



National Security and Investment Act 2021 (the *Act*)

Consultation in relation to draft statement for the purposes of section 3 of the Act (the *Draft Statement*)

**30 August 2021**



## **Introduction**

1. The views set out in this response have been prepared by a Joint Working Party of the Company Law Committees of the City of London Law Society (**CLLS**) and the Law Society of England and Wales (the **Law Society**).
2. The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.
3. The Law Society is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. It represents the profession to Parliament, Government and regulatory bodies in both the domestic and European arena and has a public interest in the reform of the law.
4. The Joint Working Party is made up of senior and specialist corporate lawyers from both the CLLS and the Law Society.

## **FOR FURTHER INFORMATION PLEASE CONTACT:**

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## NATIONAL SECURITY AND INVESTMENT ACT 2021: COMMENTS ON DRAFT STATEMENT

Para #	Matter	Comment
General	<p><b>Guidance.</b> While the Draft Statement generally provides helpful guidance, the Committee believes that the Government should provide additional written guidance to provide the market with further clarity as to how the call-in power will work in practice.</p>	<ul style="list-style-type: none"> <li>• This additional written guidance could be contained in the Draft Statement, or if there is a desire to keep the Draft Statement brief, in other written guidance. This additional guidance should address, amongst other things, the matters mentioned in this document (such as matters relating to sovereign wealth funds, pension funds and other investors affiliated with foreign states, conditional transactions, real estate and loans) and would ideally apply as from commencement of the Act.</li> <li>• The Committee appreciates that the Government’s policies and approach will develop over time. To promote clarity and predictability it will be important that regular written updates are given to the market on an ad hoc basis as and when significant matters of policy and/or approach are developed. In addition, the Committee believes it will be important that that the annual report prepared pursuant to section 61 of the Act includes, where relevant and to the extent possible given confidentiality considerations, circumstances in which transactions were called in and/or blocked, the types of undertakings sought, developments in significant matters of policy and/or approach and other important matters which have arisen during the relevant year (including further information on cooperation and interaction with other regulators).</li> </ul>
10, 11, Example 2	<p><b>17 areas.</b> The Draft Statement lists 17 areas, within which certain activities of the target trigger a filing obligation, and states that acquisitions in “<i>areas of the economy closely linked to these 17 areas [...] could be more likely to be called in</i>”.</p>	<ul style="list-style-type: none"> <li>• The Committee welcomes the removal of references to “core areas”, “core activities” and “the wider economy” as categories for assessing risk, as these were unclear. However, the revised statement does create some new uncertainties in this respect: <ul style="list-style-type: none"> <li>○ Does the “List of the 17 areas of the economy” refer only to the <i>activities</i> within those areas that are described in the Notifiable Acquisition Regulations? The example relating to transport in paragraph 11 implies this, but it should be made explicit.</li> <li>○ Does the reference to areas of the economy that are “closely linked” to the 17 listed areas refer only to activities within the broader sector (e.g. activities within the wider transport sector, including road and rail, that are not within the port/airport activities that are specified in the Notifiable Acquisition Regulations), or could it also be the case that activities that fall outside the transport sector might nevertheless be considered closely</li> </ul> </li> </ul>

Para #	Matter	Comment
		<p>linked to the specified port/airport activities? If it is the latter, the statement could minimise uncertainty by giving some additional guidance on when an area will be considered to be closely linked, or illustrative examples (e.g. the target is a critical supplier of essential inputs).</p> <ul style="list-style-type: none"> <li>○ Example 2 appears to indicate that a financial services company with “public contracts” with the Government would be considered to be active in an area that is “closely linked” to the area of “critical suppliers to Government”, even if it is not in any sense a “critical” supplier. We suggest clarifying in that example that the financial services company holds public contracts that are critical to the performance of Government functions, in order to avoid implying that any investment in a company with public sector customers carries a medium target risk.</li> </ul>
17	<p><b>Risk Factors.</b> The Draft Statement provides that the “<i>risk factors will be considered together, but an acquisition may be called in if any one risk factor raises the possibility of a risk to national security</i>” and that the Secretary of State “...<i>expects to exercise the call-in power where one or more of these risk factors has brought about, or is likely to bring about, one or more risks to national security.</i>”</p>	<ul style="list-style-type: none"> <li>● As a substantive matter, the Committee believes that a threat to national security will arise only if all three risk factors are present. If a sensitive target is acquired by an acquirer which does not threaten national security, or a target is acquired which has no sensitive activities, no real overall threat to national security will arise.</li> <li>● As currently worded the Draft Statement may give the impression that the Government envisages a substantive risk to national security could arise in circumstances where one risk factor only applies. The Committee does not believe that this will be the case and if this is the Government’s intention, that this is disproportionate. In addition, a statement to this effect will potentially further incentivize acquirers and their advisers to notify transactions where one risk is present but which is of no concern, which will strain Government resources and be burdensome on the transacting parties. Without further clarification the current statement risks encouraging the notification of a very significant number of transactions on a "better safe than sorry" basis which would appear to be contrary to the policy intent.</li> <li>● It may be that the Government wishes to preserve its flexibility to exercise the call in power where only one risk factor is present in circumstances where there is some significant uncertainty or lack of information. However, we would point out that the Government has separate information gathering powers under the Act if it wishes to obtain additional</li> </ul>

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		<p>information on a proposed transaction without needing to exercise a call in power.</p> <ul style="list-style-type: none"> <li>If, notwithstanding the above, the Government wishes to make clear that it may exercise the call in power in these circumstances (that is, where one risk factor is applicable but there is some significant further information which is required or some significant uncertainty), the Committee would suggest that a clearer distinction is drawn between the substantive matter of a threat to national security and the way the call in power could be exercised. The Draft Statement could for instance make it clear that a threat to national security will only normally arise where all three risk factors are applicable, but that the Government reserves the right to exercise the call in power where only one risk factor is present where there is some significant uncertainty or lack of information.</li> </ul>
16(b) 21, 22, 23	<p><b>Acquirer Risk.</b> The Draft Statement provides that “<i>Characteristics of the acquirer such as the sector(s) of activity, technological capabilities and links to entities which may seek to undermine or threaten <u>the interests of the UK, including the integrity of the UK’s democracy, the UK’s public safety, the UK’s military advantage and the UK’s reputation or economic prosperity, are likely to be considered in order to understand the level of risk the acquirer may pose.</u></i>”</p>	<ul style="list-style-type: none"> <li>The Committee does not believe it is appropriate for the Draft Statement: <ul style="list-style-type: none"> <li>to use the concept of threats to the “interests of the UK”, which is significantly broader than the concept of “national security”; or</li> <li>to define national security by reference to broadly stated and vague concepts such as “the integrity of the UK’s democracy”, the “UK’s public safety”, or “the UK’s reputation or economic prosperity”. These broader national interest concepts appear to be contrary to the reassurances given during the passage of the Bill through Parliament that the focus would be on protecting national security and not wider political or economic considerations.</li> </ul> </li> <li>The Committee would suggest that this is redrafted as follows: “<i>Characteristics of the acquirer such as the sector(s) of activity, technological capabilities and links to entities which may seek to undermine or threaten <u>the UK’s national security</u> are likely to be considered in order to understand the level of risk the acquirer may pose.</i>”</li> </ul>
19, 28	<p><b>Target risk.</b> The draft Statement indicates that “<i>Assessment of the target risk may also involve consideration of any national security risks arising from the target’s proximity to sensitive sites</i>” and that asset acquisitions may be called in “<i>in the event that an asset, such as land, is located near a sensitive site, which may give rise</i></p>	<ul style="list-style-type: none"> <li>The Draft Statement refers to “sensitive sites” but does not explain how sites will be identified as sensitive. It could usefully clarify that sensitive sites should be understood as those that are used for, or in close connection with, activities that are specified in the Notifiable Acquisition Regulations, in the same way as for other assets. More examples could help illustrate this and in particular an example of a land acquisition which is likely to be called in (currently only an example of one which is not likely to be called in is given). For example, are transport activities such as road and rail viewed as 'sensitive sites' (given</li> </ul>

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	<p><i>to a national security risk”.</i></p>	<p>that the transport definition in the Notifiable Acquisition Regulations is limited to ports and airports)? Are major train stations a sensitive site, such that every acquisition of a building above or near such a station presents a high target risk, and if so is it the same threshold in terms of passenger numbers for train stations as for airports? This is a question many investors would welcome clarity on given the large number of buildings located near train stations in London and other major cities.</p> <ul style="list-style-type: none"> <li>• As regards sites that are “proximate” to a sensitive site, it will often be impossible for investors to know whether this is the case, absent a searchable register of sensitive sites - which presents its own national security risks. For example, how would an acquirer be able to ascertain what the neighbouring manufacturing facility is manufacturing; whether the datacentre next door is processing data for a public sector authority; or whether an office nearby is being used to design cryptographic authentication products, or for in scope AI activities etc.? Consequently, and in order to limit the volume of voluntary notifications of benign real estate transactions, the Statement should, if possible, identify objective characteristics of real estate sites that make them more or less likely to be considered a national security risk, in the (likely unknowable) event that they happen to be proximate to a sensitive site. See also our comments below regarding Example 3.</li> <li>• While we acknowledge that a fixed distance cannot be given, as it will vary on a case by case basis depending on the nature of the perceived threat, the Statement could usefully indicate factors to be taken into account when assessing proximity, e.g. by reference to the proximity needed to carry out espionage (e.g. for high tech or military sites) or acts of terrorism (e.g. for critical infrastructure).</li> </ul>
25	<p><b>Control Risk.</b> The Draft Statement states that <i>“Additionally a large amount of control may enable parties to reduce the diversity of a market, or influence the market’s behaviour, in a way that may give rise to a risk to national security.”</i></p>	<ul style="list-style-type: none"> <li>• It is unclear why this statement has been included in the section relating to the “Control Risk”.</li> <li>• In addition, the references to “influence the market’s behaviour”, and “reduce the diversity of a market” could potentially suggest that the Government regards matters of broader industrial policy as matters of national security. The Committee does not believe that this is appropriate or that this will promote clarity and predictability. These concepts could also potentially be construed as overlapping with competition review under the Enterprise Act</li> </ul>

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		<p>2002.</p> <ul style="list-style-type: none"> <li>The Committee believes that this sentence should be deleted.</li> </ul>
Example 2	<p><b>Control Risk.</b> Example 2 states that the control risk is “high”, where the acquirer is increasing their stake from 15% to 26%.</p>	<ul style="list-style-type: none"> <li>It is unclear and confusing to regard the increase from 15% to 26% as triggering a high degree of control risk. This would be better framed as an increase from 15% to 51%.</li> </ul>
31	<p><b>Asset acquisitions.</b> The Draft Statement provides that “<i>the call-in power could be more likely to be used in relation to qualifying acquisitions of assets closely linked to the activities of the 17 areas of the economy set out in paragraph 10 or are in areas closely linked to those areas of the economy</i>”.</p>	<ul style="list-style-type: none"> <li>In line with our comments above regarding paragraphs 10 and 11, the Statement could helpfully clarify (e.g. through examples) the circumstances in which assets may be considered to be “closely linked” to the 17 listed areas, or to be in areas that are closely linked to the 17 listed areas. For example, are activities included in earlier drafts of the mandatory definitions but excluded as the definitions have been refined such as landlords of government buildings or datacentre landlords (where tenant is the operator) to be viewed to be closely linked to the sector?</li> </ul>
32	<p><b>Asset acquisitions:</b> the Draft Statement states that “<i>The Secretary of State expects to call in rarely acquisitions of assets which are not in areas linked to the 17 areas of the economy</i>”.</p>	<ul style="list-style-type: none"> <li>It would provide clarity if the language of this paragraph mirrored that in paragraph 31 by referring to “areas closely linked to those areas of the economy”.</li> </ul>
Example 3	<p><b>Acquirer risk.</b> Example 3 states that, in the context of a real estate investment, the acquirer risk is low, in part because the investor “<i>has also demonstrated that it intends to use the asset as a place of residence, which does not pose a national security risk in directing the asset for this use.</i>”</p>	<ul style="list-style-type: none"> <li>Example 3 provides welcome guidance for residential properties. However, as the last sentence indicates that the degree of acquirer risk is dependent on the acquirer using the premises for residential purposes (which implies that the acquirer might therefore be asked to enter into commitments to that effect), clarity over what is required to demonstrate a low risk intended use would be helpful.</li> <li>It would be also helpful if the guidance could state how the intended use of real estate can impact on the national security risk assessment and, in particular, what sort of commercial uses might be considered to give rise to such risks or conversely to be low risk (e.g. would the analysis in example 3 be any different if Building B was an office block and intended to be used as office rather than residential?) In addition, we note that this type of risk (how the property is intended to be used) might more accurately be described as a form of target risk, as it is not inherently connected with the characteristics (hostile or otherwise) of the acquirer.</li> </ul>

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36, 37, 38	<b><i>Retrospective use of the call-in power.</i></b>	<ul style="list-style-type: none"> <li>• Pursuant to s. 2(2) of the Act, the Government may issue a call-in notice at any time before the earlier of: (a) six months after the Secretary of State became aware of the trigger event; and (b) five years after the trigger event. There is no clear provision on when the Secretary of State might become aware of a trigger event for these purposes.</li> <li>• In order to given investors certainty, as with the competition regime, clear written guidance should be issued specifying when the Secretary of State will be deemed to have become aware of a trigger event for these purposes. In particular, the Secretary of State should be deemed to have become aware of a trigger event if it is notified to the Investment Security Unit or if it is made public (and the EA 2002 contains a definition of “made public” for these purposes).</li> </ul>
General	<b><i>Deletions from previous Draft Policy Statement.</i></b> Useful guidance included in the prior iteration of the draft policy statement has been removed in the current statement.	The Committee believes that the additional written guidance (see the first row in the table – General) should include the following which were removed from the previous draft policy statement:
	<i>Necessity and proportionality</i>	<ul style="list-style-type: none"> <li>• A statement that the power to address national security risks will be governed by the principles of necessity and proportionality.</li> </ul>
	<i>Track record</i>	<ul style="list-style-type: none"> <li>• The track record of the acquirer in relation to other acquisitions or holdings as a factor the Secretary of State would take into consideration when assessing the acquirer risk.</li> </ul>
	<i>State owned entities, sovereign wealth funds, or other entities affiliated with foreign states</i>	<ul style="list-style-type: none"> <li>• A statement that state-owned entities, sovereign wealth funds, or other entities affiliated with a foreign state do not inherently pose more of a national security risk, and recognition that these organisations may have full operational independence in pursuing long-term investment strategies with the object of economic return, raising no national security risks</li> </ul>
	<i>Routine provision of goods or services</i>	<ul style="list-style-type: none"> <li>• A statement that the Secretary of State does not ordinarily expect national security risks to arise from assets that are related to the routine provision of goods or services between businesses and therefore does not generally expect to call such transactions in for assessment.</li> </ul>
	<i>Loans and conditions acquisitions</i>	<ul style="list-style-type: none"> <li>• A statement that the overwhelming majority of loans, conditional acquisitions, futures, and options are expected to pose no national security concerns, including if they involve assets closely linked to the activities of the 17 areas of the economy subject to mandatory notification. In any event, the Secretary of State generally only expects to intervene when</li> </ul>



Para #	Matter	Comment
		an actual acquisition of control will take place (e.g. a lender seizing collateral).