NATIONAL SECURITY AND INVESTMENT BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the National Security and Investment Bill as introduced in the House of Commons on 11 November 2020 (Bill 210).

- These Explanatory Notes have been prepared by the Department for Business, Energy and Industrial Strategy in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

1 The Bill will establish a new statutory regime for Government scrutiny of, and intervention in, investments for the purposes of protecting national security. The regime makes provision for:

a. a power to issue "call-in" notices that the Secretary of State may use to call in acquisitions of control over qualifying entities or assets ("trigger events") to undertake a national security assessment whether or not they have been notified to the Government;

b. the Secretary of State to publish a statement on how he expects to use the power to give a call-in notice;

c. a mandatory notification system requiring proposed acquirers of certain shares or voting rights in specified qualifying entities to obtain clearance from the Secretary of State for their acquisitions before they take place;

d. powers which enable the Secretary of State to amend by regulations the acquisitions which fall within scope of the mandatory notification system;

e. a voluntary notification system which is intended to encourage notifications from parties who consider that their trigger event may raise national security concerns;

f. the statutory process that is to be used to assess specific trigger events for national security concerns;

g. remedies to address risks to national security, sanctions for non-compliance with the regime and the mechanism for legal challenge; and

h. interaction with the Competition and Markets Authority.

2 In addition, clause 59 of the Bill amends the overseas disclosure gateway in the Enterprise Act 2002 removing the restriction on UK public authorities disclosing information that comes to them in connection with a merger investigation under that gateway.

Policy background

3 The Government published a review of its powers to scrutinise and intervene in investments as a Green Paper on 17 October 2017, 'National Security and Infrastructure Investment Review'.

4 The Green Paper explained that, until now, the UK has used the Enterprise Act 2002 as the legislative basis to examine mergers for the purposes of national security and other areas of public concern. The Green Paper found that there was a case for reforming the Government's powers. It therefore proposed short and long-term measures to do so and held a public consultation, which closed on 17 November 2017.

5 The Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018 (S.I. 2018/578) and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018 (S.I. 2018/593) were made on 14 May 2018 to implement the short-term measures proposed in the Green Paper. These orders amended the 'share of supply' and 'turnover' thresholds to enable the Secretary of State to intervene in more mergers on public interest grounds in three sectors of the economy: military or dual-use goods which are subject to export control; computer processing units; and, quantum technology.

6 Building on the Green Paper's proposals for long-term reform, the White Paper, "National Security and Investment: A consultation on proposed legislative reforms", was published on 24 July 2018 along with a draft 'Statement of Policy Intent'. The White Paper set out detailed proposals for how the Government proposes to reform its powers to protect national security from hostile actors using the ownership of, or influence over, businesses and assets to harm the country.

7 Following the 2019 General election, the Queen's Speech of December 2019 outlined the Government's intention to *"… work closely with international partners to help solve the most complex international security issues and promote peace and security globally. It will stand firm against those who threaten the values of the United Kingdom…"* (Queen's Speech, December 2019). The briefing pack accompanying the Queen's Speech detailed the ambitions of the National Security and Investment Bill. The briefing stated that the purpose of the Bill is: *"[to] Strengthen the Government's powers to scrutinise and intervene in business transactions (takeovers and mergers) to protect national security; and, provide businesses and investors with the certainty and transparency they need to do business in the UK."*

8 On 26 February 2020, the Government outlined its intention to overhaul its approach to foreign, defence, security and development policy. The Government indicated its intention of considering: "the totality of global opportunities and challenges the UK faces and determining how the whole of government can be structured, equipped and mobilised to meet them." (Integrated Review, 26 February 2020).

9 Two Orders, the Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2020 (S.I. 2020/748) and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2020 (S.I. 2020/763) were made on 20 July 2020 to expand on the 2018 measures (see paragraph 5). These orders expanded the 'share of supply' and 'turnover' thresholds to enable the Secretary of State to intervene in mergers on public interest grounds in three additional sectors of the economy where the amended share of supply and turnover thresholds are met: artificial intelligence (AI), cryptographic authentication technologies and advanced materials.

10 The Government published its response to the National Security and Investment White Paper consultation on 12 October 2020. The Government stated that it had decided to make changes to the proposals it put forward in 2018, including the addition of a mandatory notification system for some transactions in specified sectors of the economy.

11 A draft Impact Assessment on the incoming regime was published on 11 November 2020.

Legal background

Legal background for Government intervention in mergers on national security grounds

12 The current legislative framework for the assessment of United Kingdom ("UK") mergers between enterprises (which include outright acquisitions) is contained in Part 3 of the Enterprise Act 2002 (the "Act"), which has been in force since 20 June 2003. Along with investigation of competition issues, this provides for Government intervention on public interest grounds in three types of case: public interest cases; special public interest cases; and European merger cases.

Public interest cases

13 Section 42 of the Act allows the Secretary of State to intervene in a completed or anticipated merger where he has reasonable grounds to suspect it may be, or may if it comes to fruition become, a "relevant merger situation" (see the next paragraph) and believes that one or more of the public interest considerations specified in section 58 of the Act may be relevant to the case. Section 58 currently specifies national security, media plurality (an umbrella term covering a number of media-related considerations), the stability of the UK financial system, and the need to maintain in the UK the capability to combat, and to mitigate the effects of, public health emergencies, as public interest considerations.

14 Section 23 of the Act provides that a "relevant merger situation" arises where two or more enterprises cease to be distinct, and at least one of the following thresholds is met:

a. the enterprise taken over has a UK turnover of more than £70 million (the "turnover test"); or

b. the merger has resulted in the creation or enhancement of at least a 25% share of supply or purchase in, or in a substantial part of, the UK of goods or services of any description (the "share of supply test").

15 The Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018 (S.I. 2018/578) and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018 (S.I. 2018/593), both of which came into force on 11 June 2018, amended the share of supply test and the turnover test, respectively. The turnover threshold was lowered from £70 million to £1 million for takeovers of "relevant enterprises", i.e. those active in any of the following sectors: military or dual-use goods subject to export control; computer processing units; or quantum technology. The share of supply test was amended so that the test is additionally met if the takeover is of a "relevant enterprise" that already had at least a 25% share of supply or purchase in, or in a substantial part of, the UK of goods or services before the merger. The goods or services must be connected to the activities by virtue of which it qualifies as a "relevant enterprise". The Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2020 (S.I. 2020/748) and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2020 (S.I. 2020/763), both of which came into force on 21 July 2020, amended the list of "relevant enterprises" to include those active in any of the following sectors: artificial intelligence; cryptographic authentication technology; or advanced materials. These changes were made to enable the Secretary of State to intervene in additional mergers which might give rise to national security implications.

16 Pursuant to section 42(2) of the Act, the Secretary of State intervenes in a merger by giving an intervention notice (commonly known as a "public interest intervention notice") to the Competition and Markets Authority ("CMA"). This requires the CMA to investigate the merger (commonly known as a "Phase 1 investigation") and to provide a report to the Secretary of State containing its advice on jurisdictional, and, if any arise, competition, issues. In national security cases the CMA is also required to provide to the Secretary of State a summary of any national security-related representations it has received about the case, including from other Government departments.

17 After issuing an intervention notice, the Secretary of State may pursuant to paragraph 2 of Schedule 7 to the Act make an interim order prohibiting or restricting any pre-emptive action, that is, any action which might prejudice the intervention or impede any remedial action that might be taken on it.

18 Once he has the received the CMA's Phase 1 report, the Secretary of State may pursuant to section 45 of the Act make a "reference" to the CMA requiring it to carry out a more in-depth investigation (commonly known as a "Phase 2 investigation"), if he believes that the merger may be, or may if it comes to fruition become, a "relevant merger situation" and that it might operate against the public interest. In making this decision, section 46 of the Act requires the Secretary of State to accept the advice of the CMA on jurisdictional and competition matters as set out in its report. He must also treat a competition issue identified by the CMA as being contrary to the public interest unless this is outweighed by other public interest considerations. Alternatively, pursuant to paragraph 3 of Schedule 7 to the Act, in lieu of making a Phase 2 reference the Secretary of State may accept whatever undertakings (commonly known as "undertakings-in-lieu") he considers appropriate from the parties to address the public interest issues identified. Under paragraph 5 of Schedule 7, where he considers that undertakings-in-lieu have not or will not be fulfilled, or where he considers that they were accepted on the basis of false or misleading information, the Secretary of State has the power to replace them with an order imposing remedies.

19 If a Phase 2 reference is made, section 50 of the Act requires the CMA to prepare a further report for the Secretary of State. Once he has received this report, the Secretary of State must pursuant to section 54 of the Act make a final decision on whether the merger is against the public interest, and, if he does so, he may pursuant to section 55 of the Act take whatever remedial action in his power he considers reasonable and practicable to address the public interest issues identified. This may be in the form of final undertakings accepted from the parties, as provided for by paragraph 9 of Schedule 7 to the Act, or in the form of an order imposing remedies, pursuant to paragraph 11 of Schedule 7. Under paragraph 10 of Schedule 7, the Secretary of State has an equivalent power to that in relation to undertakings-in-lieu to replace final undertakings with an order imposing remedies.

20 Pursuant to paragraph 20 of Schedule 8 to the Act, an order may make such provision as the Secretary of State considers to be appropriate in the interests of national security. Such provision may, in particular, include provision requiring a person to do, or not to do, particular things.

Special public interest cases

21 Section 59 of the Act allows the Secretary of State to intervene in a limited number of mergers of special public interest on the basis of the public interest considerations specified in section 58 of the Act (which, as already stated, include national security) where the standard jurisdictional thresholds relating to turnover and share of supply are not satisfied. These include for example, mergers involving Government defence contractors authorised to hold or receive confidential information. The subsequent process is similar to the public interest intervention procedure set out above, except that there is no competition assessment.

European merger cases

22 The European Council Merger Regulation (No 139/2004) gives the European Commission exclusive jurisdiction within the European Union ("EU") to assess mergers (which include outright acquisitions) with an EU dimension (i.e. those in which the parties meet certain global and EU-wide turnover thresholds) for any competition issues. At present this Regulation applies in the UK. The Act provides a mechanism, so long as the standard jurisdictional thresholds are met (see paragraphs 14-16 above), for the Secretary of State to intervene in these mergers on the basis of the public interest considerations specified in section 58 of the Act (other than the stability of the UK financial system, which is expressed as not applying in these cases), including national security. This is done by giving the CMA a European intervention notice ("EIN") under section 67 of the Act. The subsequent process

is similar to the public interest intervention procedure set out above, except that it does not involve any competition assessment by the CMA, this being left to the European Commission[1]. Most of the procedure in European merger cases is set out in the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (S.I. 2003/1592) rather than in the Act itself.

Legal background for clause 59 (Overseas information disclosure)

23 Part 9 of the Enterprise Act 2002 imposes a restriction on the disclosure of information that comes to a public authority in connection with, among other things, a merger investigation under Part 3 of the Enterprise Act 2002 or an antitrust investigation under the Competition Act 1998 ("specified information"). The restriction applies where the information relates to the affairs of an individual, during the lifetime of the individual, or any business of an undertaking, while the undertaking continues in existence, unless the disclosure is permitted by one of the disclosure gateways in Part 9.

24 A public authority may disclose specified information to an overseas public authority in the following circumstances:

a. where the public authority has obtained the necessary consents (section 239(1));

b. to comply with an EU obligation (section 240)[2]; or

c. for the purpose of facilitating the exercise by the public authority of its statutory functions (section 241(1)).

25 In addition, section 243(1), (2) and (12) of the Act, permits the disclosure of specified information to an overseas public authority where the disclosure is to facilitate the performance of an overseas public authority's functions. This gateway does not currently apply to information that comes to a public authority in connection with a merger investigation under Part 3 of the Enterprise Act 2002 (section 243(3)(d)).

[1] The Government laid in draft on 30 September 2020 the Competition (Amendment etc.) (EU Exit) Regulations 2020, which make transitional provision for the European Commission to continue after the end of the transition period to assess the effects in the UK of mergers with a European dimension if the European Commission's merger review is initiated formally before the end of the transition period in accordance with Article 92 of the EU Withdrawal Agreement. The draft regulations also make transitional provision for an EIN process to continue after the end of the transition period, if the EIN was issued before the end of the transition period and the European Commission has retained exclusive competence over the merger in accordance with Article 92. The CMA will be solely responsible for investigating the effects in the UK of any merger which meets the UK jurisdictional test and in respect of which an investigation by the EU Commission has not been initiated before the end of the transition period.

[2] To be repealed by the Competition (Amendment etc.) (EU Exit) Regulations 2019/93, Part 3, Reg.59.The Government laid in draft on 30 September 2020 the Competition (Amendment etc.) (EU Exit) Regulations 2020, which save and amend the effect of section 240 so that the CMA can share information with the European Commission for the purposes of ongoing antitrust or merger cases for which the European Commission has continued competence after the end of the transition period in accordance with Article 92 of the EU Withdrawal Agreement.

Territorial extent and application

26 Clause 66 sets out the territorial extent of the Bill. The extent of a Bill can be different from its application. Application is about where a Bill produces a practical effect rather than where it forms part of the law.

27 The Bill extends and applies to the whole of the United Kingdom. In addition, repeals and amendments made by the Bill have the same territorial extent as the legislation that they are repealing or amending.

28 The matters to which the provisions of the Bill relate are not within the legislative competence of the Scottish Parliament, the Welsh Parliament or the Northern Ireland Assembly, and no legislative consent motion is being sought in relation to any provision of the Bill. If there are amendments relating to matters within the legislative competence of the Scottish Parliament, the Welsh Parliament or the Northern Ireland Assembly, the consent of the relevant devolved legislature(s) will be sought for the amendments.

29 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom. The table also summarises the position regarding legislative consent motions and matters relevant to Standing Orders Nos. 83J to 83X of the Standing Orders of the House of Commons relating to Public Business.

Commentary on provisions of Bill

Background: Overview of the National Security and Investment Regime

National Security and Investment framework

30 The National Security and Investment regime replaces the Secretary of State's ability to scrutinise mergers which give rise to a national security consideration under the Enterprise Act 2002.

31 The Bill provides powers for the Secretary of State to scrutinise and, where necessary, impose proportionate remedies on specific acquisitions of control of qualifying entities and assets. It also sets out a statutory process for the exercise of these powers.

32 The Secretary of State may scrutinise specific acquisitions of control of qualifying entities and assets by issuing "call-in notices". The acquisitions which are within scope of this function are collectively known as "trigger events". The Secretary of State may issue a call-in notice up to 5 years after a trigger event has taken place, so long as that 5 years does not reach back before the introduction of this Bill.

33 The Bill provides for the Secretary of State to publish a statement setting out he expects to exercise the call-in power. The Secretary of State will not be able to call in any trigger events until such a statement has been published. Nothing in the statement will limit the Secretary of State's exercise of the call-in power.

Mandatory notification

34 The Bill provides for a mandatory notification requirement for acquisitions of certain shares or voting rights in the qualifying entities to be specified in regulations made by the Secretary of State, which are termed "notifiable acquisitions". Proposed acquirers must notify the Secretary of State of notifiable

acquisitions before they take place in order to obtain clearance to go ahead.

35 A notifiable acquisition that is completed before being approved by the Secretary of State is void and of no legal effect. Additionally, the acquirer may be subject to criminal or civil penalties for completing the acquisition without clearance. The Secretary of State may retrospectively validate a notifiable acquisition. Regulations will specify how to notify the Secretary of State of notifiable acquisitions.

36 The Bill provides a power for the Secretary of State to amend the acquisitions which are notifiable through regulations. The Secretary of State may also make regulations exempting acquisitions from the mandatory notification regime on the basis of the characteristics of the acquirer. These powers collectively allow the regime to reflect changing national security risks.

Voluntary notification regime

37 Businesses and other entities who do not meet the criteria for mandatory notification may submit a notification to the Secretary of State if they consider that their trigger event could raise national security concerns. To help inform their assessment as to whether a voluntary notification should be issued, they make reference to the statutory statement about the exercise of the call-in power.

National security assessment

38 The Secretary of State may give a call-in notice in respect of a trigger event that has taken place or is in progress or contemplation. The notice may be given up to 5 years after the trigger event took place, subject to this being done within 6 months of the Secretary of State becoming aware of the trigger event. While a trigger event is being assessed, the Secretary of State will be able to impose interim remedies in an order to ensure that the effectiveness of the national security assessment or subsequent remedies is not prejudiced by action taken by the parties. For example, the Secretary of State might prohibit activities which would result in the integration of two businesses, or act to safeguard assets, until the national security assessment is complete.

39 To facilitate assessments, the Secretary of State will have powers for gathering information. There will be safeguards on the use and disclosure of such information.

40 If, following an assessment, the Secretary of State determines that a risk to national security has arisen or would arise from the trigger event, the Secretary of State has the power to impose proportionate remedies in a final order to prevent, remedy or mitigate that risk. Breach of any requirement in a final order may lead to a civil or criminal sanction.

41 Civil and criminal sanctions will also be available in the event of non-compliance with interim orders and information requests.

42 Decisions under the Bill will be subject to judicial review or appeal. The Government will be able to apply for a closed material procedure to protect sensitive matters in these proceedings.

Comparison between current framework and the National Security and Investment regime

43 The National Security and Investment regime will be separate from the processes and practice of the CMA's mergers framework under the Enterprise Act 2002. The mergers framework will continue to exist once the new regime has been implemented, but it will only apply to competition, media plurality, financial stability and public health emergency considerations; national security implications will be addressed entirely through the new legal framework.

44 The table below summarises and compares the Enterprise Act 2002 framework for national security public interest interventions and the new National Security and Investment regime. Further detail on the current framework for national security interventions under the Enterprise Act can be found on

the legislation.gov.uk site and in CMA guidance (CMA2, Mergers: Guidance on the CMA's jurisdiction and procedure). Detail on the National Security and Investment Regime is contained in the Commentary on Provisions section.

Table 1: Comparison between national security interventions under the Enterprise Act 2002 and the National Security and Investment Regime		
	Current system under the Enterprise Act 2002	**National Security and Investment regime**
Acquisitions within scope	The Secretary of State may intervene in qualifying mergers between enterprises which raise specified public interest concerns, including on national security grounds. Further detail on this is available in the Legal Background section.	The Secretary of State may intervene where he reasonably suspects that a 'trigger event' has taken place or is in progress or contemplation, and this has given rise to, or may give rise to, a national security risk. Trigger events include: acquisitions of certain shares or voting rights in a qualifying entity; acquisition of material influence over such an entity; the acquisition of a right or an interest in a qualifying asset enabling the acquirer to use the asset or to control or direct how it is used.
Notification to Government	Parties may submit a merger notice to the CMA to notify them about a relevant merger situation. Under the Public Interest Regime, the Secretary of State may intervene in a merger whether or not there has been a notification. Following receipt and acceptance of a complete merger notice, the CMA must decide whether the duty to refer the merger for a Phase 2 investigation applies within 40 working days.	Pre-notification to the Secretary of State required for certain acquisitions, via a mandatory notice. Where this does not apply, parties to trigger events may submit a voluntary notice to the Secretary of State. The Secretary of State may intervene in a completed or anticipated trigger event whether or not there has been a notification. Following receipt and acceptance of a complete mandatory or voluntary notice, the Secretary of State must decide whether to issue a call-in notice within 30 working days.

Table 1: Comparison between national security interventions under the Enterprise Act 2002 and the National Security and Investment Regime		
	Current system under the Enterprise Act 2002	**National Security and Investment regime**
Government assessment	If a merger situation meets the criteria for intervention on the grounds of national security, the Secretary of State may issue a 'Public Interest Intervention Notice' (PIIN) to the CMA to initiate a Phase 1 investigation. Following receipt of the CMA's report on the merger, the Secretary of State has the option to clear the merger, clear the merger subject to undertakings offered by the parties to address the national security risks (see cell below on interventions and remedies), or refer the merger for a Phase 2 investigation. A Phase 2 investigation is undertaken by an Inquiry Group formed by the CMA. Following the completion of the investigation they would provide their recommendations to the Secretary of State. The Secretary of State would then have the option to clear the merger, clear the merger subject to undertakings offered by the parties to address the national security risks or an order imposing remedies, or to block/unwind the merger. The Secretary of State must make the decision to refer a merger for a Phase 2 investigation or to accept undertakings instead of making the reference within four months of the merger completing or, if it is completed without being made public, within four months of the merger being made public.	The Secretary of State will call in trigger events to undertake a national security assessment. The Secretary of State will use this process to determine whether to clear the trigger event either outright or subject to remedies, or (where this is necessary and proportionate) block or unwind it. The Secretary of State has an initial 30 working days to conduct a national security assessment. This may be extended by the Secretary of State by 45 working days if certain conditions are met. If further assessment is required, the Secretary of State may agree an additional voluntary period with the acquirer if certain conditions are met.

Table 1: Comparison between national security interventions under the Enterprise Act 2002 and the National Security and Investment Regime		
	Current system under the Enterprise Act 2002	**National Security and Investment regime**
Intervention and remedies	After intervening in a national security case, the Secretary of State may issue an interim order (by means of a statutory instrument subject to the negative resolution procedure) to prevent or reverse "pre-emptive action" by the parties which might prejudice the intervention. Such an order can come into force with immediate effect, where justified for the protection of national security. The CMA also has power to make a pre-emptive action order. The Secretary of State or the CMA (as the case may be) may subsequently grant derogations from a pre-emptive action order on application by the parties. As part of a Phase 1 investigation, if the national security concerns arising from a relevant merger situation are such that the Secretary of State would otherwise refer the merger for a Phase 2 investigation, the Secretary of State may accept undertakings as a remedy for the national security issues in lieu of making the reference. Following a Phase 2 investigation, the Secretary of State may accept undertakings or impose remedies by order, including blocking/unwinding the merger, to address a national security risk.	A notifiable acquisition must be approved by the Secretary of State before completing. A notifiable acquisition that is completed without prior approval is void and of no legal effect. The Secretary of State may during a national security assessment issue an interim order for the purpose of preventing or reversing action that might prejudice the exercise of his functions under the Bill. Interim orders will not necessarily be made public. The Secretary of State must before the end of the assessment period either notify the parties that no further action will be taken, or, where a national security risk has been identified, make a final order for the purpose of preventing, remedying or mitigating that risk. The Secretary of State must keep all orders under review and may vary or revoke them. Parties subject to an order may request that it be reviewed by the Secretary of State. When the Secretary of State makes, varies or revokes a final order, the Secretary of State must publish certain information about the trigger event and the order.

Table 1: Comparison between national security interventions under the Enterprise Act 2002 and the National Security and Investment Regime		
	Current system under the Enterprise Act 2002	**National Security and Investment regime**
Judicial review	Litigants may apply to the Competition Appeal Tribunal (CAT) if aggrieved by a decision of the Secretary of State as part of the merger review process. The CAT will review the decision by applying the same principles as the High Court on an application for judicial review. Cases must be brought within four weeks of the date on which the applicant was notified of the disputed decision, or the date of publication if earlier.	Litigants may apply to the High Court for judicial review, with a closed material procedure available to ensure sensitive information is protected. Claims will need to be brought not more than 28 days after the grounds to make the claim first arose unless the court gives permission for the claim to be brought after the expiry of this time limit.

Part 1: Call-in for national security

Chapter 1: Call-in power

45 Clauses 1 and 2 collectively provide for the "call-in power". The call-in power may be used by the Secretary of State in relation to a trigger event which has given rise to, or may give rise to, a risk to national security (see Chapter 2 for details on trigger events). Clauses 3 and 4 provide for the publication of a statement which sets out how the Secretary of State expects to exercise the call-in power and the parliamentary procedure for the statement. The Secretary of State must publish the statement before giving a call-in notice and must have regard to it when exercising the call-in power.

46 The Secretary of State will be able to call in any trigger event that raises national security concerns, including those which have not been notified to him. He will be able to do this when the trigger event is in contemplation or progress, or within a prescribed period of up to 5 years after a trigger event has taken place (but a call-in notice may not may not be given after the end of the period of 6 months beginning with the day on which the Secretary of State became aware of the trigger event where the trigger event has already occurred).

Clause 1: Call-in notice for national security purposes

47 Clause 1 enables the Secretary of State to give a call-in notice in relation to a trigger event (see Chapter 2) which the Secretary of State reasonably suspects has taken place or is in progress or contemplation, and which he reasonably suspects has given rise to or may give rise to a risk to national security.

48 Subsection (1) provides for the test which much be met for the Secretary of State to issue a call-in notice.

49 Subsection (2) specifies that, for the purposes of the Bill, the effect of clause 13(1) must be disregarded when considering whether a trigger event has taken place or will take place.

50 Subsection (4) details the persons who must be given copies of the call-in notice. These include the acquirer and, if the acquisition relates to an entity, the entity itself. In addition, the Secretary of State may consider it appropriate to give a call-in notice to, for example, the seller or sellers, a significantly affected third party, or a relevant regulator.

51 Subsections (6) to (8) provide that the Secretary of State must publish and have regard to the statement (clause 3) before exercising the call-in power, but this power is not limited by anything contained in the statement.

Clause 2: Further provision about call-in notices

52 Clause 2 concerns matters relating to the limits of the exercise of the call-in power. The power may only be exercised once per trigger event. Where the call-in notice is given in relation to a trigger event that has already taken place, it may only be exercised up to 5 years after the trigger event has taken place and up to 6 months after the Secretary of State has become aware of the trigger event, unless the Secretary of State has been given false or misleading information (see clause 22). The 5-year limit does not apply to notifiable acquisitions which have been completed without the approval of the Secretary of State (see clause 13).

53 Call-in notices may be served in relation to trigger events which take place from {date of introduction of the Bill}. Section 2(4) sets out the time periods within which the Secretary of State may serve a call-in notice in relation to trigger events that take place between 12 November and the commencement of section 2.

Clause 3: Statement about exercise of call-in power

54 Clause 3 concerns the statement which sets out how the Secretary of State expects to exercise the call-in power. While the Secretary of State is not obliged to publish a statement, the Secretary of State must do so before being able to exercise the call-in power, as stated in clause 1(6).

Clause 4: Consultation and parliamentary procedure

55 Clause 4 sets out the procedure that must be followed before the Secretary of State is able to publish the statement about the exercise of the call-in power. Before the statement may be published, the Secretary of State must carry out such consultation as the Secretary of State thinks appropriate in relation to a draft of the statement, make any changes to the draft that appear to the Secretary of State to be necessary in view of the responses to the consultation, and lay the statement before Parliament, where it is subject to annulment by either House within a period of 40 sitting days.

56 Subsections (2) to (4) provide that either House of Parliament may annul a statement before the expiry of the 40 sitting day limit. The consequence of the annulment is that the statement must be withdrawn. The annulment of a statement does not affect the validity of any call-in notice given prior to its withdrawal, nor does it affect the publication of a new statement.

Chapter 2: Interpretation

Trigger events in relation to qualifying entities and qualifying assets

57 Clauses 5-12 provide the criteria for the acquisitions of control over entities or assets that qualify for assessment by the Secretary of State under the national security regime. These acquisitions in scope of the call-in power (clause 1) are described as "trigger events".

58 Clause 6 describes those acquisitions which are 'notifiable acquisitions'. A notifiable acquisition takes place when a person acquires certain shares or voting rights in a qualifying entity specified in regulations by the Secretary of State. Notifiable acquisitions must be

approved by the Secretary of State before completing, lest they be legally void.

Clause 5: Meaning of "trigger event" and "acquirer"

59 Clause 5 provides that a "trigger event" occurs when a person gains control of either a qualifying entity or a qualifying asset.

Clause 6: Notifiable acquisitions

60 Clause 6 describes those acquisitions which are 'notifiable acquisitions'. A notifiable acquisition takes place when a person acquires control of a qualifying entity specified in regulations by the Secretary of State in any of the circumstances described in subsections (2), (5) or (6) of clause 8, or when a person acquires a right or interest in such an entity which results in them increasing their shareholding or voting rights in the entity from less than 15% to 15% or more. The Secretary of State may by regulations amend the acquisitions which are to be notifiable, or exempt acquisitions on the basis of the characteristics of the acquirer.

61 Clause 63 provides for the parliamentary procedures to be used for regulations under the Bill. Regulations under clause 6 must be laid in draft before Parliament and approved by both Houses of Parliament before they may be made.

Clause 7: Qualifying entities and assets

62 Clause 7 defines a "qualifying entity" as any entity that is not an individual.

63 However, an entity which is formed or recognised under the law of a country or territory outside the United Kingdom is only a "qualifying entity" if it carries on activities in, or supplies goods or services to, the United Kingdom.

64 Subsection (4) defines a "qualifying asset".

65 Subsection (5) provides examples of assets included in the category of "ideas, information or techniques which have industrial, commercial or other economic value" under subsection (4)(c).

66 Subsection (6) limits the definition of a "qualifying asset" in respect of land or moveable property situated outside the United Kingdom or the territorial sea adjacent to the United Kingdom, or assets within subsection (4)(c), to assets with a nexus to the United Kingdom.

Clause 8: Control of entities

67 Clause 8 defines the circumstances in which a person gains control of a qualifying entity for the purposes of the Bill. This constitutes a "trigger event", and may be subject to assessment under the national security regime if the call-in test is met. This clause also makes clear when the additional acquisition of shareholdings or rights in an entity will constitute a "trigger event".

68 There are four cases in which a person gains control of a qualifying entity, which are summarised below:

a. a person increasing the percentage of shares that they hold in the entity by a specified proportion (clause 8(2));

b. a person increasing the voting rights that they hold in the entity by a specified proportion (clause 8(5));

c. a person acquiring voting rights in the entity which give powers to secure or prevent the passage of any resolution governing the affairs of that entity (clause 8(6)), for instance in the case of an entity that does not conform to the thresholds for passing or

blocking resolutions in Schedule 1A to the Companies Act 2006; or,

d. a person acquiring a right or interest in, or relation to, the entity which enables them to materially influence the policy of that entity (clause 8(8)).

Clause 9: Control of assets

69 Clause 9 defines the circumstances in which a person gains control of a qualifying asset or the purposes of the Bill. This constitutes a "trigger event", and may be subject to assessment under the national security regime if the call-in test is met. A person gains control of a qualifying asset where they acquire a right or interest in, or in relation to, the asset and, as a result, are able either to:

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

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

70 Any right or interest in a qualifying asset, including a part-share in the asset or outright ownership, would be captured if they provide the ability to use, or direct or control how the asset is used. References to the use of an asset include references to its exploitation, alteration, manipulation, disposal or destruction.

Clause 10: Holding and acquiring interests and rights: supplementary and Schedule 1: Trigger events: holding of interests and rights

71 Clause 10 introduces Schedule 1 which provides for particular cases in which a person is to be treated as holding an interest or a right.

72 Schedule 1 sets out further details as to how interests and rights are deemed to be held and therefore provides further explanation of the mechanisms through which control of entities and assets may be acquired.

73 Paragraph 2 of Schedule 1 provides that parties acting through joint arrangements are treated as holding the collective interests and rights that each party of that arrangement holds individually.

74 Paragraph 3 provides for interests or rights held indirectly to be in scope of the regime. This means that a person holding an interest or right in a parent entity of an entity or a chain of entities is, depending on the circumstances in sub-paragraph (2)(a) or (2)(b) being satisfied, treated as holding the interest or right in the entity at the bottom of the chain. If an entity is part of a chain of entities, a person will exercise the right indirectly if each entity in the chain has a majority stake in the entity immediately below it in the chain, and the last entity in the chain has the right in question (sub-paragraph (2)(b)). Sub-paragraph (3) defines "majority stake" by reference to a majority of voting rights, dominant influence or control, and the right to appoint or remove a majority of the board of directors.

Example A: Indirect holdings

Party A acquires 100% of votes and shares of Company B.

Company B owns 51% of votes and shares of a subsidiary, Company C.

As Company B holds a majority stake in Company C, Party A has acquired indirect control over Company C through the acquisition of Company B.

75 Paragraph 5 provides that a person who controls a right, as established in paragraph 5(2), is deemed to hold that right. This means that the controller of the right - and not the holder unless they are also the controller - will be considered to hold the right. Paragraph 5(2) sets out that control can be held through an arrangement between a person and others. The definition of an arrangement in paragraph 12 provides that there needs to be a degree of stability about it.

76 Paragraphs 6 and 7 provide for rights that are exercisable only in certain circumstances and rights attached to shares held by way of security respectively, and replicate corresponding provisions in Schedule 1A to the Companies Act 2006.

77 Paragraphs 8-10 provide for the circumstances in which two or more persons are deemed to be connected persons by virtue of their relationship to one another. Each connected person is deemed to be holding the combined interests or rights of both or all of the connected persons.

78 Paragraph 11 provides for the circumstances in which two or more persons are deemed to be acting with common purpose and are therefore each deemed to be holding the collective interests and rights that each person holds individually.

> Example B: Common purpose
>
> Party A owns 20% of votes and shares of Company D.
>
> Party B owns 20% of votes and shares of Company D.
>
> Party C acquires 20% of votes and shares of Company D.
>
> Parties A, B and C co-ordinate the use of their votes, in practice meaning that they collectively use their votes to attempt to achieve a shared aim. In such circumstances, Party C's acquisition would be a trigger event through which Parties A, B and C would be deemed to have each acquired 60% of the votes and shares in Company D.

Clause 11: Exceptions relating to control of assets

79 Clause 11 provides for exceptions from the definition of a "trigger event" in relation to assets. A person is not to be regarded as gaining control of a qualifying asset by reason of an acquisition made by an individual for purposes that are wholly or mainly outside the individual's trade, business or craft, except where the asset is land or falls within specified export control provisions. Such acquisitions are therefore not within scope of the call-in power.

80 Subsection (3) provides that the Secretary of State may by regulations amend subsection (2) or prescribe other circumstances in which a person is not to be regarded as gaining control of a qualifying asset for the purposes of the Bill.

81 Clause 63 provides for the parliamentary procedures to be used for regulations under the Bill. Regulations under clause 11 must be laid in draft before Parliament and approved by both Houses of Parliament before they may be made.

Clause 12: Trigger events: supplementary

82 Clause 12 contains supplementary provisions in relation to determining when a trigger event that takes place over more than one day is to be treated as taking place (subsection (1)), and determining whether a trigger event is in progress or contemplation in circumstances where a person has entered into an agreement or arrangement which enables them to do something in

the future that would result in a trigger event taking place (subsection (2)).

Chapter 3: Approval of notifiable acquisition

83 Chapter 3 of Part 1 provides for the consequences of a notifiable acquisition completing without the approval of the Secretary of State.

Clause 13: Approval of notifiable acquisition

84 Clause 13 provides that notifiable acquisitions which are completed without the approval of the Secretary of State are void. Subsection (2) sets out the ways in the Secretary of State may approve a notifiable acquisition. Subsection (3) provides that a notifiable acquisition is void where it has been completed in a manner which is different to the stipulations of a final order (see clause 26) made by the Secretary of State.

Chapter 4: Procedure

85 Chapter 4 of Part 1 provides for two routes for persons to notify acquisitions to the Secretary of State in order to receive a call-in decision. Clause 14 is a mandatory notification route which applies to notifiable acquisitions (as defined in clause 6). Clause 18 is a voluntary notification route for trigger events which fall outside the mandatory notification regime. Clauses 15, 16 and 17 provide for retrospective validation of notifiable acquisitions which have completed without the approval of the Secretary of State (see clause 13).

86 Chapter 4 of Part 1 also provides for two mechanisms by which the Secretary of State may obtain information to assist him in carrying out his functions under the Bill. Clause 19 allows the Secretary of State to issue an information notice requiring specified information to be provided. Clause 20 permits the Secretary of State to issue an attendance notice requiring a person to attend at a specified time and place and to give evidence to the Secretary of State. These powers may be used before or after a trigger event has been called in. 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.

Clause 14: Mandatory notification procedure

87 Clause 14 requires notifiable acquisitions (see clause 6) to be notified to the Secretary of State and describes the procedure for doing so. Pursuant to subsection (1) a person who is to make a notifiable acquisition must give a mandatory notice to the Secretary of State prior to the acquisition taking place.

88 Subsection (4) provides that the Secretary of State may by regulations prescribe the form and content of a mandatory notice.

89 Subsection (5) provides that, as soon as reasonably practicable after receiving a mandatory notice, the Secretary of State must decide whether to reject or accept the notice.

90 Subsection (6) sets out the grounds on which the Secretary of State may reject a mandatory notice. Subsection (7) provides that, if a mandatory notice is rejected, the Secretary of State must, as soon as practicable, provide reasons in writing for that decision to the person who gave the notice.

91 Subsection (8) provides that, if a mandatory notice is accepted, the Secretary of State must, as soon as practicable, notify each relevant person, and, before the end of the review period (see the next paragraph), either give a call-in notice in relation to the proposed notifiable acquisition (see clause 1), or notify each relevant person that no further action will be taken under the Bill in relation to the acquisition. Subsection (10) defines "relevant person" as the

person who gave the mandatory notice and such other persons as the Secretary of State considers appropriate.

92 Subsection (9) provides that the review period lasts 30 working days beginning with the day on which the Secretary of State notifies the person who gave the mandatory notice that it has been accepted.

Clause 15: Requirement to consider retrospective validation without application

93 Clause 15 applies to notifiable acquisitions which were not approved by the Secretary of State before they were completed, and which are consequently void. Where the Secretary of State becomes aware of a void notifiable acquisition, subsection (2) requires the Secretary of State to either give a call-in notice (see clause 1) or a validation notice in relation to the acquisition, within 6 months.

94 Pursuant to subsection (3) the effect of a validation notice is that the notifiable acquisition in question is to be treated as having been completed with the approval of the Secretary of State, and it is therefore not void. A validation notice must be given to the person who was required to give a mandatory notice to the Secretary of State in relation to the notification (see clause 14) and such other persons as the Secretary of State considers appropriate. The Secretary of State must also notify those persons that no further action is to be taken under the Bill in relation to the acquisition.

Clause 16: Application for retrospective validation of notifiable acquisition

95 Clause 16 provides for validation applications: any person who has been materially affected by the voiding of a notifiable acquisition may apply to the Secretary of State for a validation notice (see clause 15) in relation to the acquisition. Pursuant to subsection (3) the Secretary of State may by regulations prescribe the form and content of a validation application.

96 Subsection (4) provides that, as soon as reasonably practicable after receiving a validation application, the Secretary of State must decide whether to reject or accept the application (but, pursuant to subsection (8), he is not required to consider an application if, in his opinion, there has been no material change in circumstances since a previous application was made).

97 Subsection (5) sets out the grounds on which the Secretary of State may reject a validation application. Subsection (6) provides that, if a validation application is rejected, the Secretary of State must, as soon as practicable, provide reasons in writing for that decision to the person who made the application.

98 Subsection (8) provides that, if a validation application is accepted, the Secretary of State must, as soon as practicable, notify each relevant person, and, before the end of the review period (see the next paragraph), either give a call-in notice (see clause 1) or a validation notice (see clause 16) in relation to the acquisition. A validation notice must be given to each relevant person, who must also be notified that no further action will be taken under the Bill in relation to the acquisition. Subsection (9) defines "relevant person" as the person who made the validation application and such other persons as the Secretary of State considers appropriate.

99 Subsection (9) provides that the review period lasts 30 working days beginning with the day on which the Secretary of State notifies the person who made the validation application that it has been accepted.

Clause 17: Retrospective validation of notifiable acquisition following call-in

100 Clause 17 applies where the Secretary of State has given a call-in notice in relation to a void notifiable acquisition (see clauses 15 and 16). Subsection (2) provides that, where a final

notification is given in relation to the call-in notice (see clause 26), the Secretary must also give a validation notice (see clause 15) in relation to the acquisition. Subsection (3) specifies the persons to whom the validation notice must be given. Subsection (5) provides that, where a final order is made in relation to the call-in notice (see clause 26), so much of the acquisition as is compatible with the final order is to be treated as having been completed with the approval of the Secretary of State, and is not therefore void.

Clause 18: Voluntary notification procedure

101 In circumstances where there is no requirement to notify, clause 18 provides a mechanism by which parties may voluntarily notify the Secretary of State of a trigger event in order to receive a call-in decision.

102 Subsection (2) provide that a seller, acquirer or any qualifying entity concerned may give the Secretary of State a voluntary notice stating that a trigger event has taken place or that a trigger event is in progress or contemplation.

103 Pursuant to subsection (4) the Secretary of State may by regulations prescribe the form and content of a voluntary notice.

104 Subsections (5) to (8) provide for the process the Secretary of State must follow upon receiving a voluntary notice. In particular, the provisions set out the grounds on which the Secretary of State may reject a voluntary notice and the procedure which the Secretary of State must follow in responding to the relevant parties.

105 Subsection (9) provides that the Secretary of State has 30 working days to review a voluntary notice once it has been accepted. Before the end of this period, the Secretary of State must decide whether to call-in the trigger event or whether to take no further action under the Bill and notify relevant parties accordingly.

Clause 19: Power to require information

106 Clause 19 provides for investigatory powers which enable the Secretary of State to obtain information either before or after the call-in power is exercised. The information must relate to the exercise of the Secretary of State's functions under the Bill. Information may be required, for example, in order to determine whether a call-in notice should be given or whether remedies should be imposed.

107 Subsection (2) provides a proportionality test for use of this power.

108 Subsection (4) provides that the Secretary of State may specify in the notice the manner in which information is to be provided and the time limit for providing it. The time limit for providing information may depend on the type of information and the amount of time required to obtain it. Subsection (4)(c) enables the Secretary of State to require the person to provide any information within their possession or power which would enable the Secretary of State to find the information required by the notice.

Clause 20: Attendance of witnesses

109 Clause 20 gives the Secretary of State the power to require the attendance of witnesses to assist him to carry out his functions under the Bill.

Clause 21: Information notices and attendance notices: persons outside the UK

110 Clause 21 makes provision in respect of the persons on whom the Secretary of State may serve an information notice or attendance notice outside the UK.

111 Subsection (2) provides that an information notice or attendance notice may be given to any

person outside the UK who 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) carrying on business in the UK.

112 Subsections (3) and (4) also provide the Secretary of State with the power to issue an information notice or attendance notice to persons outside the UK who have acquired, or who are in the process of acquiring, qualifying UK entities or assets that are either located in the UK or otherwise connected to the UK.

Clause 22: False or misleading information

113 Clause 22 gives the Secretary of State the power to reconsider a decision he has made under the Bill if it is materially affected by false or misleading information that has been provided to him. Offences in relation to providing false or misleading information are set out in clause 34.

Part 2: Remedies

114 Part 2 of the Bill is concerned with the remedies available to the Secretary of State to address risks to national security and the period in which such remedies are available.

Clause 23: Meaning of "assessment period"

115 Clause 23 provides for the time limits for the assessment of a trigger event after it has been called in. It provides that the Secretary of State has a period of 30 working days after a trigger event has been called-in to determine whether to issue a final order imposing remedies or a final notification confirming no further action is to be taken ("the initial period").

116 This period may be extended by the Secretary of State for a further 45 working days if he reasonably believes that a national security risk has arisen or would arise from the trigger event, and reasonably considers the extension is required to assess the trigger event further ("the additional period").

117 Extensions beyond 75 working days (the initial 30 day period plus the additional period of 45 working days) may be agreed between the acquirer and the Secretary of State if the Secretary of State is satisfied a national security risk has arisen or would arise from the trigger event, and reasonably considers a further period is required to consider whether to make a final order (see clause 26) or what it should contain ("the voluntary period").

Clause 24: Effect of information notice and attendance notice

118 Clause 24 provides that, when calculating the assessment period under clause 23, any period of time between the Secretary of State notifying the recipients of the call-in notice (see clause 1) that an information notice (see clause 19) or attendance notice (see clause 20) has been issued, and the Secretary of State notifying those persons that either the requirements of the notice have been complied with or that the time allowed for compliance has passed, is to be discounted.

Clause 25: Interim orders

119 Clause 25 enables the Secretary of State, whilst a national security assessment is ongoing, to make an interim order for the purpose of preventing or reversing pre-emptive action, or 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 in relation to call-in notices (see clause 1), i.e. in relation to national security assessments. This would include for example actions which might prejudice the imposition of appropriate remedies as part of a final order under clause 26. 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 permitted

purposes.

120 Subsection (4) provides that an interim order may amongst other things include provision requiring persons to do, or not to do, particular things. An interim order may, for example, prohibit the parties to a trigger event in progress from completing the acquisition, or require that any existing integration is reversed.

121 Subsection (5) sets out the permitted extra-territorial application of interim orders. An interim order may only apply to a person's conduct outside the UK or the territorial sea adjacent to the UK if they are: (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) carrying on business in the UK.

Clause 26: Final orders and final notifications

122 Clause 26 provides for the Secretary of State's final decision following a national security assessment. Before the end of the assessment period (see clause 23), the Secretary of State must either notify the recipients of the call-in notice (see clause 1) that no further action will be taken on the assessment under the Bill, or, where he is satisfied that a trigger event has taken place or is in progress or contemplation, and that it has given rise to or would give rise to a national security risk, make a final order for the purpose of preventing, remedying or mitigating that risk. 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 permitted purposes. Subsection (4) requires the Secretary of State to consider any representations made to him before making a final order.

123 Subsection (5) provides that a final order may amongst other things include provision requiring persons to do or not do particular things. A final order will be in force for the period specified in or under it, or until it is revoked (subsections (7) and (8)).

124 Subsection (6) sets out the permitted extra-territorial application of final orders. A final order may only apply to a person's conduct outside the UK or the territorial sea adjacent to the UK if they are: (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) carrying on business in the UK.

Clause 27: Review, variation and revocation of orders

125 Clause 27 requires the Secretary of State to keep interim orders and final orders under review, and to consider requests to vary or revoke them.

Clause 28: Orders: supplementary

126 Clause 28 makes provision for serving interim orders and final orders, and for serving notices that such an order has been varied or revoked. Orders, and varied orders, must be served on anyone who must comply with the order, the recipients of the call-in notice, and any other person the Secretary of State considers appropriate (for example, a regulator). The same persons must be given notice of the revocation of an order. In addition, notice that an order has been varied must be given to any person who was previously required to comply with the order but is no longer required to do so.

127 Subsection (4) prescribes the required contents of orders or accompanying explanatory material.

Clause 29: Publication of notice of final order

128 Clause 29 requires that, when the Secretary of State makes, varies or revokes a final order, he must publish notice of that fact. Subsection (2) prescribes the required contents of such

notices.

Clause 30: Financial assistance

129 Clause 30 provides that the Secretary of State may, with the consent of the Treasury, give financial assistance to or in respect of an entity, through a loan, guarantee or indemnity or any other form of financial assistance. The financial assistance must be given as a consequence of him making a final order (see clause 26).

130 If during any financial year the amount given under this clause totals £100 million or more, the Secretary of State must lay a report of the amount before the House of Commons. Where during any financial year in which such a report has been laid the Secretary of State provides any further financial assistance under this clause, he must lay a further report of the amount.

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

131 Clause 31 provides for situations where a trigger event considered under this Bill for national security reasons is also subject to consideration by the CMA under the merger control regime in Part 3 of the Enterprise Act 2002. It gives the Secretary of State the power, if a final order is in force or a final notification has been given under this Bill (see clause 26), to direct the CMA to do, or not to do, anything under the merger control regime in relation to the trigger event. This power will allow the Secretary of State to ensure that, when a risk to national security has been addressed via a final order under the Bill, the CMA does not inadvertently undermine this through any action it takes. The Secretary of State will also be able to use this power to ensure that a person is not subject to contradictory remedies under the two regimes.

132 Subsections (2) to (4) impose requirements for the use of this power, namely that the Secretary of State must reasonably consider that the direction is necessary and proportionate for the purpose of preventing, remedying or mitigating a risk to national security, that the CMA and such other persons as the Secretary of State considers appropriate must first be consulted, and that the Secretary of State's direction must be published.

Part 3: Enforcement and appeals

Clauses 32 – 36: Offences

133 The table below summarises the offences set out in clauses 32-35.

Offence	Penalty
Clause 32: Completing, without reasonable excuse, a notifiable acquisition without approval	**Criminal Penalty** On summary conviction in England and Wales: imprisonment for a term not exceeding 12 months, or a fine (or both) *. On summary conviction in Scotland: imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum (or both). On summary conviction in Northern Ireland: imprisonment for a term not exceeding 6 months, or a fine not exceeding the statutory maximum (or both). On conviction on indictment: imprisonment for a term not exceeding 5 years, or a fine (or both). **Civil Penalty** The amount of the penalty is to be such amount as the Secretary of State considers appropriate, not exceeding the permitted maximum as per clause 41. The penalty must be a fixed amount only.
Clause 33: Failing, without reasonable excuse, to comply with an order	**Criminal Penalty** On summary conviction in England and Wales: imprisonment for a term not exceeding 12 months, or a fine (or both) *. On summary conviction in Scotland: imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum (or both). On summary conviction in Northern Ireland: imprisonment for a term not exceeding 6 months, or a fine not exceeding the statutory maximum (or both). On conviction on indictment: imprisonment for a term not exceeding 5 years, or a fine (or both). **Civil Penalty** The amount of the penalty is to be such amount as the Secretary of State considers appropriate, not exceeding the permitted maximum as per clause 41. The penalty may be a fixed amount, a daily rate penalty or a combination of a fixed penalty and a daily rate penalty.

Offence	Penalty
Clause 34(1)(a): Failing, without reasonable excuse, to comply with an information notice or attendance notice.	**Criminal Penalty** On summary conviction in England and Wales: imprisonment for a term not exceeding 12 months, or a fine (or both) *. On summary conviction in Scotland: imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum (or both). On summary conviction in Northern Ireland: imprisonment for a term not exceeding 6 months, or a fine not exceeding the statutory maximum (or both). On conviction on indictment: imprisonment for a term not exceeding 2 years, or a fine (or both). **Civil Penalty** The amount of the penalty is to be such amount as the Secretary of State considers appropriate, not exceeding the permitted maximum as per clause 41. The penalty may be a fixed amount, a daily rate penalty or a combination of a fixed penalty and a daily rate penalty.
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.	**Criminal Penalty** On summary conviction in England and Wales: imprisonment for a term not exceeding 12 months, or a fine (or both) *. On summary conviction in Scotland: imprisonment for a term not exceeding 12 months, or a fine no exceeding the statutory maximum (or both). On summary conviction in Northern Ireland: imprisonment for a term not exceeding 6 months, or a fine not exceeding the statutory maximum (or both). On conviction on indictment: imprisonment for a term not exceeding 2 years, or a fine (or both). **Civil Penalty** The amount of the penalty is to be such amount as the Secretary of State considers appropriate, not exceeding the permitted maximum as per clause 41. The penalty must be a fixed amount only.

Offence	Penalty
Clause 34(2): Intentionally obstructing or delaying the making of a copy of information provided in response to an information notice.	**Criminal Penalty** On summary conviction in England and Wales: imprisonment for a term not exceeding 12 months, or a fine (or both) *. On summary conviction in Scotland: imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum (or both). On summary conviction in Northern Ireland: imprisonment for a term not exceeding 6 months, or a fine not exceeding the statutory maximum (or both). On conviction on indictment: imprisonment for a term not exceeding 2 years, or a fine (or both). **Civil Penalty** The amount of the penalty is to be such amount as the Secretary of State considers appropriate, not exceeding the permitted maximum as per clause 41. The penalty must be a fixed amount only.
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 Bill, that the person knows to be false or misleading in a material respect or is reckless as to whether this is the case.	**Criminal Penalty** On summary conviction in England and Wales: imprisonment for a term not exceeding 12 months, or a fine (or both) *. On summary conviction in Scotland: imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum (or both). On summary conviction in Northern Ireland: imprisonment for a term not exceeding 6 months, or a fine not exceeding the statutory maximum (or both). On conviction on indictment: imprisonment for a term not exceeding 2 years, or a fine (or both). **Civil Penalty** The amount of the penalty is to be such amount as the Secretary of State considers appropriate, not exceeding the permitted maximum as per clause 41. The penalty must be a fixed amount only.

Offence	Penalty
Clause 35: Unauthorised use or disclosure of regime information. It is a defence for a person charged with an offence under clause 35 to prove that they reasonably believed that the use or disclosure was lawful, or that the information had already and lawfully been made available to the public.	**Criminal Penalty** On summary conviction in England and Wales: imprisonment for a term not exceeding 12 months, or a fine (or both) *. On summary conviction in Scotland: imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum (or both). On summary conviction in Northern Ireland: imprisonment for a term not exceeding 6 months, or a fine not exceeding the statutory maximum (or both). On conviction on indictment: imprisonment for a term not exceeding 2 years, or a fine (or both).

134 The maximum will be 6 months in England and Wales until paragraph 24(2) of Schedule 22 to the Sentencing Act 2020 is brought into force.

135 Clause 55(2) provides that section 19 of the Commissioners for Revenue and Customs Act 2005 (offence of wrongful disclosure) applies to the unauthorised disclosure of personal information from Her Majesty's Revenue and Customs.

Clause 36: Offences by bodies corporate etc

136 Clause 36 provides that, where a body (for instance, a body corporate such as a company) commits an offence under this Bill, an officer of the body will also be guilty of the offence if it is attributable to their consent or connivance, or to their neglect.

137 Subsection (5) provides that the Secretary of State may by regulations provide for the modification of this clause in its application to a body corporate or unincorporated association formed or recognised under the law of a country or territory outside the United Kingdom.

Clause 37: Prosecution

138 Clause 37 provides for which enforcement agencies are responsible for prosecuting offences under this Bill. It provides that in England and Wales prosecutions must be brought by the Director of Public Prosecutions, and in Northern Ireland, the Director of Public Prosecutions for Northern Ireland. In Scotland, the Procurator Fiscal handles all prosecutions in the public interest and there is therefore no need for the kind of provision made in this clause in Scotland.

Clause 38: Proceedings against partnerships etc

139 Clause 38 makes provision about, and in connection with, bringing proceedings for offences under this Bill against partnerships or other unincorporated associations.

Clause 39: Offences: penalties

140 Clause 39 sets out the available penalties on conviction for persons who commit offences under this Bill. These are set out in the table after paragraph 135 above.

141 Subsection (3) provides that, in relation to offences committed before paragraph 24(2) of Schedule 22 to the Sentencing Act 2020 is brought into force, the maximum term of

imprisonment which may be imposed on summary conviction in England and Wales is 6 months.

Clause 40: Power to impose monetary penalties

142 Clause 40 enables the Secretary of State to impose a monetary penalty on a person where he is satisfied beyond reasonable doubt that the person has committed an offence under clause 32, 33 or clause 34. Subsection (6) provides that the amount of the penalty must be such amount as the Secretary of State considers appropriate, but it may not exceed the maximum penalty for the offence as set out in clause 41. Subsection (7) requires the Secretary of State to have regard to various factors when determining the amount of a monetary penalty, including the seriousness of the offence and the ability of the penalised person to pay the penalty. Further information on the monetary penalties is set out in the table after paragraph 135 above.

Clause 41: Permitted maximum penalties

143 Subsections (1) to (7) of clause 41 set out the maximum monetary penalties that the Secretary of State may impose for different offences under the Bill. They specify the maximum fixed penalty and, if applicable, the maximum daily rate penalty. In relation to the offences of completing a notifiable acquisition without approval and failing to comply with an order, there are different maximum penalties for businesses and non-businesses. In relation to businesses, the maximum penalties are, depending on the offence, either a specified amount or a percentage of the worldwide turnover of the business and of any businesses it owns or controls.

144 Pursuant to subsections (8) and (9) the Secretary of State may by regulations specify how to calculate the maximum penalty applicable in any case (for example, how to determine the turnover of a business), or amend any of maximum penalty amounts or percentage rates specified in subsections (1) to (7).

145 Clause 63 provides for the parliamentary procedure to be used for regulations under the Bill. Regulations under clause 41 must be laid in draft before Parliament and approved by both Houses of Parliament before they may be made.

Clauses 42-47: Monetary penalties and cost recovery

146 Clauses 42 and 46 require the Secretary of State to keep under review a monetary penalty and a requirement to pay costs respectively.

147 Clause 43 ensures that a person may not be subject to both a monetary penalty and a criminal sanction for the same offence.

148 Clauses 44 and 45 deal with monetary penalties and cost recovery respectively. They set out the procedure for recovering unpaid penalties and costs and provide for interest to be incurred on the unpaid balance.

149 Clause 47 enables the Secretary of State to issue a notice requiring a person issued with a monetary penalty to also pay the Secretary of State's costs incurred in imposing the penalty.

Clause 48: Enforcement through civil proceedings

150 Clause 48 provides that the duty of a person to comply with a requirement under or by virtue of an information notice, an attendance notice, an interim order or a final order is enforceable through civil proceedings by the Secretary of State for an injunction, or for specific performance of a statutory duty under section 45 of the Court of Session Act 1988, or for any other appropriate relief or remedy. This applies whether or not the person is in the UK.

Clause 49: Procedure for judicial review of certain decisions

151 Clause 49 provides that claims for judicial review of certain decisions under this Bill must be brought within 28 days beginning with the day after the day on which the grounds to make the claim first arose, unless the court considers that exceptional circumstances apply.

Clause 50 Appeals against monetary penalties

152 Clause 50 enables any person on whom a monetary penalty or variation in penalty is imposed to appeal against the penalty or variation.

Clause 51: Appeals against costs

153 Clause 51 enables any person on whom costs are imposed, or on whom a variation in costs is imposed, to appeal against the costs or variation.

Clause 52: Extra-territorial application and jurisdiction to try offences

154 Clause 52(1) provides that the offences set out in clauses 32, 33, 34 and 35 may be committed by conduct that occurs inside or outside the UK irrespective of the offender's nationality or, if a body, country of formation or recognition.

155 Subsection (2) provides that, where an offence under the Bill is committed outside the UK, proceedings for the offence may be taken at any place in the UK and may be treated for all incidental purposes as having been committed at any such place.

156 Subsection (3) specifies that in the application of subsection (2) to Scotland, any such proceedings may be taken in any sheriff court district in which the person is apprehended or in custody, or in such sheriff court district as the Lord Advocate may determine.

157 Subsection (4) defines "sheriff court district" by reference to the definition in section 307(1) of the Criminal Procedure (Scotland) Act 1995.

Part 4: Miscellaneous

Clause 53: Procedure for service, etc

158 Clause 53 enables the Secretary of State to make regulations prescribing the procedure for giving notices and serving orders under this Bill.

159 The regulations may in particular specify the manner in which a notice must be given, or an order served, the address to which a document must be sent, and whether a document may be sent electronically. They may also specify the date and time a notice or order is to be regarded as having been given or served (this may be important, for example, where a time limit begins to run from that date). The regulations may also make provision for cases where the person to whom the notice or order is being sent is not an individual (for example, in the case of a company) or is outside the United Kingdom.

Information gateways

160 Clauses 54 and 55 provide the Secretary of State with the power to disclose information in specified circumstances to public authorities, and vice-versa.

Clause 54: Disclosure of information

161 Clause 54 specifies the circumstances in which information may be disclosed.

162 Subsection (1) provides an information gateway for public authorities to disclose information to the Secretary of State for the purpose of facilitating the exercise of his functions under the Bill.

163 Subsection (2) permits the Secretary of State to disclose information received under this Bill to any UK or overseas public authority for specified purposes. Subsection (3) in addition permits disclosure of information to overseas public authorities for the purpose of the exercise of corresponding functions of overseas public authorities.

164 Subsection (4) specifies that any person who receives information under subsection (2) or (3) of this clause may not use it for any purpose other than the purpose for which it was disclosed, or further disclose it, without the Secretary of State's consent. This subsection does not apply to information received from HMRC. In accordance with clause 55(1), any person seeking to use information disclosed by HMRC under clause 54 for a purpose other than facilitating the exercise by the Secretary of State of his functions under the Bill, or seeking to further disclose such information, will be required to obtain HMRC consent.

165 Subsections (6) and (7) set out considerations the Secretary of State must take into account when deciding whether to disclose information under this clause.

166 As the information disclosed under this clause may include information to which a duty of confidence would attach, subsection (8) overrides any obligation of confidence owed by a person disclosing information under this clause, or any other restriction that would apply to the disclosure of that information (except as provided by clause 57).

167 Subsection (9) defines "overseas public authority" and "public authority".

Clause 55: Disclosure of information held by HMRC

168 Clause 55(1) provides that a person (which includes the Secretary of State, another public authority or an overseas public authority) who receives information which has been disclosed under clause 54 by HMRC, may not use the information for any purpose other than facilitating the exercise by the Secretary of State of his functions under the Bill or disclose the information, without the permission of HMRC. Subsection (2) applies the criminal offence under section 19 of the Commissioners for Revenue and Customs Act 2005 (offence of wrongful disclosure) to the unauthorised disclosure of personal information from HMRC.

169 As the information disclosed under this clause may include information to which a duty of confidence would attach, subsection (3) overrides any obligation of confidence owed by a person disclosing information under this clause, or any other restriction that would apply to the disclosure of that information (except as provided by clause 57).

Clause 56: Duty of the CMA to provide information and assistance

170 Clause 56 requires the CMA to give information and assistance to the Secretary of State to enable him to carry out his functions under this Bill. This clause largely replicates an existing duty in section 105(5) and (6) of the Enterprise Act 2002.

Clause 57: Data protection

171 Clause 57 provides that information may only be used or disclosed for the purposes of this Bill if this does not contravene the data protection legislation or Parts 1 to 7 of, or Chapter 1 of Part 9 of, the Investigatory Powers Act 2016.

Clause 58 and Schedule 2: Minor and consequential amendments and revocations

172 Clause 58 and Schedule 2 make amendments to remove the existing national security screening measures from the Enterprise Act 2002.

Clause 59: Overseas information disclosure

173 Clause 59 amends the overseas disclosure gateway in section 243 of the Enterprise Act 2002, removing the restriction on UK public authorities disclosing information that comes to them

in connection with a merger investigation under that gateway.

Clause 60: Defamation

174 Clause 60 protects the Secretary of State and the CMA against actions for defamation as a result of the exercise of functions under the provisions of the Bill.

Clause 61: Annual report

175 Clause 61 requires, after the end of each financial year, the Secretary of State to publish an annual report including information set out at subsection (2), and to lay a copy of the report before each House of Parliament.

Part 5: Final Provisions

Clause 62: Transitional and saving provision in relation to the Enterprise Act 2002

176 Clause 62 is a transitional provision concerning trigger events which take place after the introduction of this Bill but before commencement. It provides for the Secretary of State's powers of intervention under sections 42, 59 and 67 of the Enterprise Act 2002 to continue to apply to these trigger events after commencement. However, these powers do not continue to apply to a trigger event if any action is taken in relation to it under this Bill.

Clause 63: Regulations under this Act

177 Clause 63 makes provision in relation to the regulations that may be made by the Secretary of State under the Bill.

Clause 64: Financial provision

178 Clause 64 deals with the further financial provision necessary as a result of the Bill.

Clause 65: Interpretation

179 Clause 65 sets out definitions for terms used in the Bill

Clause 66: Short title, commencement and extent

180 Clause 66 provides for the short title, commencement and extent of the Act.

181 Subsection (2) provides for certain specified provisions of the Bill to come into force on the day the Bill is passed.

182 Subsection (3) provides that the other provisions of the Bill are to come into force on such day as the Secretary of State may by regulations appoint.

183 Subsection (4) provides that regulations under subsection (3) may appoint different days for different purposes, or make transitional, transitory or saving provision.

184 Subsection (5) provides that any amendment or repeal made by the Bill has the same extent as the enactment to which it relates and that, subject to that, the provisions of the Bill will extend throughout the United Kingdom.

Commencement

185 Clause 66 makes provision for certain powers enabling the making of regulations to come into force on the day of Royal Assent. The remaining provisions of this Bill will come into force on days appointed by the Secretary of State by commencement regulations.

Financial implications of the Bill

186 The new statutory regime for scrutiny by Government of investments and other events for the purposes of protecting national security will give rise to the following additional annual costs to Government:

a. discussions with businesses prior to notification (£0.6 million to £1.8 million);

b. screening cases that have been notified (£1.9 million to £4.2 million);

c. formalising the detailed national security reviews (£0.2 million to £2.4 million);

d. undertaking market monitoring activities (£1.0 million to £2.0 million).

187 In addition, see the commentary above on clause 30 which makes provision for financial assistance to be given to or in respect of entities in consequence of the making of a final order.

Parliamentary approval for financial costs or for charges imposed

188 A money resolution is required for the Bill because it gives rise to charges on the public revenue. The money resolution will be required to cover the expenditure outlined above in the "Financial implications of the Bill" section. No ways and means resolution is required for the Bill, because the Bill does not authorise any new taxation or other similar charges on the people.

Compatibility with the European Convention on Human Rights

189 The Government considers that the National Security and Investment Bill is compatible with the European Convention on Human Rights ("ECHR"). Accordingly, the Secretary of State for Business, Energy and Industrial Strategy has made a statement under section 19(1)(a) of the Human Rights Act 1998 to this effect.

Related documents

- The following documents are relevant to the Bill and can be read at the stated locations:
- The Enterprise Act 2002, https://www.legislation.gov.uk/ukpga/2002/40/contents
- The Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018, http://www.legislation.gov.uk/uksi/2018/593/contents/made
- The Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018, http://www.legislation.gov.uk/uksi/2018/578/contents/made
- The Enterprise Act 2002 (Turnover Test) (Amendment) Order 2020, https://www.legislation.gov.uk/uksi/2020/763/contents/made
- The Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2020, https://www.legislation.gov.uk/ukdsi/2020/9780348208795/introduction
- Mergers: Guidance on the CMA's jurisdiction and procedure, https://www.gov.uk/government/publications/mergers-guidance-on-the-cmas-jurisdiction-and-procedure
- National security and infrastructure investment review (Green Paper), https://www.gov.uk/government/consultations/national-security-and-infrastructure-investment-review
- National security and investment: proposed legislative reforms (White Paper), https://www.gov.uk/government/consultations/national-security-and-investment-proposed-reforms
- The Queen's Speech December 2019, https://www.gov.uk/government/speeches/queens-speech-december-2019
- The Queen's Speech December 2019 Background Briefing Notes, https://www.gov.uk/government/publications/queens-speech-2019-background-briefing-notes
- Press release on the Integrated Review of foreign policy (Press release), https://www.gov.uk/government/news/pm-outlines-new-review-to-define-britains-place-in-the-world

Annex A - Territorial extent and application in the United Kingdom

The Bill extends and applies to the United Kingdom[3].

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
1 CALL-IN FOR NATIONAL SECURITY Clauses 1 to 22	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
2 REMEDIES Clauses 23 to 31	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
3 ENFORCE-MENT AND APPEALS Clauses 32 to 52	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
4 MISCE- LLANEOUS Clauses 53 to 61	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
5 FINAL PROVISIO-NS Clauses 62 to 66	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Schedule 1 Schedule 2	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No

[3] References in this Annex to a provision being within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly are to the provision being within the legislative competence of the relevant devolved legislature for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

NATIONAL SECURITY AND INVESTMENT BILL

EXPLANATORY NOTES

These Explanatory Notes relate to the National Security and Investment Bill as introduced in the House of Commons on 11 November 2020 (Bill 210).

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