirer risk and is capable of operating the entity or asset in a way that avoids the relevant national security risk; and

    b. the Government is not itself capable of operating the entity or asset in a way that avoids the relevant national security risk (if it is, it should assume ownership of the target, subject to payment of appropriate compensation).

46. We also consider that the same safeguards should apply before the exercise of a power to unwind a transaction for breach of a remedy condition.

Question 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?

47. While we agree that the Senior Minister may require information-gathering powers in order to make a call-in decision or to monitor compliance with remedies, we strongly disagree with the proposal that a request for information should automatically "pause the clock". This process clearly leads to risk of the review period being significantly extended, in particular given that these provisions will apply equally where information is requested from third parties (such as former investors) who have no interest in ensuring that the transaction proceeds in a timely fashion. This is particularly concerning given that the White Paper notes that deadlines of up to three months may be set for the provision of this information. As such, the proposed statutory timetables for review will become almost meaningless. Transacting parties would be incapable of accurately predicting the likely timetables for the post-notification and post-call-in decisions and would be unable to plan their transactions accordingly, or to coordinate them with other regulatory clearance timetables. This would increase the difficulty and cost of securing appropriate financing for transactions with a UK nexus.

48. In order to reduce uncertainty, a similar approach to that adopted in relation to section 109 requests issued during a merger review process could be adopted, i.e. the issuance of request

for information does not automatically "stop the clock", however, if a party fails to provide information which is vital to the review within the designated timeframe, the clock can then be paused. If such an approach were to be adopted, we note that the Government should be required to act objectively and reasonably in (i) determining whether the information required is vital to their review (and therefore merits a formal rather than informal information request); and (ii) setting any deadline for a response. This is especially relevant given the proposed criminal and civil sanctions for failure to provide information.

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

49. We do not have strong views on these.

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

50. In our view, after-the-event scrutiny from a judge is unlikely to be a strong curb on Ministers' powers. We think it unlikely that many transaction parties will wish to challenge the decision of a Senior Minister given the high profile nature of such a challenge, and the asymmetry of information between transaction parties and Government (making it difficult to predict the outcome of any such challenge). Alongside the legal risk, the high potential for brand-damage and the challenge of timing an appeal alongside a transaction timeline presents a high barrier to parties considering bringing action in the courts. Judicial oversight of the exercise of the call-in power seems to offer limited constraint on political considerations in this context.

51. Therefore, while we accept that decisions around national security are ultimately the responsibility of Government and should be made by Ministers, we believe that some independent oversight of the regime is highly desirable. The oversight body would not make decisions itself, but would seek to ensure that the Senior Minister has acted appropriately in reaching a decision.

Question 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?

52. We consider that the existence of a parallel national security review should not cause the CMA to delay its substantive assessment of the competition issues relating to the merger in question. Such issues are clearly distinct from national security concerns (hence the proposed introduction of a separate regime). Consequently, if the reference to "adapted timings for competition assessments" in paragraph 11.17 of the White Paper is intended to allow for delays to the CMA's substantive assessment (as distinct from the consideration and formulation of remedies), we consider that would be undesirable. Such delay would create increased uncertainty, therefore increasing costs of a transaction and potentially dampening appetite for investment in the UK.

53. In the area of remedies, we recognise that some coordination may be beneficial in certain cases. However, we consider that such cases are likely to be rare and would not justify a general requirement to coordinate the timing and procedure of competition and national security assessments to ensure simultaneous remedy assessment by the two regulators. If national

security remedies will have priority over competition ones, it is not obvious why the Minister should intervene to delay the imposition of competition remedies (particularly in Phase 1). A better approach might be to allow the CMA to accept undertakings and then to have input into any subsequent assessment of remedies by the Minister with a view to ensuring competition considerations are taken into account.

We would be very happy to discuss the contents of this letter further with you. Please contact Tom Taylor (ttaylor@bvca.co.uk) at the BVCA if you would like to arrange a call or further meeting.

Yours faithfully,

Amy Mahon
Chair, BVCA Legal & Accounting Committee