NATIONAL SECURITY AND INVESTMENT BILL
EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM
FOR THE BILL AS INTRODUCED IN THE HOUSE OF COMMONS

INTRODUCTION

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the National Security and Investment Bill (the "Bill"). This memorandum has been prepared by the Department for Business, Energy and Industrial Strategy. On introduction of the Bill, in the House of Commons, the Secretary of State (the Rt Hon Alok Sharma MP) made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.

SUMMARY 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 includes a number of criminal and civil sanctions for non-compliance with the regime.

10. The Bill also contains a standalone provision to amend the overseas disclosure gateway in section 243(3)(d) of the Enterprise Act 2002. This will remove a restriction on public authorities disclosing to overseas public authorities under the gateway, information relating to the affairs of an individual or any business of undertaking, that comes to them in connection with a merger investigation under Part 3 of that Act.

Part 1: Call-in for national security

11. Clause 1 provides the Secretary of State with the power to give a call-in notice where he reasonably suspects that a trigger event has taken place or is in progress or contemplation, and that it has given rise to or may give rise to a risk to national security.

12. Clause 2 sets out further provisions about the call-in power. The power may be exercised in respect of trigger events that take place after the introduction of the Bill. A call-in notice may not be given in relation to a trigger event which has taken place if more than 6 months has passed since the Secretary of State became aware of the trigger event or if more than 5 years have passed since the date of trigger event. It is only possible to give one call-in notice in respect of each trigger event. These restrictions do not apply where false or misleading information has materially affected a decision under the regime. In these circumstances, it is possible to

reconsider a decision not to give a call-in notice, or to re-exercise the call-in power, as long as this is done within 6 months of the discovery of the false or misleading information.

13. “Trigger event” is defined in clause 5. A trigger event takes place when a person gains control of a qualifying entity or qualifying asset.

14. Pursuant to clause 7(2) and (3) a “qualifying entity” means any entity other than an individual (whether or not a legal person) and includes a company, a limited liability partnership, any other body corporate, a partnership, an unincorporated association and a trust. However, where an entity is formed or recognised under the law of a country or territory outside the United Kingdom (“UK”), it will only constitute a “qualifying entity” if it carries on activities in the UK or supplies goods or services to persons in the UK.

15. Pursuant to clause 8 control is gained over a qualifying entity in the following circumstances:

    a) the acquisition of more than 25% of the shares or voting rights in the entity;

    b) the acquisition of more than 50% of the shares or voting rights in the entity;

    c) the acquisition of 75% or more of the shares or voting rights in the entity;

    d) the acquisition of voting rights in the entity that (whether alone or together with other voting rights held by the person) enable the person to secure or prevent the passage of any class of resolution governing the affairs of the entity; or

    e) the acquisition of material influence over the policy of the entity.

16. The share thresholds are equivalent to the thresholds set out in the Companies Act 2006 that provide the ability to block a special resolution from being passed (more than 25% ownership), to pass an ordinary resolution (more than 50% ownership) or to pass a special resolution (75% ownership).

17. Pursuant to clause 7(4) to (6) a “qualifying asset” means an asset of any of the following types:

a) land (including land situated outside of the UK if it is used in connection with activities taking place in the UK or the supply of goods or services to persons in the UK);

b) tangible (or, in Scotland, corporeal) moveable property (including property situated outside the UK or the territorial sea adjacent to the UK if it is used in connection with activities taking place in the UK or the supply of goods or services to persons in the UK);

c) ideas, information or techniques which have industrial, commercial or other economic value, if used in connection with activities taking place in the UK or the supply of goods or services to persons in the UK, including trade secrets, databases, source code, algorithms, formulae, designs, plans, drawings or specifications and software.

18. Pursuant to clause 9 a person gains control over a qualifying asset if they acquire a right or interest in, or in relation to, the asset which enables them to:

a) use the asset, or use it to a greater extent than prior to the acquisition; or

b) control or direct how the asset is used, or control or direct how it is used to a greater extent than prior to the acquisition.

19. Use of an asset includes its exploitation, alteration, manipulation, disposal or destruction.

20. Schedule 1 provides for particular cases in which a person is to be treated as acquiring an interest or right, for example if interests or rights are held jointly, indirectly or by nominees.

21. The exception in clause 11 provides that an individual is not to be regarded as gaining control of a qualifying asset as a result of an acquisition made for purposes that are wholly or mainly outside the individual's trade, business or craft. This exception does not apply to an asset which is land, or which falls within the specified export control provisions set out in subsection (2). Pursuant to subsection (3), the Secretary of State may by regulations amend the list of assets in subsection (2) or prescribe other circumstances in which a person is not to be regarded as gaining control of a qualifying asset.

22. Pursuant to clause 3 the Secretary of State may publish a statement setting out how he expects to exercise the call-in power. Clause 1(6) provides that the Secretary of State may not use the call-in power unless a statement has been published. Pursuant to clause 1(7) he must also have regard to the statement when exercising the call-in power. The statement may include, among other things:

    a) details of sectors of the economy in relation to which the Secretary of State considers that trigger events are more likely to give rise to a risk to national security;

    b) details of the trigger events, qualifying entities and qualifying assets in relation to which the Secretary of State expects to exercise the power to give a call-in notice; and

    c) details of factors that the Secretary of State expects to take into account when deciding whether or not to do so.

23. The Bill provides for a mandatory notification regime in relation to proposed acquisitions of certain shares or voting rights in specified qualifying entities. Clause 6 defines these "notifiable acquisitions" as taking place when a person: gains control of a qualifying entity in the circumstances set out in paragraphs (a) to (d) of paragraph 15 above (i.e. all acquisitions of control other than the acquisition of material influence over the policy of the entity); or acquires 15% or more of the shares or voting rights in the entity. The qualifying entity must also be of a description specified by the Secretary of State in regulations. Any description of entity must include provision that the entity carries on specified activities in the UK. Acquisitions that are impossible for the proposed acquirer to notify in advance are excluded from the mandatory notification regime by clause 6(3). Under subsection (5)(b) the Secretary of State may make regulations exempting acquisitions from the mandatory notification regime on the basis of the characteristics of the acquirer.

24. Pursuant to clause 13 notifiable acquisitions will need to be approved by the Secretary of State before taking place. Subsection (1) provides that a notifiable acquisition that is completed before being approved is void. Approval is given when the Secretary of State decides not to issue a call-in notice in relation to the notifiable acquisition, or clears it to proceed outright or subject to remedies after calling in.

25. Clause 14 sets out the procedure for obtaining approval. Unless the Secretary of State has already issued a call-in notice in relation to the acquisition, the proposed acquirer must give a mandatory notice to the Secretary of State. The Secretary of State may reject the notice on certain grounds, including if it does not contain sufficient information to allow the Secretary of State to make a call-in decision. The Secretary of State must provide reasons in writing for rejecting a notice. If the notice is accepted, the Secretary of State has 30 working days (from communication of acceptance) in which to make a call-in decision. If the Secretary of State decides not to issue a call-in notice, he must clear the acquisition to proceed.

26. Where a notifiable acquisition is completed without being approved and is accordingly void, clauses 15 to 17 give the Secretary of State the power to retrospectively validate the acquisition in conjunction with screening it either on his own initiative or on the application of a person who has been materially affected by the voiding.

27. Where the mandatory notification regime does not apply, pursuant to clause 18 parties are be able to voluntarily notify their planned or completed trigger events pursuant in order to obtain a call-in decision from the Secretary of State. The acquirer, seller or any target entity concerned will be able to start this process by giving a voluntary notice to the Secretary of State. The Secretary of State may reject the notice on certain grounds, including if it does not contain sufficient information to allow the Secretary of State to make a call-in decision. The Secretary of State must provide reasons in writing for rejecting a notice. If the notice is accepted, the Secretary of State has 30 working days (from communication of acceptance) in which to make a call-in decision. If the Secretary of State decides not to issue a call-in notice, he must clear the trigger event.

28. The Secretary of State has powers to require persons to provide information in relation to the exercise of his functions under the Bill by issuing an information notice pursuant to clause 19, which he may exercise before or after calling in a trigger event. The Secretary of State also has powers to require the attendance of witnesses to give evidence in relation to the exercise of his functions under the Bill, under clause 20. The Secretary of State may not require the provision of information under clause 19 or evidence under clause 20 except where it is proportionate to the use to which the information is to be put in the carrying out of the Secretary of State's functions under the Bill.

29. Pursuant to clause 21 the powers to issue information notices and require attendance of witnesses extend extraterritorially, in respect of the following categories of person:

    a) a UK national;

    b) an individual ordinarily resident in the UK;

    c) a body incorporated or constituted under the law of any part of the UK; or

    d) a person carrying on business in the UK.

30. The powers also extend extraterritorially where:

    a) a trigger event has taken place in relation to a qualifying entity which is formed or established under the law of any part of the UK, or in relation to a qualifying asset which is land or tangible moveable property situated in the UK or the territorial sea adjacent to the UK, or is intellectual property used in connection with activities taking place in the UK; or

    b) arrangements are in progress or contemplation which, if carried into effect, will result in a trigger event taking place in relation to a qualifying entity or a qualifying asset of that description;

    and the person required to give information or evidence is the acquirer.

31. Clause 22 provides that the Secretary of State may reconsider a decision made under this Bill, and affirm, vary or revoke it, if the decision is materially affected by false or misleading information provided to him.

Part 2: Remedies

32. Once a trigger event has been called in, the national security assessment period begins. Pursuant to clause 23 the assessment period runs for 30 working days from the day on which the call-in notice is given to the acquirer (the "initial period"). This may be extended for a further 45 working days (the "additional period") where the Secretary of State reasonably believes that a trigger event

has taken place or is in progress or contemplation, and that a risk to national security has arisen or would arise from the trigger event if completed, and reasonably considers that an additional period is required to further assess the trigger event. The assessment period may be further extended by agreement between the Secretary of State and the acquirer (the "voluntary period") but only if the Secretary of State is satisfied, on the balance of probabilities, that a trigger event has taken place or is in progress or contemplation, and that a risk to national security has arisen or would arise from the trigger event if completed, and reasonably considers that the period is required for the purpose of considering whether to impose a final remedy or what final remedy to impose.

33. Pursuant to clause 24, if during the assessment period the Secretary of State exercises his information-gathering powers, the time taken (or, if there is non-compliance, given) to comply with the requirement does not count for the purposes of calculating the assessment period.

34. Pursuant to clause 25 the Secretary of State may during the assessment period make an interim order where he reasonably considers that the provisions of the order are necessary and proportionate for the purpose of preventing or reversing pre-emptive action, or of mitigating its effects. "Pre-emptive action" is defined as action which might prejudice the exercise of the Secretary of State's functions under the Bill. An interim order may amongst other things include provision requiring persons to do, or not to do, particular things, for example it may prohibit the parties from completing a trigger event in progress until the assessment process has concluded.

35. Clause 26 provides that the Secretary of State must make a final order or give a final notification before the end of the assessment period. To impose a final order the Secretary of State must be satisfied, on the balance of probabilities, that a trigger event has taken place or is in progress or contemplation, and that a risk to national security has arisen or would arise from the trigger event if completed, and he must reasonably consider that the provisions of the order are necessary and proportionate for the purpose of preventing, remedying or mitigating the risk. Before making such an order the Secretary of State must consider any representations made to him. A final order may amongst other things include provision requiring persons to do, or not to do, particular things. A final order may therefore impose conditions on the trigger event (i.e. clear the trigger event subject to conditions), prohibit the trigger event altogether or require it to be "unwound" if already completed. If the Secretary of State does not make a final order by the end of the assessment period, he must give a final notification clearing the trigger event outright.

36. In terms of extraterritorial reach, pursuant to clauses 25(5) and 25(6) respectively, provision made by an interim or final order may only extend to a person's conduct outside the UK or the territorial sea adjacent to the UK if the person is:

    a) a UK national;

    b) an individual ordinarily resident in the UK;

    c) a body incorporated or constituted under the law of any part of the UK; or

    d) a person carrying on business in the UK.

37. Pursuant to clause 27 the Secretary of State is under an obligation to keep interim orders and final orders under review and may vary or revoke them. He is also under a duty to consider requests to vary or revoke orders by persons that are subject to them. However, in the case of final orders the Secretary of State is not required to consider such requests where there has been no material change in circumstances since the order was made or last varied or since the date of any earlier request.

38. Notice of the fact that a final order has been made, varied or revoked must be published by the Secretary of State as soon as practicable, pursuant to clause 29.

39. Pursuant to clause 30 the Secretary of State may, with the consent of the Treasury, give financial assistance to or in respect of an entity in consequence of making a final order. "Financial assistance" means loans, guarantees or indemnities, or any other kind of financial assistance.

40. Where a final order is in force or a final notification has been given in relation to a trigger event which involves or would involve two or more enterprises ceasing to be distinct for the purposes of the merger control regime under Part 3 of the Enterprise Act 2002 (i.e. a qualifying merger), the Secretary of State may pursuant to clause 31 direct the Competition and Markets Authority ("CMA") to do, or not do, anything under the merger control regime in relation to the trigger event. The Secretary of State may only exercise this power if he reasonably considers that the direction is necessary and proportionate for the purpose of preventing, remedying or mitigating a risk to

national security. A direction could for example require the CMA to clear a merger notwithstanding any competition concerns it raises where the Secretary of State considers that it would be harmful to national security if the merger did not go through. Before giving a direction the Secretary of State must consult the CMA and such other persons as he considers appropriate. A direction must also be published.

Part 3: Enforcement and appeals

41. Criminal and civil sanctions will be available for non-compliance with the regime. These are set out in Part 3 of the Bill. A summary of the offences created, and the civil and criminal penalties that will be available for these offences, is given in the table below. Pursuant to clause 47 the Secretary of State will also be able to require a person issued with a civil penalty to pay the costs incurred by the Secretary of State in relation to the imposition of the penalty, for example investigation costs.

Offence	**Civil Penalty** (Clauses 40 and 41)	**Criminal Penalty** (Clause 39)
Clause 32 Completing, without reasonable excuse, a notifiable acquisition without approval	Businesses: Maximum fixed penalty: 5% of total worldwide turnover (including of businesses owned or controlled by the penalised business), or £10 million, whichever is higher Maximum daily rate penalty: N/A Non-businesses: Maximum fixed penalty: £10 million Maximum daily rate: N/A	Summary conviction: England and Wales: fine and/or imprisonment of up to 12 months Scotland: fine (not exceeding statutory maximum) and/or imprisonment of up to 12 months Northern Ireland: fine (not exceeding statutory maximum) and/or imprisonment of up to 6 months Indictment: fine and/or imprisonment up to five years

Offence	**Civil Penalty** (Clauses 40 and 41)	**Criminal Penalty** (Clause 39)
Clause 33 Failure, without reasonable excuse, to comply with an interim order or final order	Businesses: Maximum fixed penalty: 5% of total worldwide turnover (including of businesses owned or controlled by the penalised business), or £10 million, whichever is higher Maximum daily rate penalty: 0.1% of total worldwide turnover (including of businesses owned or controlled by the penalised business), or £200,000, whichever is higher Non-businesses: Maximum fixed penalty: £10 million Maximum daily rate penalty: £200,000	Summary conviction: England and Wales: fine and/or imprisonment of up to 12 months Scotland: fine (not exceeding statutory maximum) and/or imprisonment of up to 12 months Northern Ireland: fine (not exceeding statutory maximum) and/or imprisonment of up to 6 months Indictment: fine and/or imprisonment up to five years

Offence	**Civil Penalty** (Clauses 40 and 41)	**Criminal Penalty** (Clause 39)
Clause 34(1)(a) Failure, without reasonable excuse, to comply with an information notice or an attendance notice	Maximum fixed penalty: £30,000 Maximum daily rate penalty: £15,000	Summary conviction: England and Wales: fine and/or imprisonment of up to 12 months Scotland: fine (not exceeding statutory maximum) and/or imprisonment of up to 12 months Northern Ireland: fine (not exceeding statutory maximum) and/or imprisonment of up to 6 months Indictment: fine and/or imprisonment up to two years.
Clause 34(1)(b) Intentionally or recklessly altering, suppressing or destroying any information required by an information notice, or causing or permitting its alteration, suppression or destruction	Maximum fixed penalty: £30,000 Maximum daily rate penalty: £15,000	Summary conviction: England and Wales: fine and/or imprisonment of up to 12 months Scotland: fine (not exceeding statutory maximum) and/or imprisonment of up to 12 months Northern Ireland: fine (not exceeding statutory maximum) and/or imprisonment of up to 6 months Indictment: fine and/or imprisonment up to two years

Offence	**Civil Penalty** (Clauses 40 and 41)	**Criminal Penalty** (Clause 39)
Clause 34(2) Intentionally obstructing or delaying the making of a copy of information provided in response to an information notice	Maximum fixed penalty: £30,000 Maximum daily rate penalty: N/A	Summary conviction: England and Wales: fine and/or imprisonment of up to 12 months Scotland: fine (not exceeding statutory maximum) and/or imprisonment of up to 12 months Northern Ireland: fine (not exceeding statutory maximum) and/or imprisonment of up to 6 months Indictment: fine and/or imprisonment up to two years
Clause 34(3) and (4) Supplying information that is false or misleading in a material respect to the Secretary of State (or to another person, knowing that the information is be used for the purpose of supplying information to the Secretary of State) in connection with any of the functions of the Secretary of State under the Act, that the person knows to be false or misleading in a material respect or is reckless as to whether this is the case	Maximum fixed penalty: £30,000 Maximum daily rate penalty: N/A	Summary conviction: England and Wales: fine and/or imprisonment of up to 12 months Scotland: fine (not exceeding statutory maximum) and/or imprisonment of up to 12 months Northern Ireland: fine (not exceeding statutory maximum) and/or imprisonment of up to 6 months Indictment: fine and/or imprisonment up to two years

Offence	**Civil Penalty** (Clauses 40 and 41)	**Criminal Penalty** (Clause 39)
Clause 35 Unauthorised use or disclosure of regime information It is a defence for a person charged with this offence to prove that they reasonably believed that— (a) the use or disclosure was lawful, or (b) the information had already and lawfully been made available to the public	N/A	Summary conviction: England and Wales: fine and/or imprisonment of up to 12 months Scotland: fine (not exceeding statutory maximum) and/or imprisonment of up to 12 months Northern Ireland: fine (not exceeding statutory maximum) and/or imprisonment of up to 6 months Indictment: fine and/or imprisonment up to two years

42. Part 3 of the Bill also makes provision regarding judicial oversight of the regime. Clause 50 and clause 51 create an appeal process for civil penalties and requirements to pay associated costs under the Bill respectively, in England and Wales and in Northern Ireland, to the High Court, and in Scotland, to the Court of Session. All other regime decisions will be subject to judicial review. Clause 49 provides for a shortened time limit of 28 days (from the usual 3 months) in respect of judicial reviews of certain regime decisions.

43. The sanctions provisions – both criminal and civil – apply extraterritorially by virtue of clause 52, regardless of the nationality or country of formation of the offender.

Part 4: Miscellaneous

44. Part 4 contains miscellaneous provisions.

45. Clause 54 provides a number of information gateways for the regime. The first of these allows public authorities to disclose information to the Secretary of State in order to facilitate the exercise

of his functions under the Bill. The second allows the Secretary of State to disclose information to public authorities or overseas public authorities for the following purposes: facilitating the exercise of his functions under the Bill; preventing or detecting crime; criminal investigation or proceedings; civil proceedings under the Bill; protecting national security. The Secretary of State may also disclose information to an overseas public authority for the purpose of the exercise of corresponding functions of overseas public authorities. Clause 55 applies safeguards to information provided by Her Majesty's Revenue and Customs.

46. Clause 56 imposes a duty on the CMA to give the Secretary of State information and assistance in particular circumstances.

47. Clause 57 provides that information may only be used or disclosed for the purposes of the Bill if this does not contravene data protection legislation (as defined in section 3 of the Data Protection Act 2018).

48. Part 4 also makes consequential amendments and revocations to the Enterprise Act 2002 to remove the existing national security regime from that Act (clause 58 and Schedule 2).

49. This Part also imposes a duty on the Secretary of State to produce an annual report to be laid before Parliament which provides details of, among other things, any financial assistance given to entities pursuant to clause 30, the number of mandatory and voluntary notices accepted and rejected and the number of call-in notices given (clause 61).

50. In addition, the Bill contains a standalone provision to amend section 243(3)(d) of the Enterprise Act 2002. This will remove a restriction on public authorities disclosing to overseas public authorities, information relating to the affairs of an individual or any business of undertaking, that comes to them in connection with a merger investigation under Part 3 of that Act.

51. Currently, a public authority may only disclose such information to overseas public authorities (i) with the consent of the parties providing the information and the consent of the individual or business to whom the information relates; (ii) to comply with a European Union obligation; or (iii) where it is making the disclosure to facilitate the exercise by the disclosing public authority of its statutory functions. This amendment will permit disclosure to facilitate the performance of an overseas public authority's functions.

52. The amendment is being made because at the end of the transition period, the CMA will be solely responsible for investigating the effects of large international mergers on competition in UK. To provide effective cross-border enforcement of competition law that protects the UK's markets and consumers, the CMA will need to be able to disclose confidential information with overseas competition authorities, including where consent has not been obtained. This will enhance the CMA's ability to receive such confidential information from international counterparts.

Part 5: Final provisions

53. Part 5 sets out transitional provisions, provisions in relation to regulations under the Bill, financial provisions, interpretation provisions, and commencement and extent provisions.

ECHR ISSUES

Article 6: Right to a fair trial

54. Article 6 of the ECHR provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in the determination of his civil rights and obligations or of any criminal charge against him.

Criminal offences (clauses 32, 33, 34 and 35)

55. Criminal proceedings for offences under the Bill will obviously engage the criminal limb of Article 6, i.e. they will involve the determination of a criminal charge. The Government considers that the offence provisions are compatible with Article 6.

56. In relation to the offence of unauthorised use or disclosure of regime information under clause 35, a defence is provided for under subsection (2). The intention is that the legal burden should be on the defendant to prove the defence. The imposition of a legal burden on a defendant may interfere with their rights under Article 6(2), i.e. the presumption of innocence. To be compatible with Article 6(2), a reverse legal burden must strike a balance between the importance of what is at stake and the rights of the defence. In other words, it must be reasonably proportionate to the legitimate aim sought to be achieved. The Government considers that this is the case here. The starting point is that this offence plays an important role in ensuring there are adequate safeguards surrounding the use and disclosure of regime information, some of which may relate to national security or be of a personal or commercially sensitive nature. The defence relates to factual

matters which are within the defendant's knowledge and therefore more readily provable by the defendant than the prosecution. The nature and extent of the factual matters the defendant is required to prove are not unduly onerous.

57. The other Bill offences do not raise similar issues as at most they place an evidential burden on the defendant, where they provide that a "reasonable excuse" negatives criminal liability: see *R (Cuns) v Hammersmith Magistrates' Court* [2016] EWHC 748 (Admin); (2017) 181 JP 111, paragraph 4).

58. The Government considers that the pre-existing criminal justice legislation which will apply to criminal proceedings for Bill offences, and the requirement under section 6(1) of the Human Rights Act 1998 for criminal courts (as public authorities) not to act in a way which is incompatible with Convention rights, should mean that these proceedings are conducted in a way which is compatible with the requirements of the criminal limb of Article 6.

Civil penalties and recovery of associated costs (clauses 40 and 45)

59. Pursuant to clause 40 the Secretary of State will be able to impose civil penalties requiring the payment of money for some criminal offences under the Bill, such as failing to comply with an order, as an alternative to prosecution. Imposition of civil penalties will engage Article 6 and is furthermore considered likely to be found to engage the criminal limb of Article 6. Civil penalties will be imposed for conduct classified as criminal under domestic law; they will be imposed with punishment and deterrence in mind; and the maximum penalties are likely to be deemed to be punitive in nature.

60. Pursuant to clause 45 the Secretary of State will also be able to require penalised persons to pay the costs (e.g. investigation costs) incurred by the Secretary of State in relation to imposing a civil penalty. The Government considers that a requirement to pay costs will engage Article 6.

61. The civil penalty and cost recovery provisions are considered to be compatible with Article 6. Clauses 50 and 51 create a right of appeal against civil penalties and requirements to pay associated costs imposed under the Bill, respectively. In England and Wales, and in Northern Ireland, the appeal is to the High Court, and in Scotland, to the Court of Session. The Bill provides for these appeals to involve a 'full merits review' (i.e. the appeal court may quash or reduce the penalty or costs at its discretion) in order to ensure an adequate level of scrutiny for Article 6

compatibility even if the criminal limb applies. Under section 6(1) of the Human Rights Act 1998 the appeal court (as a public authority) will also be prohibited from acting in a way which is incompatible with Convention rights, so these proceedings should be conducted in a way which is compatible with Article 6.

Interim orders and final orders (clauses 25 and 26)

62. The interim order power in clause 25 enables the Secretary of State to impose temporary requirements and prohibitions on persons in relation to a trigger event whilst a national security assessment is ongoing for the purpose of preventing or reversing action which might pre-empt the regime. The Secretary of State could, for example, impose a 'standstill' requirement in respect of a trigger event in progress.

63. Whether the imposition of an interim measure engages Article 6 depends on whether it effectively determines a civil right or obligation notwithstanding the length of time it is in force, bearing in mind the nature of the interim measure, its object and purpose as well as its effect on the right in question (*Micallef v Malta* [GC], no. 17056/06, ECHR 2009, paragraphs 80-85).

64. Given their purpose (to prevent or reverse pre-emptive action) and temporary nature (as short-term measures that precede either a clearance decision or the making of a final order), the Government anticipates that in most cases interim orders should not be determinative of any civil rights or obligations and, where this is the case, Article 6 will not be engaged. However, the Government accepts that there may be rare instances where an interim order could be regarded as effectively determining a civil right if in practice it has some form of permanent effect. This could be the case, for example, where a temporary standstill requirement results in the insolvency of a business because the trigger event was prevented from completing. The Government cannot therefore rule out some interim orders engaging the civil limb of Article 6.

65. The final order provision in clause 26 enables the Secretary of State to impose requirements and prohibitions on persons in relation to a trigger event at the end of the national security assessment, for the purpose of safeguarding national security. Final orders will engage the civil limb of Article 6 where they determine property rights, the right to carry on a business, or some other civil right or obligation.

66. All regime decisions other than the imposition of civil penalties and requirements to pay associated costs (which have already been considered above), including the imposition of interim orders and final orders, will be subject to judicial review. This is considered to be a sufficient standard of review in all the circumstances to ensure compatibility with Article 6. Article 6 does not in general require administrative decisions to be subject to an appeal on the merits, as opposed to a judicial review of the lawfulness of the decision-making process, especially when the decision under review is substantially based on "grounds of expediency" (*R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60; [2015] AC 945, paragraph 31). The subject matter of regime decisions is national security. The question of whether something is in the interests of national security is a matter of judgment and policy entrusted to the executive, not a matter for judicial decision; the executive is in the best position to judge what national security requires (*Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153, paragraphs 26 and 50). Furthermore, a wide margin of appreciation is afforded to ECHR States in matters relating to national security (*Konstantin Markin v Russia* [GC], no. 30078/06, ECHR 2012, paragraph 134).

67. This approach follows the precedent of the current merger control regime: section 120 of the Enterprise Act 2002 provides for the Competition Appeal Tribunal to apply judicial review principles in reviews of merger decisions, including in interventions by the Secretary of State on national security grounds.

Judicial review time limit (clause 49)

68. Clause 49 shortens the time limit for bringing a judicial review in respect of regime decisions relating to the screening of trigger events from the usual 3 months (which in England and Wales is subject to a requirement to act promptly) to 28 days from when the grounds to make the claim first arose, unless the court considers that exceptional circumstances apply. This constitutes a limitation on access to justice and thus an interference with Article 6.

69. Article 6 does not confer an absolute right of access to the courts as EHCR States enjoy a margin of appreciation in laying down regulations that entail certain limitations, provided that the very essence of the right of access to the courts is not impaired and the limitations serve a legitimate aim and are proportionate (*Ashingdane v United Kingdom*, no. 8225/78, 28 May 1985, paragraph 57).

70. The shorter time limit for bringing certain judicial reviews is considered to be compatible with Article 6. The time limit will not impair the very essence of the right of access to justice because litigants will still have a significant period of time – 28 days – in which to bring a claim. In fact, a similar time limit applies to legal challenges under the current merger control regime, including in relation to national security screening. Rule 25 of the Competition Appeal Tribunal Rules 2015 provides that an application to the Competition Appeal Tribunal to review a merger decision must be made within four weeks of the date on which the applicant was notified of the merger decision, or the date of its publication, whichever is the earlier. This time limit was chosen following a public consultation and has been in place since 2003.

71. Furthermore, the shorter time limit is in pursuance of a legitimate aim, namely the avoidance of prolonged uncertainty over screened acquisitions (particularly those which have already completed and where there has already been a measure of business integration) or the general functioning of the screening regime (for example about the validity of the statement under clause 3 setting out how the Secretary of State expects to exercise the call-in power), which may have a chilling effect on investment. There is also a public interest in timely certainty and finality in relation to final orders given that they are imposed for the purpose of safeguarding national security. It is not considered that the same need for timely certainty applies to challenges to decisions relating to regime enforcement or to information sharing which is not for the purpose of a national security assessment, so these have been excluded from the shorter time limit.

72. The Government considers the chosen time limit to be proportionate on the basis that it strikes the right balance between the need for timely certainty and the need to ensure that there is an adequate opportunity to challenge regime decisions, including in the event that there are practical obstacles to bringing proceedings. In addition, the power of the court under clause 49(5) to allow a late claim to proceed if it considers that exceptional circumstances apply will act as a 'safety net' to ensure that any limiting of access to justice is proportionate in all the circumstances.

Overseas information sharing (clauses 54 and 59)

73. Clause 54(2) enables the Secretary of State to disclose information which he has received in connection with the screening regime to overseas public authorities for the purposes of criminal or relevant civil investigations or proceedings. Clause 59 amends section 243 of the Enterprise Act 2002, which gives publics authorities a corresponding power to share information received in connection with a merger investigation under Part 3 of that Act. This may give rise to concerns

about the effect that such disclosure may have in the country or the territory of the authority to whom the disclosure is made.

74. Before sharing information with an overseas public authority, clause 54(7) requires the Secretary of State to have regard to whether the law of the country or territory to whose authority the disclosure would be made provides protection against self-incrimination in criminal proceedings corresponding to that provided in the UK. Section 243(6)(b) of the Enterprise Act 2002 already requires public authorities to have regard to this consideration. Furthermore, public authorities are prohibited by section 6(1) of the Human Rights Act 1998 from acting in a way which is incompatible with Article 6. The powers are therefore compatible with Article 6.

Article 8: Right to respect for private and family life

75. Article 8 of the ECHR provides that everyone has the right to respect for his private and family life, his home and his correspondence.

Screening regime

76. Article 8 is engaged because the Bill confers powers on the Secretary of State to collect, store and disclose personal data in connection with the screening regime, for example, an individual's name, home address, or professional and business activities.

77. The collection, storage and disclosure of personal data by a public authority such as the Secretary of State are likely to constitute an interference with Article 8 rights.

Information gathering (clauses 14, 16 18, 19, 20 and 56)

78. The Government considers that the Bill provisions under which the Secretary of State may obtain and store personal information are compatible with Article 8.

79. Personal data may be provided to the Secretary of State in response to an information notice pursuant to clause 19, or an attendance notice pursuant to clause 20. These will be issued at the discretion of the Secretary of State. They are subject to statutory tests and other safeguards which should ensure that any interference with Article 8 rights is "in accordance with the law" (i.e. the requirement of lawfulness), in pursuit of a legitimate aim, and necessary in a democratic society, i.e. proportionate to the legitimate aim pursued.

80. The information notice and attendance notice provisions meet the requirement of lawfulness. They set out clear statutory tests for issuing requirements to provide information or to give evidence. They set out that these requirements must relate to the functions of the Secretary of State under the Bill, so the scope of the Secretary of State's discretion is sufficiently clear and foreseeable. Furthermore, there are adequate procedural safeguards surrounding the exercise of these powers. Notices must state the purpose for which they have been given and the possible consequences of not complying. The Bill makes clear that recipients are not required to provide information or evidence that they could not be compelled to provide in civil proceedings. The issuing of information notices and attendance notices will also be subject to judicial review.

81. It should be the case that personal data is collected and stored in connection with these powers only where this is necessary and proportionate in the interests of national security or for some other valid connected purpose such as enforcement of regime obligations. These are clearly legitimate aims for the purposes of Article 8. As stated, the statutory tests explicitly require the information or evidence to relate to the exercise of the functions of the Secretary of State under the Bill, i.e. the screening of acquisitions on national security grounds and related enforcement. The statutory tests explicitly prohibit the Secretary of State from requesting information or evidence unless this is proportionate to the use to which the information or evidence is to be put. The procedural safeguards set out above also contribute to the proportionality of the powers, as does the entitlement to travel expenses if a person is required to give evidence more than 10 miles from their place of residence.

82. A further safeguard is the overriding provision in clause 57 which essentially requires any disclosure or use of personal data pursuant to a power or duty in the Bill to be in accordance with data protection legislation. Hence the safeguards in data protection legislation on the use, which includes storage and retention, of personal data will apply to personal data gathered under the Bill. These safeguards include storage limitation and confidentiality requirements, for example.

83. Under clause 56 the Secretary of State may by direction require the Competition and Markets Authority to provide him with information. This could include personal data. This provision meets the requirement of lawfulness. It sets out a clear statutory test for exercising the power. The scope of the Secretary of State's discretion is sufficiently clear and foreseeable as the test provides that the information must be for the purpose of enabling the Secretary of State to exercise his functions under the Bill. The statutory test also only places a duty on the Competition and Markets Authority

to provide information which the Secretary of State reasonably requires. Personal data should therefore be collected and stored in connection with this power only where this is necessary and proportionate in the interests of national security or for some other valid connected purpose such as enforcement of regime obligations. As already stated, these are clearly legitimate aims for the purposes of Article 8. The data protection safeguards provided for by clause 57 will also apply to any personal data disclosed to the Secretary of State under this clause.

84. Personal data may also be collected by the Secretary of State as part of the mandatory notification procedure, pursuant to clause 14, as part of the voluntary notification procedure, pursuant to clause 18, or as part of an application for retrospective validation of a notifiable acquisition completed without approval, pursuant to clause 16.

85. These provisions meet the requirement of lawfulness as they make clear the purpose of the notification/application in each case. The notification/application is in each case part of an initial screening process of acquisitions on national security grounds. Information is required to be provided under the mandatory notification procedure if the proposed acquirer wishes to obtain approval for their acquisition. In the other contexts, information will be provided voluntarily in order to obtain a call-in decision or retrospective validation from the Secretary of State. The provisions also provide for the Secretary of State to prescribe the required contents of notifications/applications in regulations, so it should be sufficiently clear and foreseeable what information is required.

86. It should be the case that personal data is collected and stored in connection with these provisions only where this is necessary and proportionate in the interests of national security, which, as already stated, is a legitimate aim for the purposes of Article 8. These provisions are about the provision of information to the Secretary of State so that he is in a position to decide whether to call-in an acquisition for reasons of national security. The information that the Secretary of State requires to be provided, when prescribing the required contents of notifications/applications in regulations, should be related to this assessment only in order to comply with the statutory purpose. There is also nothing to prevent the Secretary of State from requiring only a proportionate amount of information to be provided. The overriding provision in clause 57 essentially requiring personal data to be stored and retained in accordance with the requirements of data protection legislation applies as a safeguard to information collected under these provisions too.

Information sharing (clause 54)

87. Clause 54 authorises the Secretary of State to disclose information obtained under the Bill to a public authority or to an overseas public authority. This could include personal information. The Government considers that this provision is compatible with Article 8.

88. The provision meets the requirement of lawfulness. In particular, it sets out in clear terms, in subsections (2) and (3), the purposes for which information may be disclosed. The circumstances in which personal data may be shared by the Secretary of State are therefore sufficiently clear and foreseeable. The offence of unauthorised disclosure of information under clause 35 provides an additional safeguard which contributes to lawfulness. Information sharing will also be subject to judicial review.

89. It should be the case that personal data is disclosed by the Secretary of State pursuant to clause 54 only where this is necessary and proportionate in pursuance of a legitimate aim. The purposes for which information may be shared as set out in subsections (2) and (3) are: to facilitate the functions of the Secretary of State under the Bill (i.e. the screening of acquisitions on national security grounds and related enforcement); to prevent or detect crime; for criminal investigations or proceedings; for civil proceedings under the Bill; to protect national security; to facilitate corresponding functions of an overseas public authority (sharing for this purpose may well have implications for the national security of the UK too). These are legitimate aims for the purposes of Article 8. The offence of unauthorised disclosure of information under clause 35 contributes to ensuring that disclosure only occurs for a permitted purpose.

90. In relation to proportionality, clause 54 contains safeguards which apply to the disclosure of personal data. Subsection (4) places a restriction on use for an alternative purpose by a recipient or onward disclosure without the consent of the Secretary of State. This is backed by the offence of unauthorised use or disclosure of information under clause 35. Pursuant to subsection (6) the Secretary of State must consider whether disclosure would prejudice, to an unreasonable degree, the commercial interests of any person concerned. Pursuant to subsection (7), before making an overseas disclosure the Secretary of State must consider whether the law of the country or territory to whom the disclosure would be made provides protection against self-incrimination in criminal proceedings which corresponds to the protection provided in the UK and whether the matter in respect of which the disclosure is sought is sufficiently serious. Clause 55 sets out

additional safeguards which are to apply to the disclosure of information from Her Majesty's Revenue and Customs, including a requirement for Revenue and Customs to consent to the disclosure. The overriding provision in clause 57 essentially requiring personal data to be disclosed in accordance with the requirements of data protection legislation (including for example the need for appropriate security measures) also applies as a safeguard to disclosures under clause 54.

Amendment to Part 9 of the Enterprise Act 2002 (clause 59)

91. The Government considers that the amendment to Part 9 of the Enterprise Act 2002 in clause 59 of the Bill is compatible with Article 8. When deciding whether to disclose personal data to an overseas public authority that has come to a public authority in connection with a merger investigation under Part 3 of the Enterprise Act 2002, the public authority will have to comply with the pre-existing safeguards contained within Part 9 of the Act. It will have to assess whether the matter in respect of which the disclosure is sought is sufficiently serious to justify making the disclosure (section 243(6)(a) of the Enterprise Act 2002). It will also have to have regard to the need to exclude from disclosure commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates or information relating to the private affairs of an individual whose disclosure the authority thinks might significantly harm the individual's interests (section 244(3) of the Enterprise Act 2002). Any disclosure of such information must be necessary for the purpose for which the authority is permitted to make the disclosure (section 244(4) of the Enterprise Act 2002).

92. The safeguards in sections 243 and 244 of the Enterprise Act 2002 do not go as far as the safeguards in the data protection legislation (as defined by section 3 of the Data Protection Act 2018). However, public authorities will have to comply with the provisions of the data protection legislation and section 237(4) of the Enterprise Act 2002 makes it clear that nothing in Part 9 of the Enterprise Act 2002 authorises disclosure that would be prohibited by the data protection legislation.

Article 14: Prohibition of discrimination

93. Article 14 of the ECHR provides that the enjoyment of rights and freedoms set forth in the ECHR shall be secured without discrimination on any ground, including nationality. Article 14 therefore provides for a right not to be discriminated against on grounds of nationality. It can be relied upon by both natural and legal persons.

94. The screening regime provisions apply equally to UK and foreign investors. They are not therefore directly discriminatory.

95. Even if the exercise of the powers in the Bill prove in practice to involve differential treatment of UK and foreign investors (or between foreign investors from different countries) by the Secretary of State, and to thereby engage Article 14 when read in conjunction with Article 1 Protocol 1 property rights (as to which see below), there should be a reasonable and objective justification for this, namely the need to protect national security. The powers in the Bill are predicated on the need to protect national security. For example, subsection (3) of clause 26 provides that the Secretary of State may only make a final order if he reasonably considers that the provisions of the order are necessary and proportionate for the purpose of preventing, remedying or mitigating a risk to national security, which the Secretary of State must also be satisfied, on the balance of probabilities, exists. Furthermore, a wide margin of appreciation is afforded to ECHR States in matters relating to national security (*Konstantin Markin v Russia* [GC], no. 30078/06, ECHR 2012, paragraph 134). The powers in the Bill are therefore considered to be compatible with Article 14.

Article 1 of the First Protocol: Protection of property

96. Article 1 of the First Protocol to the ECHR ("A1P1") provides that every natural or legal person is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. A1P1 includes the qualification that it does not impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Call-in power (clause 1)

97. Clause 1 of the Bill enables the Secretary of State to call in trigger events for a national security assessment. The Government does not consider that the call-in power itself engages A1P1. Call-in itself places no restrictions on the trigger event. It essentially amounts to a notification of the start of the formal process. Furthermore, the Bill does not require call-in notices or the fact of call-in to be published. Under the mandatory notification regime, notifiable acquisitions must be approved by the Secretary of State before completing. While call-in may therefore delay an approval decision, the Government considers that it is not call-in which engages A1P1 in this

circumstance but the separate and prior requirement for approval under the mandatory notification provisions (considered in detail below). Call-in does not therefore appear to be capable of interfering with property rights.

98. The call-in power is however relevant to the A1P1 compatibility of the interim order and final order provisions as it determines which trigger events may be assessed by the Secretary of State and therefore which trigger events the Secretary of State may potentially impose remedies in relation to, and it is therefore addressed further below where relevant.

Interim orders and final orders (clauses 25 and 26)

99. The interim order (clause 25) and final order (clause 26) provisions enable the Secretary of State to impose requirements and prohibitions on persons during and at the end of the national security assessment, respectively. A1P1 is engaged by these provisions. Interim orders and final orders may interfere with the peaceful enjoyment of personal property. For example, by placing restrictions on the exercise of board rights in a company or the use of an asset.

100. The interim order and final order provisions are considered to be compatible with A1P1. The making of interim orders and final orders will be at the discretion of the Secretary of State and subject to statutory tests and other safeguards which should ensure that any interference with property rights is "subject to the conditions provided for by law" (i.e. the requirement of lawfulness), and pursues a legitimate aim by means reasonably proportionate to the aim sought to be realised.

101. Interim orders and final orders may only be made in relation to trigger events that have been called in for assessment by the Secretary of State. The Bill provisions provide for sufficient clarity in respect of the circumstances in which the call-in power may be used and therefore the circumstances in which an interim order or final order could potentially be made to meet the requirement of lawfulness. The Bill contains detailed provisions regarding what constitutes a trigger event. Although broad concepts, qualifying entities and qualifying assets are defined in clear terms, as are the thresholds for gaining control of these. In particular, the concept of acquiring control of an entity by acquiring material influence over its policy has been drawn from the merger control regime under Part 3 of the Enterprise Act 2002, and will therefore be familiar to regime actors and their advisors. Notwithstanding the somewhat different context (the merger

control regime is competition-focused and applies to businesses only), actors should be able to reasonably foresee when acquisitions might be caught by the regime.

102. Furthermore, clause 1 sets out a clear call-in test. The Secretary of State will not be able to use the call-in power unless he has first published a statement under clause 3 setting out how he expects to exercise the call-in power. The Secretary of State will also be required to have regard to the statement before giving any call-in notice. The statement should therefore provide further clarity and transparency regarding the Secretary of State's likely use of the call-in power in practice. In particular, it should assist actors in foreseeing when their activities are more likely to be called in for scrutiny.

103. Pursuant to clause 25(1) the Secretary of State may only make an interim order if he reasonably considers that the provisions of the order are necessary and proportionate for the purpose of preventing or reversing pre-emptive action, or mitigating its effects. "Pre-emptive action" is defined in subsection (2) as action which might prejudice the exercise of the functions of the Secretary of State under the Bill.

104. The interim order provision meets the requirement of lawfulness. It sets out a clear statutory test. Although it does not require the Secretary of State to consider representations before making an interim order (the need to act speedily to prevent or reverse pre-emptive action may preclude this), it does not prohibit this. Clause 28 requires reasons for the making of an interim order and other details about the order to be provided to persons subject to it. Furthermore, pursuant to clause 27 the Secretary of State is required to keep interim orders under review and to consider any request by a person subject to one for it to be varied or revoked. Interim orders will also be subject to judicial review. It is therefore considered that there are adequate procedural safeguards for the purposes of A1P1 surrounding the exercise of this power.

105. The interim order statutory test should ensure that any interference with property rights pursues a legitimate aim by means reasonably proportionate to the aim sought to be realised. The test sets out that the purpose of an interim order must be to prevent or reverse action which might prejudice the functions of the Secretary of State under the Bill, i.e. the carrying out of national security assessments and the imposition of remedies in the interests of national security, or to mitigate the effects of such action. It is a legitimate aim to prevent or reverse such action, or to mitigate its effects, in particular as these may themselves be detrimental to national security.

The statutory test explicitly requires the Secretary of State to reasonably consider the provisions of the order to be necessary and proportionate to this end. Furthermore, an interim order may only be made after call-in, which means that the call-in test requiring reasonable suspicion of a trigger event and of a risk to national security from that trigger event should also have been met. In other words, there should be an adequate evidential basis to justify an interim order in relation to the trigger event concerned. The procedural safeguards attached to this power (see above) will also contribute to the proportionality of any interference. Furthermore, interim orders may only remain in force for the duration of the assessment period. This is time limited and only extendable if rigorous statutory tests are met and, in some cases, if the acquirer agrees to the extension. Clause 25(5) also sets out restrictions on the extraterritorial application of interim orders.

106. Pursuant to clause 26(3) the Secretary of State may only make a final order if he is satisfied, on the balance of probabilities, that a trigger event has taken place or is in progress or contemplation, and a risk to national security has arisen from the trigger event or would arise from the trigger event if completed. The Secretary of State must also reasonably consider that the provisions of the order are necessary and proportionate for the purpose of preventing, remedying or mitigating the national security risk.

107. The final order provision meets the requirement of lawfulness. It sets out a clear statutory test. Clause 26(4) requires the Secretary of State to consider representations made to him before making a final order. Clause 28 requires reasons for the making of a final order and other details about the order to be provided to persons subject to it. Furthermore, pursuant to clause 27 the Secretary of State is required to keep final orders under review and to consider requests to vary or revoke such orders from persons subject to them (unless there has been no material change of circumstances since the order was made or last varied, or the person's previous request). Final orders will also be subject to judicial review. It is therefore considered that there are adequate procedural safeguards for the purposes of A1P1 surrounding the exercise of this power.

108. The final order statutory test should ensure that any interference with property rights pursues a legitimate aim by means reasonably proportionate to the aim sought to be realised. The test sets out that the purpose of a final order must be to prevent, remedy or mitigate a risk to national security. The protection of national security is clearly a legitimate aim which can justify interference with property rights. The statutory test explicitly requires the Secretary of State to reasonably consider the provisions of the order to be necessary and proportionate to this end.

Furthermore, the test requires the Secretary of State to be satisfied, on the balance of probabilities, that a trigger event has taken place or is in progress or contemplation, and that a risk to national security has arisen or would arise from the trigger event. Thus, there should be an adequate evidential basis to justify a final order in relation to the trigger event concerned. The procedural safeguards attached to this power (see above) will also contribute to the proportionality of any interference. In addition, clause 26(6) sets out restrictions on the extraterritorial application of final orders.

Mandatory notification regime (clauses 6, 13 and 14)

109. The mandatory notification provisions (clauses 6, 13 and 14) require proposed acquirers of certain shares or voting rights in the qualifying entities to be specified in regulations by the Secretary of State, to obtain approval from the Secretary of State before completing their acquisition (but not before taking any preparatory steps short of completion). If approval is not obtained, the acquisition will be void, or, in other words, of no legal effect. Although the obligation is placed on the acquirer to obtain approval, these provisions constitute a control on the use of the seller's property, i.e. effectively preventing the seller from selling the property until approval has been obtained. A1P1 is therefore engaged. A1P1 only extends to existing possessions, so a proposed acquirer is unlikely to have a property right within the meaning of A1P1. The Government cannot however rule this out entirely. For example, it may be possible for a proposed acquirer to have a legitimate expectation in relation to the proposed acquisition.

110. The control of use is a temporary one specifically in relation to the mandatory notification provisions. The restriction on completion operates until the Secretary of State makes a final decision under the call-in process, either following receipt of a mandatory notice from the proposed acquirer or on his own initiative. If this involves a permanent interference with property rights, for example a blocking of the acquisition, then this results from the final order that provides for this rather than the mandatory notification provisions themselves.

111. To the extent that the voiding of a notifiable acquisition completed without approval separately engages A1P1, this does not constitute a deprivation of possessions within the meaning of A1P1. The property at no point passes to the proposed acquirer as the acquisition is of no legal effect. The seller retains the property and may deal with it in any lawful way they wish.

112. The mandatory notification provisions are considered to be compatible with A1P1.

113. The requirement of lawfulness is met. The notifiable acquisitions that require approval are clearly and objectively defined in clause 6. Regulations are to set out the remaining element, namely the qualifying entities the acquisitions must relate to. Proposed acquirers should, at least with appropriate advice, be able to determine whether they come within the mandatory notification regime to the extent set out in the Bill.

114. Interference with property rights pursuant to the mandatory notification provisions is capable of being in pursuit of a legitimate aim, namely the protection of national security, by means reasonably proportionate to the aim sought to be realised. This will depend on the content of the regulations made by the Secretary of State specifying the qualifying entities in relation to which relevant acquisitions will be notifiable. The regulation-making power is capable of being exercised compatibly with A1P1. Furthermore, a wide margin of appreciation is afforded to ECHR States in matters relating to national security (*Konstantin Markin v Russia* [GC], no. 30078/06, ECHR 2012, paragraph 134). Many countries, including for example France and Germany, operate investment-screening regimes that require authorisation prior to completion on grounds of national security.

115. The effect of the mandatory notification provisions in the Bill is to enable the Secretary of State to pre-screen certain acquisitions in relation to the qualifying entities to be specified in regulations, on national security grounds. The included types of acquisition are those which either result in control over qualifying entities, or which may realistically result in control through the acquisition of material influence. It would not be possible to require the acquisition of material influence to be notified as this is a subjective concept. Instead, an objective threshold has been chosen, namely the acquisition of 15% or more of the shares or voting rights in an entity, which may realistically result on its own or in combination with other sources of influence (board appointment rights, for example) or factors in material influence. The concept of material influence has been drawn from the merger control regime under Part 3 of the Enterprise Act 2002. The Competition and Markets Authority, which is responsible for investigating mergers for competition issues, has issued guidance stating that it may examine any shareholding of 15% or more in order to see whether the holder might be able to exercise material influence. Where a proposed acquisition of 15% or more of the shares or voting rights in an entity is notified to the Secretary of State, he will be in a position to consider whether in his view the threshold for material influence

will be met. Non-business qualifying entities have not been excluded from inclusion in the mandatory notification regime. Acquisitions of control over such entities may entail a national security risk if they are engaged in sensitive activities.

116. In relation to proportionality, the provisions only restrict the completion of notifiable acquisitions, not steps preparatory to this. As analysed above, this amounts only to a temporary control of use. Only acquisitions in relation to qualifying entities which carry on activities in the UK may be made notifiable in the regulations. The Secretary of State will be able to amend the qualifying entities and the acquisition types in scope through regulations. The regime will therefore be flexible, for example if operational experience suggests that the thresholds have not been set at the right level. Acquisitions which are impossible for the proposed acquirer to notify in advance, and therefore impossible to obtain prior approval for, are specifically excluded from the mandatory notification regime by clause 6(3). Proposed acquirers will have the right to a timely decision (within 30 working days) on whether a call-in notice will be issued in relation to their acquisition. If a call-in notice is issued, the assessment process will be subject to time limits (including an initial period of 30 working days) which may only be extended if rigorous statutory tests are met (in particular requiring the Secretary of State to reasonably believe, or be satisfied on the balance of probabilities, that a risk to national security would arise from the trigger event if completed) and, in some cases, if the proposed acquirer agrees to the extension. The Secretary of State will have the power to make regulations exempting acquisitions from mandatory notification on the basis of the characteristics of the acquirer. For example, passive investors may be excluded on the basis that they are less likely to pose a risk even if the acquisition itself is a sensitive one. This power contributes to the proportionality of the regime. The Secretary of State's powers to retrospectively validate void acquisitions under clauses 16 to 18, either of his own initiative or on the application of any person who has been materially affected by the voiding, also contributes to the proportionality of the regime.

117. To the extent that the voiding of non-approved notifiable acquisitions separately engages A1P1, the Government considers that voiding is capable of being in pursuit of a legitimate aim, namely the protection of national security, by means reasonably proportionate to the aim sought to be realised. As stated above, this will depend on the content of the regulations specifying the qualifying entities in relation to which relevant acquisitions will be notifiable. The regulation-making power is capable of being exercised compatibly with A1P1.

118. To mitigate against the possible harm to national security if a notifiable acquisition completes without approval, the law will not recognise or enforce the acquisition. This will not ensure that there will be no de facto exercise of control by the purported acquirer, but it will make it more likely that an interested party might raise an issue with the acquisition which could avoid possible harm to national security and lead to the Secretary of State being alerted to a national security risk. For example, a company may only become aware of a share acquisition after completion when asked to update its shareholder register. In the case of a notifiable acquisition, the company may question the validity of the acquisition and refuse to recognise it or inform the Secretary of State.

119. Furthermore, while it will be an offence for proposed acquirers to complete without approval, determined hostile actors may not be deterred by this and a risk to national security may 'crystallise' on day one of an acquisition. Voiding acts as an additional deterrent against parties proceeding without clearance.

120. In addition, voiding increases the likelihood of non-screened acquisitions being brought to the Secretary of State's attention. The Bill gives the Secretary of State the power to retrospectively validate void acquisitions. This may encourage interested parties to inform the Secretary of State of non-screened acquisitions, thereby enabling him to assess these for national security risks.

Civil penalties and recovery of associated costs (clauses 40 and 45)

121. The Government considers that civil penalties and requirements to pay associated costs under the Bill will engage and interfere with A1P1 as they will require possessions, i.e. money, to be paid to the Secretary of State.

122. The imposition of civil penalties and requirements to pay associated costs will be at the discretion of the Secretary of State and subject to statutory tests and other safeguards which should ensure that any interference with property rights is "subject to the conditions provided for by law" (i.e. the requirement of lawfulness), and pursues a legitimate aim by means reasonably proportionate to the aim sought to be realised.

123. The civil penalty provision meets the requirement of lawfulness. It sets out a clear statutory test for imposition. The criminal offences in relation to which a civil penalty are available (under

clauses 32 to 34) are clearly defined. The circumstances in which a civil penalty may be imposed are thus sufficiently clear and foreseeable. Clause 40(7) requires the Secretary of State to take various factors into account when determining a penalty, including the ability of the person on whom the penalty is to be imposed to pay the penalty, which are consistent with the eliciting of representations before a penalty is imposed. Subsection (8) requires a range of information about the penalty to be provided to the penalised person, including the grounds of imposition. Furthermore, the Secretary of State is required to keep monetary penalties under review. Civil penalties will also be subject to appeal incorporating a 'full merits review'. It is therefore considered that there are adequate procedural safeguards for the purposes of A1P1 surrounding the exercise of this power.

124. The civil penalty statutory test should ensure that any interference with property rights pursues a legitimate aim by means reasonably proportionate to the aim sought to be realised. The test permits a civil penalty to be imposed only for certain criminal offences under the Bill. Imposition of penalties is expressly envisaged as a legitimate aim by A1P1. Furthermore, the punishment of crime is clearly a legitimate aim which can justify interference with property rights. Given that the offences criminalise non-compliance with a national security screening regime, a further legitimate aim is deterrence of such conduct with a view to the protection of national security. The statutory test explicitly requires the Secretary of State to be satisfied beyond reasonable doubt that the person has committed the offence before imposing a penalty. Thus, there should be an adequate evidential basis to justify interference with property rights.

125. In relation to proportionality, the Secretary of State is required by clause 40(6) to consider the amount of a penalty to be appropriate before imposing it and furthermore, pursuant to clause 40(7), must consider the seriousness of the offence and the ability of person to pay the penalty when setting a penalty. The procedural safeguards attached to this power (see above) will also contribute to the proportionality of any interference.

126. The cost recovery provision meets the requirement of lawfulness. It sets out a clear basis for requiring costs to be paid. Possible categories of costs which may be required to be paid are set out. The circumstances in which a costs requirement may be imposed and what this could entail should be sufficiently clear and foreseeable. Clause 45(4) requires a range of information about a costs requirement to be provided to the person required to pay, including the grounds for making the requirement. Furthermore, the Secretary of State is required to keep costs

requirements under review. Costs requirements will also be subject to appeal incorporating a 'full merits review'. It is therefore considered that there are adequate procedural safeguards for the purposes of A1P1 surrounding the exercise of this power.

127. The cost recovery provision should ensure that any interference with property rights pursues a legitimate aim by means reasonably proportionate to the aim sought to be realised. The provision permits a requirement to pay costs to be made only in relation to costs relating to the imposition of a monetary penalty. These costs may include investigation costs, administration costs and the costs of obtaining expert advice. Ensuring that those who commit offences and are penalised also contribute financially to the upkeep of an enforcement regime which has the twin objectives of detecting and punishing crime and protecting national security through deterrence is clearly a legitimate aim which can justify interference with property rights. The procedural safeguards attached to this power (see above) will contribute to the proportionality of any interference.

Information gathering and sharing (clauses 14, 16, 18, 19, 20, 54, 56 and 59)

128. Valuable confidential commercial information can constitute a possession within the meaning of A1P1 *(Veolia Es Nottinghamshire Ltd v Nottinghamshire County Council* [2010] EWCA Civ 1214; [2012] PTSR 185, [121]).

129. The collection and storage of confidential commercial information by the Secretary of State pursuant to clauses 14, 16, 18, 19, 20 and 56 are, therefore, likely to constitute an interference with A1P1. Moreover, the disclosure of confidential commercial information by the Secretary of State or another public authority pursuant to clause 54 or clause 59 potentially constitute an interference with the right to private property protected by A1P1.

130. The Government considers that the information gathering and information disclosure provisions are compatible with A1P1 with respect to confidential commercial information on the basis that any interference with property rights should be "subject to the conditions provided for by law" (i.e. the requirement of lawfulness), and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised.

131. In relation to the provisions under the screening regime (i.e. all of the clauses bar clause 59), this is the case for essentially the same reasons as those provisions are compatible with

Article 8 (though the safeguards attached to personal data mentioned may not necessarily apply to commercial information). In addition, there are further safeguards in relation to commercial information under the screening regime. Pursuant to clauses 28(5) and 29(3) the Secretary of State is empowered to withhold, from a served final order (or accompanying explanatory material) or the published notice of a final order respectively, anything the disclosure of which is likely to prejudice the commercial interests of any person.

132. The amendment to section 243(3)(d) of the Enterprise Act 2002 serves to protect the economic well-being of the country and the rights of others. Removing the restriction on the disclosure of merger information under the overseas disclosure gateway pursues a legitimate aim in that it would facilitate the CMA cooperating with overseas competition authorities in addressing the potential anti-competitive effects of mergers on UK markets.

133. A UK public authority making a disclosure under the overseas disclosure gateway must comply with the pre-existing safeguards contained within Part 9 of the Act. It must assess whether the matter in respect of which the disclosure is sought is sufficiently serious to justify making the disclosure (section 243(6)(a)). It must consider whether the disclosure is contrary to the public interest, and whether the disclosure would cause significant harm to the interests of the business to which it relates (section 244(2) and (3)(a)). If the public authority considers that the disclosure could significantly harm the interests of a business, then it must make a judgment as to the extent to which the disclosure is necessary for the purpose for which the authority is able to make the disclosure to the overseas public authority (section 244(4)).

Department for Business, Energy and Industrial Strategy
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