Department for
Business, Energy
& Industrial Strategy

NATIONAL SECURITY AND INFRASTRUCTURE INVESTMENT REVIEW

The Government's review of the national security implications of foreign ownership or control

October 2017

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The consultation can be found on the BEIS section of GOV.UK:
www.gov.uk/beis

Any enquiries regarding this publication should be sent to us at
https://www.gov.uk/government/consultations/national-security-and-infrastructure-investment-review

Foreword from the Secretary of State for Business, Energy and Industrial Strategy

The United Kingdom economy is open to the world. Core to our economic approach is to trade with other countries, to invest in other countries and to welcome foreign investment into our economy.

Foreign investors into the British economy know that they can count on a business environment and a legal and policy framework that is even-handed and that does not impose arbitrary restrictions on corporate transactions.

That framework of laws and policies, as in other advanced economies, must allow the Government to fulfil its duty of safeguarding our national security. It must also ensure that mergers and takeovers – which can be important sources of investment and competitive challenge – are conducted in an orderly and transparent way so that shareholders can make an informed assessment of the merits of a bid.

As with our standards of corporate governance, our framework of laws and policies on protecting national security and on the conduct of mergers has been considered and updated from time to time. This tradition of periodic examination and improvement has contributed to our reputation for being a destination in which people can invest with confidence.

In keeping with this, this Green Paper makes proposals for reforms to keep our arrangements up-to-date. In particular, it proposes to update our arrangements for the scrutiny of investments in relation to national security. This is to ensure that any questions of national security can be considered in a clear, consistent and proportionate way. These proposals are not in any way designed or intended to limit market access for any individual countries, nor are they related to the degree of market access the UK is able to enjoy abroad.

We invite responses to our proposals from businesses and other interested parties both within the United Kingdom and around the world. Their responses will be key in determining our way forward for the future which we will set out in a White Paper next year.

We are determined that our rules should serve as a model of fairness and efficiency. Our Plan for Britain depends on being open for business with the rest of the world and these measures are intended to underpin that commitment.

THE RT HON GREG CLARK MP
SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

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General information about the consultation

Purpose of this consultation

This Green Paper is the result of the Government's review of the Enterprise Act 2002 and its powers in relation to foreign investment and national security.

It sets out the Government's proposals to reform and strengthen our powers for scrutinising the national security implications of particular types of investments.

The Green Paper sets out the approach the Government proposes to take in both the short and long term. The Government wishes to use the responses to the Green Paper to develop these proposals further.

Issued: 17 October 2017
Consultation responses:

- for consultation responses in relation to chapter 7 and secondary legislation: 14 November 2017
- for consultation responses in relation to chapter 8 and longer term reforms: 9 January 2018.

Enquiries to:

National Security and Infrastructure Investment Review
Consumer and Competition Policy Directorate
Department for Business, Energy & Industrial Strategy,
1st Floor,
1 Victoria Street,
London,
SW1H 0ET

Tel: 0207 215 5000
Email: nsiireview@beis.gov.uk

Territorial extent:

National security and competition policy are reserved matters. However, we will continue to engage with the devolved administrations about these issues.

How to respond

Your response will be most useful if it is framed in direct response to the questions posed in chapter 9. Responses should be submitted via the Citizen Space website: https://beisgovuk.citizenspace.com/ccp/nsiireview/

Alternatively, respondents can email responses to nsiireview@beis.gov.uk or can provide hard copy responses to the correspondence address above.

Additional copies:

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Confidentiality and data protection

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information legislation (primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004).

If you want information that you provide to be treated as confidential please say so clearly in writing when you send your response to the consultation. It would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded by us as a confidentiality request.

We will summarise all responses and place this summary on the GOV.UK website. This summary will include a list of names or organisations that responded but not people's personal names, addresses or other contact details.

Quality assurance

This consultation has been carried out in accordance with the Government's Consultation Principles.

If you have any complaints about the consultation process (as opposed to comments about the issues which are the subject of the consultation) please address them to: enquiries@beis.gov.uk.

Executive summary

The United Kingdom follows an economic model that thrives on openness to trade. This has served our country well over the years. However, such a model can only be effective if it comes with safeguards.

Foreign direct investment (FDI) brings considerable benefits to the UK economy: the injection of foreign capital, new jobs, ideas, talent and leadership. Thanks, in part, to the stable policy environment pursued by successive governments in relation to trade and investment, the UK is one of the top destinations for foreign investment. This Green Paper reaffirms our commitment to this approach, which has helped make our economy strong and diverse. Indeed, our intention is for the UK to remain amongst the most open economies to foreign investment, and to reinforce this by strengthening safeguards so that public confidence in the regime remains high. As the UK prepares to leave the European Union, we will remain, in the Prime Minister's words, *"open for business: open to investment in our companies, infrastructure, universities and entrepreneurs"* and the strongest advocate for an optimistic and outward-looking world built on free trade, partnerships and globalisation.

However Britain's rightly-praised openness to foreign investment also needs to be accompanied by appropriate scrutiny of the potential national security impacts of deals, as demonstrated by the Hinkley Point C decision last year. The vast majority of investment into the UK's economy raises no national security concerns. However, we need to be alert to the risk that having ownership or control of critical businesses or infrastructure could provide opportunities to undertake espionage, sabotage or exert inappropriate leverage. This is an issue already recognised by other developed and open countries in their equivalent regimes. This Green Paper therefore sets out proposals to reform how the Government scrutinises investments for national security purposes.

The Government wants to maintain the UK's strong track record in attracting overseas investment, with an open and reliable regime governing mergers across the whole economy. The UK's tradition of periodic refinement and improvement of this regime has enabled us to remain internationally competitive.

The independent Takeover Panel has recently announced proposals for reform of the Takeover Code which determines the process and timings of mergers. We believe the changes proposed by the Takeover Panel would improve the regime and look forward to the conclusion of its consultation. Alongside this, the Government will, where relevant, act to ensure public funds are protected in merger situations.

Proposed national security reforms

All reforms that the Government makes in this area will only be the necessary and proportionate steps to protect national security. This applies to both the short-term measures it will take, and any final set of long-term reforms that it will pursue.

Short-term steps

In the short term, the Government proposes to amend the turnover threshold and share of supply tests within the Enterprise Act 2002. This is to allow the Government to examine and potentially intervene in mergers that currently fall outside the thresholds in two areas: (i) the dual use and military use sector, (ii) parts of the advanced technology sector. For these areas only, the Government proposes to lower the turnover threshold from £70 million to £1 million and remove the current requirement for the merger to increase the share of supply to or over 25%.

This will be done through secondary legislation. The Government welcomes respondents' views on the precise forms of words to define the relevant areas and the new thresholds.

Long-term reforms

In the longer term, the Government intends to follow the example of other developed, open, countries and make more substantive changes to how it scrutinises the national security implications of foreign investment. The precise shape and scope of these reforms will be informed by this consultation, from which detailed proposals will be put forward in a White Paper.

The reforms have a particular focus on ensuring adequate scrutiny of whether significant foreign investment in our most critical businesses – those which are essential to our country and society – raises any national security concerns and providing the ability to act in circumstances where this might be the case. The expectation is that the need to act would be relatively rare. Scrutiny does not mean making any part of the UK's economy off-limits to foreign investment. The proposals are concerned only with national security, and are designed to be focused and proportionate in their scope and application. The potential reforms include:

- an expanded version of the 'call-in' power, modelled on the existing power within the Enterprise Act 2002, to allow Government to scrutinise a broader range of transactions for national security concerns within a voluntary notification regime and/or;
- a mandatory notification regime for foreign investment into the provision of a focused set of 'essential functions' in key parts of the economy. Mandatory notification could also be required for new projects that could reasonably be expected in future to provide essential functions and/or foreign investment in specific businesses or assets.

The Government wishes to consider whether some, or all, of these elements should be included in a new regime. The Government welcomes respondents' views on these proposals. In particular, we welcome views about how to ensure the proposals are designed and implemented in a way which is as efficient, clear and as straightforward as possible, maintaining confidence in the UK's well-functioning competition regime, while protecting national security.

Introduction

Background

1. The United Kingdom has a well-deserved reputation as an open economy. We enjoy one of the highest rates of inward FDI in the world. However in recent years there have been a small number of transactions which have raised questions about whether our regime is sufficient to protect our national security effectively.

2. Until now, the UK has used the Enterprise Act 2002 to examine mergers for the purposes of national security and other areas of public concern. This paper asks whether that approach is sufficient to ensure that national security risks receive the appropriate level of scrutiny, and whether the Government has the necessary powers to ensure the national security of the UK.

3. This paper sets out the Government's short-term and long-term proposals, and invites comments on the way forward.

The principles underpinning the Government's review

4. In considering the question of when and how it is legitimate for the Government to intervene in otherwise private deals, this review and Green Paper have drawn on a set of key principles and aims – which are to:

    - **ensure the UK remains attractive to inward investment** – changes should not put at risk the UK's current world-leading position in attracting FDI;
    - **provide certainty and transparency wherever possible** – any changes to the rules need to be transparent in nature and provide investors with clarity about how they would work in practice;
    - **reflect national security concerns** – where concerns arise, the Government must be able to deliver its primary duty of protecting national security;
    - **ensure a targeted scope wherever possible** – reforms that relate solely to national security should apply only to those particular businesses and sectors which pose the greatest risks and where other regulatory regimes are not sufficient; and
    - **ensure powers are proportionate** – any new powers given to the Government must be proportionate and exercised judiciously.

Structure

5. This Green Paper is structured as follows:

- Chapter 1 considers the role of FDI in promoting growth and productivity;
- Chapter 2 summarises the current framework around mergers, including the recent proposals made by the Takeover Panel for reform of the Takeover Code;
- Chapter 3 covers the national security challenges facing the country and how the Government responds to these;
- Chapter 4 sets out the current powers for the Government to protect the country's most critical assets from these and other threats;
- Chapter 5 reviews how other countries have approached these common challenges;
- Chapter 6 summarises the Government's conclusions about whether the current UK regime remains sufficient;
- Chapter 7 details the Government's proposed short-term reforms;
- Chapter 8 sets out options for long-term reforms;
- Chapter 9 lists the consultation questions to which respondents are invited to respond.

Chapter 1: The economic impact of foreign direct investment

Summary

- The UK is a particularly open economy, which receives and makes very high levels of foreign direct investment (FDI). It is also characterised by very high volumes of merger activity more generally.
- Foreign investment brings tangible benefits to the UK, and underpins a significant amount of economic activity.
- The inflow of foreign capital and expertise is particularly important in providing the necessary investment to build, maintain and modernise the UK's infrastructure.
- Mergers are important to help companies grow, become more efficient and innovate.

6. The UK is one of the world's top destinations for FDI. It has the third highest FDI stock in the world behind the US and China (see table 1). A 2016 ranking of countries by FDI as a proportion of Gross Domestic Product showed the UK at 46% – the fourth highest proportion in the G20 (table 2).

Table 1. FDI inward stock[1] position in 2016

Ranking	Country	FDI ($ trillions)
1	United States	6.4
2	China (including Hong Kong)	1.6
3	United Kingdom	1.2
4	Singapore	1.1
5	Canada	1.0
6	Ireland	0.8
7	The Netherlands	0.8
8	Switzerland	0.8
9	Germany	0.8
10	France	0.7

Source: 'Foreign direct investment', UNCTAD Data Center[2]

[1] Inward stock refers to the total amount of FDI a country has received.
[2] United Nations Conference on Trade and Development (UNCTAD) (2017), 'Data Centre'.

Table 2. Inward FDI stock as a percentage of GDP in 2016

Ranking	Country	FDI as % of GDP
1	Canada	62.2
2	South Africa	46.9
3	Mexico	46.6
4	United Kingdom	46.2
5	Australia	45.3
6	Brazil	35.3
7	United States	34.3
8	Saudi Arabia	33.6
9	Russian Federation	29.5
10	France	28.4

Source: UNCTAD Data Center[3]

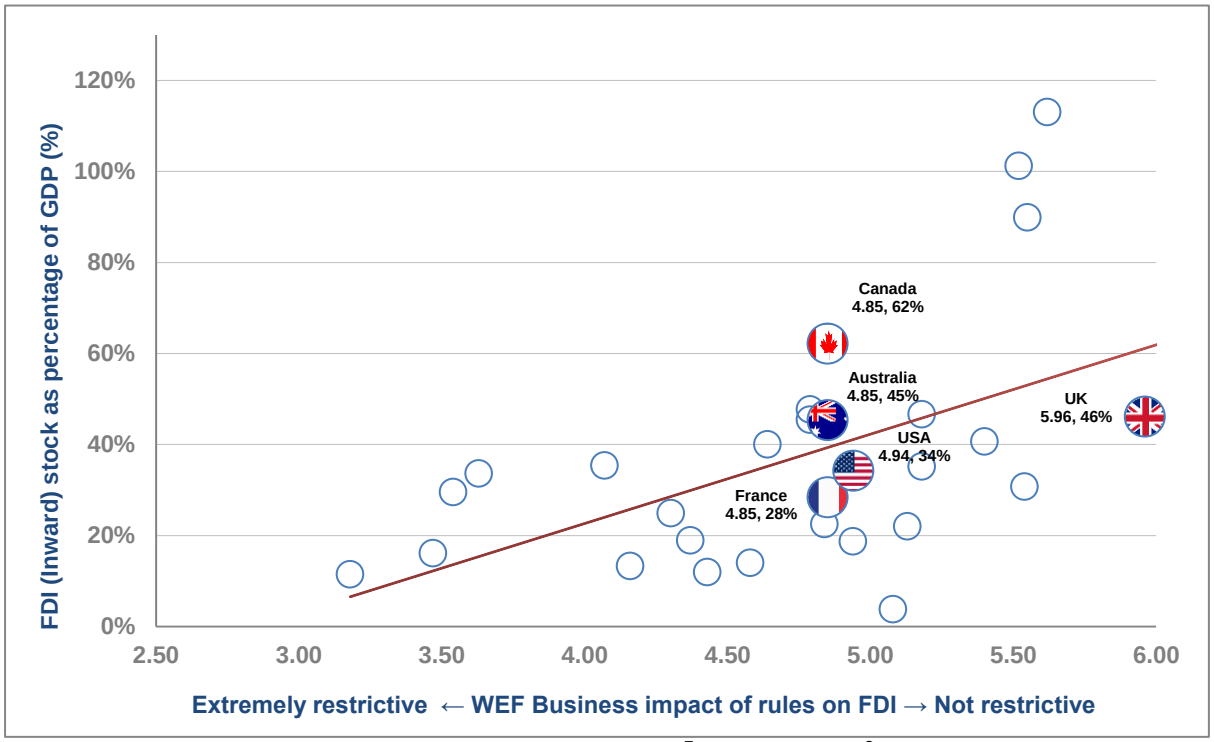
7. The UK is also one of the largest outward investors in the world. UK outward FDI stocks as a percentage of GDP stood at 56% in 2016, the third highest in the G20.[4] By 2016, the UK's stock of outward FDI was over $1.4 trillion, behind only the United States in total value.

8. FDI into the UK leads to tangible and considerable benefits for our economy and citizens. It can bring new jobs – almost 85,000 new jobs were created by inward investment projects in 2015.[5] It can also bring fresh ideas, new talent and world-class leadership, sparking new developments in the UK. For example, FDI has helped to make the UK car industry among the best in the world – with more than 1.6 million cars manufactured each year in the most productive automotive sector in the EU.[6] FDI also contributes indirectly to the country's tax revenue and therefore helps fund our public services.

9. The reasons that drive FDI decisions are varied. The UK's policy environment is a key factor in making the country an attractive destination for foreign investors. The chart on the next page compares the World Economic Forum's measure of how open a country's FDI rules are with that country's stock of FDI as a share of GDP. While there are multiple factors involved, there is a positive correlation between an economy's 'openness' and the FDI it attracts.

[3] UNCTAD (2017), 'Data Centre'.
[4] UNCTAD (2017), 'Data Centre'.
[5] HM Government (2016), 'Inward Investment Results 2015/16'.
[6] KPMG (2014), 'The UK Automotive Industry and the EU'.

Chart 1: Relationship between restrictiveness of FDI rules and extent of foreign investment



Source: Data taken from WEF Competitiveness Rankings[7] and UNCTAD[8]. Note: the chart covers the countries with the 30 largest Gross Domestic Products in 2015.

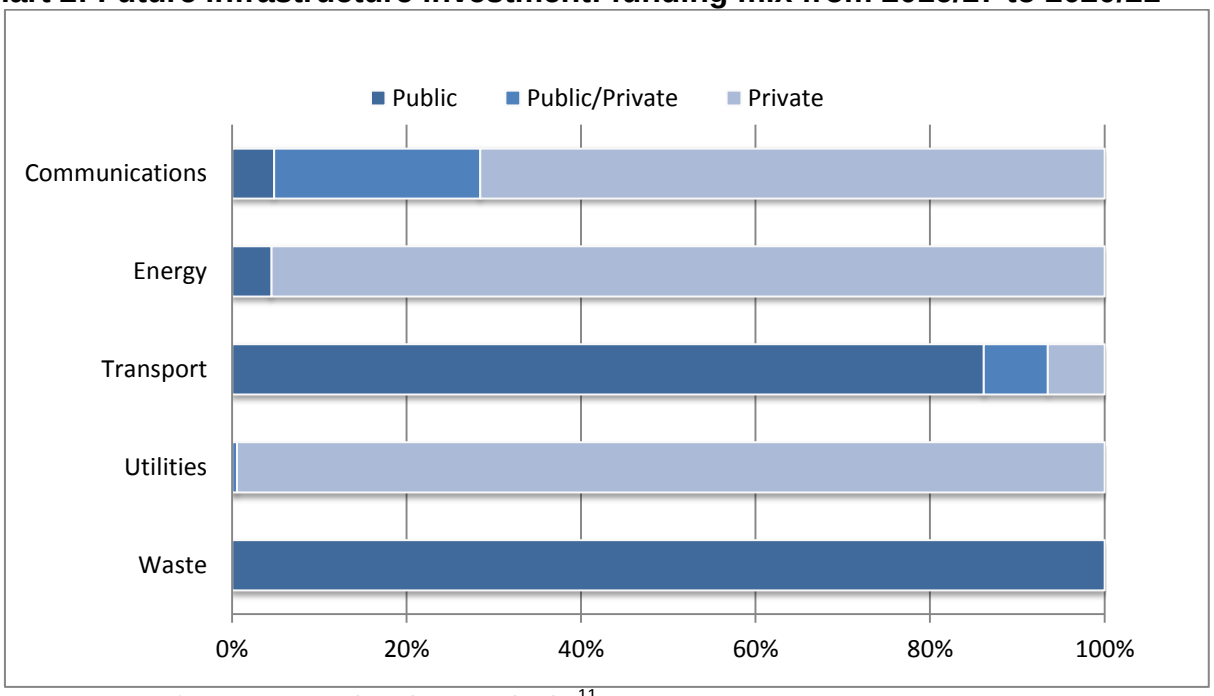
Infrastructure investment

10. The UK requires significant capital sums to upgrade, renew and expand its infrastructure. This is vital as we seek to ensure that the economy remains resilient to future challenges including climate change and a growing population. The National Infrastructure Pipeline[9] details long-term plans to invest over £410 billion in 525 projects in water, energy and transport infrastructure up to and beyond 2020-21. A large proportion of this will need to be provided by foreign investors.

11. The UK relies on investment from the private sector to deliver infrastructure projects as effectively and efficiently as possible. Over 50% of the infrastructure investment pipeline up to 2020-21 is expected to be financed and delivered by the private sector, with the largest proportion of private investment in utilities, energy and communication.[10] Chart 2 on the next page sets out the funding split of each sector for the infrastructure pipeline between 2016/17 and 2020/21.

[7] World Economic Forum (2015), 'Competitiveness Rankings'.
[8] UNCTAD (2017), 'Data Centre'.
[9] HM Treasury and Infrastructure and Projects Authority (2016), 'National Infrastructure Pipeline'.
[10] National Infrastructure and Construction Pipeline Analysis (2016).

Chart 2: Future infrastructure investment: funding mix from 2016/17 to 2020/21



Source: Infrastructure and Projects Authority[11]

Mergers

12. FDI often takes the form of mergers or acquisitions where overseas companies merge with, or take over, British businesses. Regardless of the nationalities of investors involved, mergers matter for a thriving market economy. They can bring real benefits to consumers and the economy as a whole through higher growth, greater innovation and increased productivity. Companies often merge to take advantage of synergies and economies of scale. They can also allow stronger companies to grow and remove weaker players, thereby promoting competition and increasing the efficiency of the market as a whole.

13. The UK punches above its weight in relation to the volume of global mergers and takeovers it attracts, typically accounting for between 10 and 20% of global activity.[12] Like FDI, this goes both ways – between 2012 and 2016: overseas companies spent £58 billion on acquiring 164 UK companies on average per year while UK firms spent £20 billion acquiring 121 overseas companies.[13]

[11] Infrastructure and Projects Authority (2016), 'National Infrastructure and Construction Pipeline Analysis'.
[12] Financial Times (2016), 'Dealmaking falls to three-year low'.
[13] Office of National Statistics (2012 – 2016), 'Mergers and acquisitions database'.

Chapter 2: The UK's merger regime

Summary

Mergers are an important part of a dynamic economy. The UK's merger regime is designed to offer clarity for businesses and build investor confidence. It is based on transparent rules administered consistently by expert bodies. Ministers' statutory ability to intervene in mergers is limited to issues of national security, financial stability and media plurality. Public concern may arise from some mergers, for example, where employees are affected or research and development is at risk.

The independent Takeover Panel has recently proposed a set of improvements to provide more information and time for scrutiny in the takeover process. The Government welcomes and supports these proposals. The Government will also take steps to ensure that government funding for research and development is clawed back in certain cases where a company in receipt of such funding is taken over.

Introduction

14. The UK's merger regime reflects the openness of our economy. It is characterised by transparent rules designed to guard against anti-competitive behaviour and uphold proper conduct. These rules are administered consistently by expert bodies that operate independently of Government: the Competition and Markets Authority (CMA), which is responsible for assessing the effect on competition from mergers, and the Takeover Panel, which oversees the Takeover Code governing the process of takeovers. Ministers' ability to intervene is significantly restricted, by law, to issues of public interest so as to provide clarity to businesses and investors.

15. The Government's current powers to intervene in mergers that may raise national security concerns are in the Enterprise Act 2002, which also establishes key parts of the UK's competition regime.

The merger control regime

16. The UK operates a voluntary (rather than mandatory) merger notification regime. Under the Enterprise Act 2002, there is no requirement to notify mergers to the CMA, regardless of whether or not the CMA would have jurisdiction to review the merger. For those that meet statutory tests relating to companies' turnover or their share of supply, the independent CMA is responsible for assessing whether a transaction is a relevant situation for the purposes of the Act and, if so, whether the proposed merger would significantly lessen competition.

17. For the CMA to assess a proposed merger, the acquired company must have an annual turnover of more than £70 million and/or the merger should result in the creation of, or increase in, a 25% or more combined share of sales or purchases in the UK (or in a substantial part of it), of goods or services of a particular description.[14]

18. The CMA may be notified of relevant mergers and also has powers to 'call in' mergers about which it is not voluntarily notified. Where a merger raises competition concerns, the CMA has the powers to address these by accepting undertakings or by imposing remedies on the merger parties to address competition concerns or, if that is not possible, prohibiting the merger. In recent years, around 600 transactions have received some scrutiny annually, of which between 60 and 80 have typically become merger cases. Mergers that are subject to review by the CMA undergo an initial 'Phase 1' investigation. Where competition concerns are identified at the end of the Phase 1 investigation, the merger is referred for an in-depth 'Phase 2' investigation (although the merging parties are able to offer remedies at the end of Phase 1 to avoid a reference to the Phase 2 investigation). Around 10 mergers annually have been subject to a Phase 2 investigation in recent years. Typically, up to 20 mergers each year have ultimately been subject to some level of intervention (either at the end of a Phase 1 or a Phase 2 investigation).

19. In cases where a merger has a cross-EU dimension, which is determined by a turnover test,[15] any competition implications are currently investigated by the European Commission, rather than national competition authorities such as the CMA. Cases covered by the European Commission operate on a mandatory notification regime.

Role of Ministers in public interest cases

20. The UK merger regime is designed to offer clarity for businesses and build investor confidence. Under the Enterprise Act 2002 and EU law, Ministers can only intervene formally in cases that raise public interest considerations and meet either the CMA's or the European Commission's consideration thresholds (with exceptions for certain defence and media mergers covered below). Public interest categories therefore apply to both EU and domestic mergers and cover:

[14] Competition and Markets Authority (2014), 'Mergers Guidance on the CMA's jurisdiction and procedure'.

[15] The European Commission will look at cases which exceed certain turnover thresholds, namely a) where the combined worldwide turnover of all undertakings concerned is over €5 billion, and the aggregate EU-wide turnover of at least two undertakings is over €250 million, or b) where the combined worldwide turnover of all undertakings concerned is over €2.5 billion, the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €100 million, and the combined aggregate turnover all of the undertakings concerned is over €100 million in at least three Member States (MSs), and in each of at least 3 of these MSs the aggregate turnover of at least two of the undertakings concerned is over €25 million. But the European Commission will not look at cases if all the undertakings concerned achieve more than two-thirds of their aggregate EU-wide turnover within one and the same MS.

- national security (including public security);
- financial stability (prudential regulation in European mergers); and
- media plurality.

21. There have been 12 public interest interventions since the Enterprise Act 2002 was enacted. Seven have been on national security grounds. The most recent intervention on national security grounds occurred earlier this year when the Secretary of State made a public interest intervention in the Sepura/Hytera merger; the Secretary of State subsequently accepted statutory undertakings to remedy the national security issues raised by the deal.[16]

22. Any public interest intervention under the Enterprise Act 2002 requires the CMA to provide a report to the Government on jurisdictional and competition issues. The CMA would not be expected to provide its own advice on public interest issues at Phase 1, as the CMA acknowledges it is not an expert on national security issues and will generally summarise any representation made to it in its Phase 1 report (including those of other Government departments). However following a reference on public interest grounds, the independent Phase 2 Inquiry Group would be required to report to the Secretary of State about whether the merger operates or is expected to operate against the public interest.

23. The Government's powers under the Enterprise Act 2002 allow it to intervene across the economy if it reasonably expects there are public interest issues. However, as noted above, interventions are normally only permitted in relevant mergers above certain turnover and share of supply thresholds. There are a few very limited exceptions, for certain defence contractors and media companies (the special public interest regime).[17] As well as mergers involving most small businesses being outside the scope of the Enterprise Act 2002 powers, investments in new projects (such as new-build nuclear power stations) are not covered by the Act (until they begin operation), nor are the transfer of "bare assets" (non-business entities such as machinery or intellectual property).

The Takeover Code

24. The independent Takeover Panel administers the Takeover Code, which determines the process and timetable for takeovers. The Takeover Code requires companies to set out their plans and how they will handle the target company, in the event of a successful takeover.

[16] https://www.gov.uk/government/publications/proposed-acquisition-of-sepura-plc-by-hytera-communications-corporation-ltd-decision-notice

[17] In these special merger cases, the Government is able to issue a "special public interest intervention notice" (SPIIN); hence this is sometimes referred to as the SPIIN regime.

Bidder's plans for the target company

25. Bidding companies are required to set out the long-term commercial justification for the offer in the offer document, including their intentions on issues such as the future business direction, continued employment of employees and management, strategic plans (including likely effect on employment), pensions and fixed assets. These statements automatically have the status of post-offer intention statements within the terms of the Takeover Code. Although these are not legally binding, they must accurately reflect the parties' intentions at the time of making the statement and be made on reasonable grounds; deviation from them within 12 months, or such other time as is specified in the statement, must be publicised and explained. It is then for the Takeover Panel to decide whether any disciplinary action is required under the Takeover Code.

26. The target company's board is required to set out its opinion on the offer's effects on all the company's interests including specifically, employment and the bidder's strategic plans for the company and their likely repercussions on employment and locations of businesses. The factors which the board may take into account are not limited to these points, and in particular the board does not have to treat the offer price as the determining factor. Furthermore, the Code complements, rather than replaces, other relevant legal duties, such as section 172 of the Companies Act 2006. Under this section, directors have a duty to promote the success of the company for the benefit of its members as a whole, and, in doing so, directors must also have regard to a number of other specified stakeholder relationships and wider issues. These include the likely consequences of any decision in the long term and the interests of the company's employees, the need to foster business relationships with suppliers, customers and others and the need to act fairly as between members of the company.

27. The Code also allows for employee representatives to give a written opinion on the offer, which covers their view of the effects on employment and must be appended to the board circular if it is received in good time; otherwise it must be published promptly on a website and a Regulatory Information Service announcement must be made. The Code also allows for opinions to be given by trustees of any of the company's pension schemes.

Timetables for the takeover process

28. The Takeover Code sets out timetables for the completion of takeovers, including specific timetables for the main stages of making and securing acceptance of an offer. The timetable is designed to ensure that, especially in a hostile bid situation, the target is not kept 'under siege' by bidders. However, if a target requires more time to mount a defence, the Code provides for it to request extensions to the deadlines. This applies both to the 28 day 'put up or shut up' deadline (whereby bidders must make a formal offer within 28 days after its interest becomes public) and in subsequent stages where the target can present new information or arguments against the takeover before a bidder can put forward its final revised offer (if it chooses to).

Enforcement of post-offer undertakings

29. In some mergers, the companies involved may decide voluntarily to make legally binding commitments under the Takeover Code, known as post-offer undertakings, in which they commit to take, or not to take, specified action. The ability to give legally binding post-offer undertakings was introduced into the Takeover Code in 2015.

30. Post-offer undertakings are required to be specific, precise and objective. They are enforceable by the Takeover Panel and the Takeover Code requires a party which has given a post-offer undertaking to provide updates to the Takeover Panel on compliance. The Takeover Panel may also appoint an independent supervisor to monitor compliance. When post-offer undertakings have been breached or are likely to be breached, the Takeover Panel can seek a court order securing compliance. If the bidder still goes ahead and breaches a court order, it can be found to be in contempt of court. Such behaviour is treated extremely seriously by the courts and they may impose severe sanctions including fines (which have no upper limit in the higher courts) and imprisonment.

Issues with the current regime

31. The UK merger regime has provided a stable and transparent framework for business and investors. However, there have been concerns raised about how takeovers governed by the Takeover Code take place. These include how much information is available on the bidder's detailed plans, how to make public debate on the likely impact of the takeover as informed and timely as possible, and how to give target companies sufficient time to respond to a bid.

32. Although a takeover is essentially a commercial transaction between two sets of company directors and shareholders, there can be a wider legitimate interest in the outcome, given that takeovers can affect jobs, pensions, salaries, and the long-term location, direction and functions of a company. Takeovers often move at speed and it is important that as much relevant information is made available as early as possible so that shareholders can properly consider the offer, but also so that any wider public debate can be properly informed and the bidder is able to respond to public concerns.

33. A further area of concern in takeovers is where Government has provided funding to industry, for example for research and development, to support innovation and growth of cutting-edge industries and solutions. When companies in receipt of public funds are taken over, the Government has a duty to safeguard public funds. One of the ways it can do this is by inserting 'change of control' clauses in funding agreements to allow the Government to claw back funding in the event that a takeover means the new company does not meet the eligibility criteria to receive the grant or the new company intends a fundamental change to the purpose for which the grant was given. The Government will therefore look to ensure that public funding includes provisions to claw back money in certain takeovers if the new company would have been ineligible to receive the grant or the purpose for which the grant was made has changed.

34. There have also been calls to widen the public interest grounds on which the Government might intervene in a merger. As noted in paragraph 20, while we remain in the EU, public interest grounds for intervention are limited to:

- national security (including public security);
- financial stability (prudential regulation in European mergers); and
- media plurality.

35. We note that recent proposals from the EU on the screening of foreign investment (see paragraph 70), which are not likely to come into effect until the UK has left the EU, do not propose to expand the public interest grounds for interventions in mergers.

36. The Government has carefully reviewed how reforms of the way mergers and takeovers can be made. We have been discussing with interested parties (including the Takeover Panel) how the regime might be reformed to provide more information and time to allow for assessment of the bid by interested parties, and how assurances given during the takeover can be properly assessed and compliance with them scrutinised.

The Takeover Panel's proposals for changes to the Code

37. The Takeover Panel has recently published a consultation paper[18] proposing a number of important reforms to the way takeovers operate. In summary, the proposals would:

- require bidders to make clear their plans for the target company earlier in the process. Under the proposals, bidders will first have to make their statements of intention when they announce the intended takeover rather than when the formal offer document is published;
- require bidders to be more specific on key aspects of the target company's future which often cause public concern, specifically:
  - the research and development functions,
  - the balance of the skills and functions of the target company's employees and management, and
  - the location of the target company's headquarters and headquarters functions;
- allow a target company facing a bid to pause the takeover process. At present a target company has 14 days from the publication of the offer document to publish its response to the bid. In fast-moving takeovers, bidders may publish their offer document at the same time as making the announcement of the bid, leaving the target with only those initial 14 days to prepare its defence. Under the new proposals, the target company's permission is needed if the bidder wants to publish its offer document within 14 days of announcing its bid. This would give the target a total of

[18] The Takeover Panel (2017), 'Consultation paper issued by the Code Committee of the Panel: statements of intention and related matters'.

28 days in which to publish its defence and therefore extends the public discussion of the merits of the bid; and

- require companies to report at least annually on how they were fulfilling their binding post-offer undertakings and to report at the end of 12 months on how they had fulfilled their post-offer intention statements.

Conclusion

38. The Government wants to maintain the UK's strong track record in attracting overseas investment, with an open and reliable regime governing mergers across the whole economy. The UK's tradition of periodic refinement and improvement of this regime has enabled us to remain internationally competitive. The Government will therefore monitor the impact of any changes and will continue to keep under review whether wider reforms are needed.

39. The regime governing takeovers provides important safeguards on the timing and available information during a takeover, including the system of post-offer undertakings and their enforcement. The Government made suggestions to the Takeover Panel during the development of its recent proposals. We believe the changes proposed by the Takeover Panel would improve the regime. This would also have the effect of other interested parties having more time to consider and express their views on a potential deal. We look forward to the conclusion of its consultation.

40. The following chapters of the Green Paper deal with national security issues that can be raised by investments.

Chapter 3: National security risks, particularly to national infrastructure

Summary

- The UK faces continued and broad-ranging hostile activity from foreign intelligence agencies and others, but has a well-developed and co-ordinated approach to respond to it.
- Foreign ownership or control of businesses, particularly those that operate national infrastructure, can raise specific risks. This could also be the case where investors obtain cumulative ownership or control within, or across, sectors.

How the Government addresses national security risks

41. The 2015 UK national security risk assessment, a summary of which was published as part of the National Security Strategy (see box below), shows that the country faces greater and more complex threats compared to the last assessment published in 2010.

42. Foreign intelligence agencies continue to engage in hostile activity against the UK and our interests, and against many of our close allies. This includes human, technical and cyber operations at home and overseas to compromise the Government, diplomatic missions, Government-held information and critical national infrastructure; attempts to influence Government policy covertly; and operations to steal commercial secrets and disrupt the private sector.

National Security Risk Assessment

The National Security Risk Assessment (NSRA) compares and prioritises the risks to the UK's national security interests. The NSRA 2015 concluded that the threats faced by the UK, including our Overseas Territories and our overseas interests, have increased in scale, diversity and complexity since 2010. It explained that four particular challenges are likely to drive UK security priorities for the coming decade with both immediate and long-term implications:

- the increasing threat posed by terrorism, extremism and instability;
- the resurgence of state-based threats and intensifying wider state competition;
- the impact of technology, especially cyber threats and wider technological developments; and
- the erosion of the rules-based international order, making it harder to build consensus and tackle global threats.

43. The Government has a well-developed and co-ordinated approach to protecting our national security (see box overleaf), including in the area of critical national

infrastructure, and works with businesses to ensure that they have the necessary knowledge and tools to reduce risks. However, it lacks comprehensive statutory powers in relation to business ownership and control.

The UK Government's approach to protecting national security

National Security Strategy and Strategic Defence and Security Review

The Strategic Defence and Security Review (SDSR) sets out how the objectives of the National Security Strategy are to be pursued. These include:

- protecting our people;
- projecting our global influence; and
- promoting our prosperity.

Counter-terrorism strategy

The UK Government's counter-terrorism strategy (known as CONTEST) aims to reduce the risk from international terrorism so that people can go about their business freely and with confidence. The strategy is divided into four principal strands**:** Prevent, Pursue, Protect and Prepare.

National Cyber Security Strategy

The National Cyber Security Strategy 2016 to 2021 sets out the Government's plan to make Britain secure and resilient in cyberspace. The strategy explains the Government's approach to tackling and managing cyber threats in the UK. It also sets out how the UK will aim to be one of the most secure places in the world to do business in cyberspace.

How control of businesses, particularly those operating critical national infrastructure, can raise national security concerns

44. This part of the Green Paper focuses on national security considerations that could arise from control of businesses undertaking the functions, or providing the services, that are essential to our country.

45. In considering where national security risks relating to ownership or control are most likely to arise, the Government is most focused on national infrastructure (see box on the next page). It is these businesses, and critical parts of their supply chains, where the loss or compromise of a service would give rise to a major detrimental impact on essential services, with severe economic or social consequences or loss of life.

46. These national security risks are, broadly, as follows:

    - increased access (to businesses, physical assets, people, operations or data) and ability to undertake espionage;
    - greater opportunity to undertake disruptive or destructive actions or an increase in the impact of such action; and
    - the ability to exploit an investment to dictate or alter services or to utilise ownership or control as inappropriate leverage in other negotiations.

47. Foreign nationality is considered a risk factor when making assessments about the threat to national security posed by an individual or group of individuals. It is accepted that foreign nationals may feel an allegiance or loyalty to their home nation or in the case of dual nationals, their 'other' nationality. This loyalty may motivate them to undertake hostile 'insider' activity, such as unauthorised disclosure of information or corruption of internal processes or systems, or make them vulnerable to coercion by a hostile state, who would exploit their position to conduct espionage or other acts intended to damage the UK's national security. Whilst the vast majority of foreign nationals make a positive contribution to the UK, our economy, society and culture, these considerations, whilst not exhaustive, point to some of the reasons why a foreign investor may pose more of a national security risk.

What is national infrastructure?

National infrastructure comprises those facilities, systems, sites, information, people, networks and processes necessary for a country to function and upon which daily life depends. It also includes some functions, sites and organisations which are not critical to the maintenance of essential services, but which need protection due to the potential danger to the public (civil nuclear and chemical sites for example).

In the UK, there are 13 national infrastructure sectors: chemicals, civil nuclear, communications, defence, emergency services, energy, finance, food, Government, health, space, transport and water. Several sectors have defined 'sub-sectors': emergency services for example can be split into police, ambulance, fire services and coast guard. Each sector has one or more lead Government department responsible for the sector, and ensuring protective security is in place for critical assets.

Not everything within a national infrastructure sector is judged to be 'critical'. The UK's Critical National Infrastructure (CNI) is defined by the Government as those critical elements of national infrastructure (namely assets, facilities, systems, networks or processes and the essential workers that operate and facilitate them), the loss or compromise of which could result in:

a) major detrimental impact on the availability, integrity or delivery of essential services – including those services, whose integrity, if compromised, could result in significant loss of life or casualties – taking into account significant economic or social impacts; and/or
b) significant impact on national security, national defence, or the functioning of the state.

Source: Centre for the Protection of National Infrastructure

48. Foreign control of businesses which operate outside critical infrastructure increasingly raises national security concerns. The proliferation and growing importance of technology and advanced engineering know-how means that threats are not necessarily confined to large companies with high turnover. This poses further challenges to the Government's ability to monitor and respond to emerging threats.

49. The risk of espionage may be intensified where a single investor has multiple areas of investment or ownership across a sector (or across sectors or supply chains). This cumulative investment could enable an organisation with malign intent to build a complex and detailed understanding of critical national infrastructure within a single sector or multiple sectors. Having these ownership stakes might also confer the ability to identify key vulnerabilities in the supply chain and engage in the theft of intellectual property.

50. National security risks could also arise from investments into locations which are in close physical proximity to a national infrastructure site. Known as 'proximity risk', the national security concern arises from the potential that the foreign investor's ownership or control of the adjoining site may be exploited to enable espionage or other activities.

51. The Government recognises that these risks arise in relation to foreign control, access or influence, which can be distinct from ownership. It also recognises that investment by itself does not automatically give an investor the right to influence the company's strategy or operations, nor to gain access to sensitive information or sites.

What the Government is already doing to support businesses and to tackle these threats

52. The Government has a number of legal powers to protect businesses which own or operate critical assets or which operate in sectors which may give rise to national security concerns, as set out in the next chapter. Alongside these, it has a well-established programme of support for these businesses. The Centre for the Protection of National Infrastructure (CPNI) focuses on physical and personnel security, while the newly-created National Cyber Security Centre (NCSC) is responsible for cyber security.

53. Both CPNI and NCSC operate in a similar way with industry – alongside the Government, police and academia, they work collaboratively to identify risks and to reduce the vulnerability of national infrastructure assets. CPNI, for example, offers practical advice for businesses to plan their security (for example, considering how well they will recover from a security incident) and to business leaders (for example, considering how to embed protective security into strategic decision-making).

54. Outside those assets defined as falling within the UK's national infrastructure, the Government and other agencies, such as local police, offer a broad range of support to companies to bolster their protections – cyber, physical and personnel. For example, the Government's 'Cyber Aware' campaign, drawing on expert advice from the NCSC, offers small business and individuals advice about how best to protect themselves from cyber criminals.

Chapter 4: The UK's current powers to mitigate national security concerns raised by business transactions

Summary

- The Enterprise Act 2002 provides key powers for Government to intervene in mergers.
- Sector-specific regulations and powers also aim to ensure that national infrastructure operates securely. Emergency powers could be used should circumstances require them. There are only limited sectoral powers relating specifically to corporate ownership or control and these are not generally aimed at national security concerns.
- Through 'golden shares' and other contractual terms, the Government has other means of gaining a formal role in approving foreign investment. These may apply only in a small number of companies.

Introduction

55. This chapter sets out the powers, regulations and other means currently available to the UK Government and independent regulators aimed at ensuring business transactions such as mergers cannot undermine national security. It first summarises the Enterprise Act 2002 described in more detail in Chapter 2, and then it describes sector-specific and emergency powers, and finally the use of golden shares.

The Enterprise Act 2002

56. As discussed in chapter 2, the key powers provided to Government to intervene in mergers that may raise national security concerns are within the Enterprise Act 2002 which also establishes key parts of the UK's competition regime.

57. In short, Ministers can only intervene formally in cases that raise national security concerns and meet either the CMA's or the European Commission's jurisdictional thresholds (with exceptions for certain defence and media mergers). This means that the acquired company must have an annual turnover of more than £70 million and/or the merging companies will collectively supply or acquire 25% or more of goods or services of a particular description in the UK (or a substantial part of it), provided that the merger results in an increment to that share.

Other statutory powers to protect national security

58. In addition to the Enterprise Act 2002, other legislation allows Government to intervene in companies' activities when essential national security interests are at stake; these include emergency powers such as those in the Civil Contingencies Act 2004 (see box below).

The Civil Contingencies Act 2004

This Act contains the broadest set of powers for Government to intervene to impose emergency regulations to address actual or threatened emergencies. An example would be a serious threat to human welfare arising from disruption to the supply of money, food, water, energy or fuel, or a threat to communication or transport systems. However, these powers may only be used where the urgency of the situation means that Parliamentary processes for scrutinising new regulations need to be circumvented temporarily.

59. There are also legal powers specific to certain national infrastructure sectors. Each is largely focused on operational requirements and largely designed to be used in reaction to emergency scenarios. For example in sectors such as:

- **water** – under s208 of the Water Industry Act 1991 (as amended), the Government can direct 'water undertakers' and some licensees in the interests of national security;
- **communications** – under s132 of the Communications Act 2003, the Secretary of State can require Ofcom to suspend or restrict a provider's entitlement to provide networks, services or associated facilities in the interests of national security or to protect the public from any threat to public safety or public health;
- **energy** – the Energy Act 1976 permits the Government to take control of generation or transmission systems. This also includes powers to direct nuclear sites in exceptional circumstances;
- **civil nuclear** – under s92(3) of the Energy Act 2013, the Secretary of State may direct the Office for Nuclear Regulation to exercise a particular function as he deems necessary for national security;
- **manufacturing** – the Industry Act 1975, which gives the Government broad (untested) powers to intervene in the transfer of control of manufacturing firms to foreign owners "where that change of control would be contrary to the interests of the United Kingdom".

60. Annex A summarises the current approach to regulation and oversight of the 13 national infrastructure sectors.[19] As it makes clear, while many key sectors of interest have some form of operational regulation (to ensure an appropriate

[19] As noted in chapter 3, the 13 sectors are chemicals, civil nuclear, communications, defence, emergency services, energy, finance, food, government, health, space, transport and water.

level of safety and resilience in these areas) there is limited oversight or powers relating to corporate or beneficial ownership or control, and these are not specifically targeted on national security.

61. Alongside its decision to undertake this review, the Government also announced in September 2016 that it would direct the Office for Nuclear Regulation (ONR) to require advance notice from key companies in the civil nuclear sector of any change of ownership or part-ownership. This will allow both ONR and Government to undertake an assessment of the security implications of any such change. This reform will be implemented shortly and means that approximately 50 companies in the sector must inform the ONR about changes of which they are aware involving more than 5% of a company's shares or votes, or any change which gives an investor one or more seats on the Executive Board or equivalent.

Golden shares and procurement

62. Alongside the above legislative and regulatory powers, the UK Government also utilises tailored commercial arrangements as a further means of ensuring its key interests are defended in certain companies. For example, the UK Government holds 'golden shares' in a small number of companies (including BAE Systems for example) that could be used to prevent foreign investors from holding more than a certain percentage of its shares.

63. Departmental procurement policy, and a standard contractual term used by the Ministry of Defence (known as DEFCON 566 Change of Control of Contractor), requires the contractor (which may be on List X – see box below) to notify MOD of any "intended, planned or actual change in control of the contractor", even where there is no change in the company's ultimate beneficial owner.

List X

Businesses working on UK Government contracts (or sub-contracts) must apply for 'List X' status for any facilities which hold very sensitive information that justifies heightened protective measures. This covers information at UK classifications of 'Secret' or above (or information provided by international partners and classified 'Confidential' or above), and ensures that such facilities meet minimum requirements set out in Cabinet Office guidance.

Chapter 5: The approach taken by other countries and international organisations

Summary

- Other developed and open economies have well-established and systematic means of screening investment, particularly from other countries, for national security issues.
- International organisations such as the European Union and World Trade Organisation recognise the duty of Governments to protect national security and therefore permit exceptions to wider rules governing international capital flows.

64. The national security challenges described in chapter 3 are not unique to the United Kingdom, nor is the recognition that particular sectors of the economy are more sensitive and of more potential interest to hostile actors, and therefore should be subject to tailored treatment in relation to foreign ownership or control of these companies.

65. As part of this review, the Government has examined the approaches taken by a cross-section of other developed economies, namely the United States, Canada, Australia and France. These are summarised in Annex B. Key points or patterns include:

- all require approval to be sought before the investment has completed (if the transaction meets the threshold and scope of the regime);
- most of these countries have different thresholds for scrutiny depending on the origin and type of investor – thresholds for notification tend to be highest for investors from countries with which they have free trade agreements, and lowest for foreign state-owned enterprises;
- the United States is the only country to have a voluntary regime – in the other countries reviewed, application is mandatory. However, it does have the power to call-in a transaction even if it was not notified;
- all have extensive powers to apply conditions to investments and to block applications;
- Australia, France and Canada consider national interest more broadly whilst the United States focuses solely on national security. For example, Australia considers whether the investment is in Australia's "national interest", while Canada assesses whether an investment delivers a "net benefit" to Canada;
- all regimes allow for a specific timescale during which applications can be considered. However they also allow the time for review to be extended; and
- only a small number of transactions are formally blocked.

66. International organisations also recognise that critical national infrastructure justifies and requires a greater extent of Government intervention, including the prioritisation of national security.

67. The EU has formal exceptions[20] to the free movement of capital and the freedom of establishment in relation to public security and public policy. Subsequent case law has established that these exceptions can only be invoked where there is "a genuine and sufficiently serious threat to a fundamental interest of society". In addition to France (included in the summary above), a number of other members of the European Economic Area have established foreign investment screening regimes, particularly in relation to national infrastructure sectors such as those described in chapter 3.

68. For example, the German Foreign Trade and Payments Act and the Foreign Trade Ordinance was used in 2016 to block foreign acquisition of Aixtron SE, which supplies equipment to the semiconductor industry. Germany recently expanded the Foreign Trade Ordinance to cover a wider range of companies operating in "critical national infrastructure", including software providers for those sectors, and particular defence technologies. All such investments can potentially be blocked by ministers if the deal is seen to endanger public order or national security.[21]

69. Iceland's Act on Investment by Non-Residents in Business Enterprises (and other related legislation) imposes some limitations on foreign ownership of key industries including energy production.

70. The European Commission has recently made proposals[22] on an EU-wide Foreign Direct Investment (FDI) screening mechanism. The UK is considering its approach to these proposals and we are working closely with the Commission and other Member States. We support addressing barriers to trade wherever they are found, countering the threat of protectionism for the benefit of the global economy. We are clear that screening to prevent threats such as espionage, sabotage and leverage merit special treatment but this should not be conflated with screening to control market access for protectionist reasons. The UK is committed to free trade and investment, which must remain a priority for both a successful UK and European economy.

71. As well as the EU, other relevant international organisations also permit some limited restrictions on investment in relation to national security. The World Trade Organisation's General Agreement on Trade in Services, contains exceptions acknowledging a member's right, in certain cases, to take "action which it considers necessary for the protection of its essential security interests",[23] and to take action necessary to maintain public order where a "genuine and sufficiently serious threat is posed to one of the fundamental

[20] See, for example, Article 65(1)(b) of the Treaty on the Functioning of the European Union.
[21] See http://www.bmwi.de/Redaktion/EN/Pressemitteilungen/2017/20170712-zypries-besserer-schutz-bei-firmenuebernahmen.html
[22] See http://europa.eu/rapid/press-release_IP-17-3183_en.htm
[23] Article XIV bis of GATS

interests of society".[24] The OECD Code[25] similarly recognises a government's right to take action which it considers necessary for "the protection of its essential security interests".

[24] Article XIV(a) and Footnote 5 to Article XIV(a) of GATS.
[25] See Article 3 of the OECD Code of Liberalisation of Capital Movements.

Chapter 6: The Government's conclusions about national security

72. Many of the national security challenges described in chapter 3 are not new ones. However, they now exist in an increasingly complex international economic and political landscape, with greater interconnectivity of nations and ever greater flows of capital. New technologies have also introduced new security challenges. The United Kingdom also faces a continued need for investment in our national infrastructure (as described in chapter 1). This demands that governments look closely at whether they have sufficient powers, systems or processes to address these issues.

73. The approach taken by some of our partner countries (as described in chapter 5) shows a significant degree of consistency in the scope and approach of their formal systems for scrutinising national security implications of foreign investment, particularly those into national infrastructure sectors. In contrast, the **UK's current approach appears less well developed than our partners** to deal with the potential risks to national security that we face, and the scale of investment our national infrastructure will require.

74. Our powers are currently **limited in places** – while the Enterprise Act 2002 powers enable the Government to intervene in mergers across the economy, interventions are only permitted in mergers above certain turnover and share of supply thresholds.[26] Investments in new projects (such as new-build nuclear power stations) are not typically covered by the Act. Technological change also means that thresholds designed at the turn of the century are no longer appropriate for the current economic, social or national security context.

75. Furthermore, in contrast to other countries' regimes, our powers appear:

- **inconsistent –** in some sectors, this means that the Government can rely only upon emergency or 'backstop' powers; and
- **may be too reliant on voluntary powers** – given the national security threats described in chapter 3, it may be insufficient to rely on business voluntarily notifying potential transactions involving foreign actors taking significant influence or control over key parts of our critical national infrastructure; and
- **potentially uncertain for businesses** – by solely relying on voluntary or 'call-in' powers, businesses cannot be certain in which transactions Government may, or may not, have national security interests.

[26] The only exceptions being, as noted in chapter 2, under the Special Public Interest Regime relating to some defence and media companies.

76. The Government's view is that it should be able to act where necessary to protect national security. Given the changing nature of national security risks, these can arise outside regulated sectors and can also arise in relation to both small and large companies. This Paper therefore sets out the Government's proposals for the short- and long-term steps necessary to reform the existing regime, to ensure that it is able to take action to protect national security where required.

77. The current merger thresholds in the Enterprise Act 2002 represent the most pressing issues, requiring urgent updating for certain parts of the economy. The next chapter sets out how Government will promptly do so through secondary legislation, and invites respondents' views about this plan. However, these will only be the first step in our reforms in this area.

78. The Government also proposes making longer-term, substantive reforms. Chapter 8 sets out a number of potential options it could pursue – a final package of reforms could include some, or all, of these. It welcomes respondents' views about the merits of these to help inform the next step of policy development.

79. Any of these reforms would represent a change in the UK's process. However, they should not impede the UK's openness to foreign investment nor its championing of free trade. These changes would empower Government to act only where legitimate national security risks are raised. And no part of the economy, including national infrastructure, would be automatically off limits to foreign investment.

Chapter 7: The Government's proposals for short-term reforms

Summary

The Government is taking a staged approach to reforming how it scrutinises national security implications of business transactions – it seeks input on the detail of prompt action in the short term to amend specific components of our current regime.

The Government proposes to amend the turnover threshold and share of supply tests within the Enterprise Act 2002. This is to allow the Government to examine and potentially intervene in mergers that currently fall outside the thresholds in two areas: (i) the military and dual-use sector, (ii) parts of the advanced technology sector.

For these two areas alone, the Government proposes to lower the turnover threshold from £70 million to £1 million and remove the current requirement for the merger to *increase* the share of supply to or over 25%.

Introduction

80. The Government believes that long-term reform to its powers in this area is needed. However, there are current gaps and issues that require more immediate action to ensure Government can protect national security. This chapter describes its proposals to do so.

Amending the jurisdictional tests for mergers within parts of key sectors of the economy to deal with national security threats

81. As set out in Chapter 2, the Enterprise Act 2002 does not allow Government to intervene in mergers for national security reasons unless the business being taken over has a UK turnover of more than £70 million, or the merger takes the merger parties' combined share of supply of particular goods or services in the UK to 25% or more (or increases an existing share of supply of 25% or more). Businesses covered by the special public interest regime are the only exception to this.

82. Since 2002, technology has advanced and the nature of potential national security risks to our country and society has evolved. As a result, the Enterprise Act jurisdictional tests have become a less appropriate threshold for Government intervention in mergers on national security grounds.

83. The Government will take rapid action to amend this, ensuring that mergers in key sectors that could raise national security concerns can be called in by the Secretary of State. The Government considers that the most pressing gaps

relate to companies in key parts of the military and dual-use and advanced technology sectors.

The military and dual-use sector

84. The military and dual-use sector covers the design and production of military items (such as arms, military and paramilitary equipment) and so-called dual-use items which could have both military and civilian uses. The national security interests in this sector are obvious – these items can, in the wrong hands, pose clear and immediate risks to the UK, our people and society. There are also indirect national security interests – thanks to UK businesses' innovation, our military and defence forces have a clear operational advantage over others. The acquisition of UK businesses with this expertise and intellectual property can, therefore, raise legitimate and significant national security concerns for the country as a whole.

85. The national security risks inherent in this area of the economy were recognised when the Enterprise Act 2002 was passed. Under the Act's special public interest regime, the Government is currently able to intervene in relevant mergers of *defence contractors* which fall below the usual jurisdictional thresholds, as discussed in chapter 2. However not all businesses that design or produce military items are defence contractors or hold confidential defence material, so they are not subject to the special public interest regime. As well as military and defence businesses, there are also businesses that design or produce items, or have technical expertise relating to activity or items, which are primarily for *civilian* uses but could also have military applications.

86. As technology has evolved, small businesses which undertake niche activities or produce highly specialised products in this sector increasingly hold information or items which carry significant national security risks. However mergers involving these businesses are not currently subject to scrutiny for national security reasons; either because the turnover of the business is too small or because the prospective merger does not create or enhance a UK share of supply of 25% or more. The Government is proposing to address this anomaly.

87. The Government is minded to use some of the Strategic Export Control Lists[27] as the basis for which businesses in this sector will be subject to amended thresholds for intervention in mergers. The lists detail goods which have been agreed multilaterally or, in some cases, by the UK alone as posing a risk, for example, to national security or human rights, or because of international obligations or foreign policy commitments, and for which UK businesses must currently secure a licence before exporting. The Government therefore proposes that enterprises that design or manufacture items or hold related software and technology specified on the UK Military List, UK Dual-Use List, UK Radioactive Source List and EU Dual-Use Lists (i.e. not just those enterprises

[27] See https://www.gov.uk/government/publications/uk-strategic-export-control-lists-the-consolidated-list-of-strategic-military-and-dual-use-items-that-require-export-authorisation.

that currently export these) would be in scope of the amended thresholds. We are also exploring (a) how future updates to the relevant Strategic Export Control Lists should be dealt with (and, in particular whether such updates should be brought automatically into scope of the revised merger thresholds) and (b) if enterprises that design or manufacture items or hold technology or software subject to temporary export controls[28] should also be in scope.

88. The Government considers that the well-established nature of the Strategic Export Control Lists (which have existed in something like their present form since the 1990s) will ensure businesses are aware whether they are in scope of the amended thresholds. However, it welcomes respondents' views about the appropriateness of this, and alternative suggestions about how the above activities could best be covered by amended thresholds. We would also welcome views on whether the scope of the new thresholds should reflect updates to the relevant Strategic Export Control Lists and if enterprises that design or manufacture items subject to temporary export controls should also be in scope.

Parts of the advanced technology sector

89. Advanced technology is the other area of activity where Government wishes new thresholds to apply. Technological advances have changed the way in which people interact and businesses develop and grow. New products and services offer the potential to transform the way we live. Much of this depends on continuing advances in computing power and in connectivity, in and out of the home. These changes have also brought challenges. Cyber security is now a real concern for almost every business and consumer, for example. The changes also raise national security concerns for Government too. Advances in technology now mean that there are ubiquitous goods with the potential to be directed remotely should a hostile actor obtain access or control.

90. Mergers related to companies that undertake these activities, therefore, have the potential to give hostile actors knowledge or expertise that could be used to undermine our national security.

91. The innovation behind these changes has often been driven by small businesses, whose energy and creative thinking has brought new perspectives to sometimes old problems. Therefore, there is a real risk that mergers involving these types of businesses which fall below the current thresholds could raise national security concerns.

92. The key areas where Government wishes amended thresholds to apply to target businesses are in the following table. It welcomes respondents' views about the appropriateness of these definitions which will form the basis for the definitions in the proposed legislation.

[28] Orders may be made under section 6 of the Export Control Act 2002 imposing export controls lasting for a maximum of 12 months.

Area of advanced technology	Proposed definitions
Multi-purpose computing hardware	Enterprises that: (i) own or create intellectual property rights in the functional capability of multi-purpose computing hardware; or (ii) design, maintain or support the secure provisioning or management of roots of trust of multi-purpose computing hardware.
Quantum-based technology	Enterprises that research, develop, design or manufacture goods for use in, or supply services based on, quantum computing or quantum communications technologies. This would include the creation of relevant intellectual property or components.

93. The Government recognises that elements of these activities may also, in part, be covered by the use of certain of the Strategic Export Control Lists. The Government wishes to avoid duplication. However, this is preferable to any items or activities being overlooked. Nevertheless, it welcomes respondents' views about how the two lists could best be used alongside each other.

94. It welcomes responses from all parties but particularly from those businesses and investors active in these sectors, and those that advise them.

Green Paper Questions

1.	Do you think the proposed definitions for the dual-use and military and advanced technology sectors provide sufficient clarity and certainty to businesses and investors?
2.	Do you think the scope of the new thresholds should reflect updates to the relevant Strategic Export Control Lists? Do you think that enterprises that design or manufacture items subject to *temporary* export controls should also be in scope?
3.	Are the proposed definitions sufficiently focused on sectors where national security concerns may arise? If not, what amended definitions would help achieve this?

Amendments to the merger thresholds for these two sectors to allow public interest interventions

95. The Government proposes amending both the turnover threshold and share of supply tests for mergers in the narrow areas of the economy described above.

96. The Government proposes to lower the turnover threshold because, as mentioned above, it is clearly now feasible for businesses in these sectors with comparatively low UK turnover to undertake activities which are critical for defence or which otherwise undermine our national security. The Government has reviewed the turnover of businesses in these key sectors and, in light of this, proposes to lower this threshold to £1 million – it considers that this is a proportionate step to address national security risks while leaving micro-businesses outside the scope of the Enterprise Act regime. While this would constitute a significant reduction from £70 million, £1 million still represents a relatively high UK turnover – only around 4 percent of UK businesses are above this threshold in the whole economy.

97. The Government is also proposing to remove the current requirement for a qualifying merger or takeover to bring about an *increase* in the share of supply. Instead an additional test would be added such that the share of supply threshold would also be met in the relevant sectors if the target business had an existing share of supply of 25% or more of the relevant goods or services. In coming to this view, the Government has carefully considered the desirability of the test continuing to operate by reference to the commercial strength arising out of the merger or takeover. It has concluded that the proposed amendment is an important step to protect national security because it is feasible that national security concerns may arise from the acquisition of businesses in these sectors by buyers with no current presence in that market, or indeed the entire UK market.

98. The Government is mindful that these changes would represent the first changes to these thresholds since the Enterprise Act 2002 came into force. However, the real and significant national security issues require us to act and to do so promptly. The Government welcomes respondents' views about how best these changes could be made.

Green Paper Question

4.	Do you agree that the new jurisdictional tests in the Enterprise Act 2002 for businesses in the above defined sectors should be: • a turnover of over £1 million, rather than £70 million as now; and/or • a merger or takeover involving a target with 25% or more share of supply (i.e. with no need for an increase), or which meets the current test of creating or enhancing a share of supply of 25% or more.

99. The Government is working closely with the CMA on the implications of this change, given the legislation will also amend the thresholds above which transactions in the relevant sectors are subject to scrutiny for competition concerns. The amendments are intended to address only the Government's national security concerns – the changes are not driven by any concern from it or the CMA about how competition is working in these markets. The CMA will

apply the same criteria to scrutinising these smaller mergers on competition grounds as it does with other mergers. As with all mergers, those that are above the jurisdictional thresholds need not be notified if the parties consider that the merger is unlikely to raise the possibility of competition or public interest concerns. The CMA already provides guidance on its approach to voluntary notification of mergers.[29] This guidance continues to apply to all notifiable mergers in respect of competition issues.

100. The Government's objectives in amending the jurisdictional tests relate solely to dealing with national security-related issues, and not for any other public interest rationale. Nevertheless, it recognises that the structure of the Enterprise Act 2002 means that its proposals would, in theory, allow the Government to intervene in smaller deals for media plurality or financial stability reasons. However, by applying the new threshold and test to the narrow descriptions of the key sectors, Government cannot currently foresee any circumstance where a merger related to enterprises undertaking this type of activity beneath the £70 million or current share of supply test could raise media plurality and/or financial stability concerns.

101. The Government proposes to publish guidance alongside the secondary legislation that will set its view out in more detail to provide further reassurance to businesses and investors about the solely national security-focused rationale for these amendments. As discussed later in this chapter, it also stands ready to engage with any businesses who wish to understand whether a proposed or actual merger might raise national security issues.

Green Paper Questions

5.	Would Government guidance in relation to its views about the amendments, including their solely national security focus, be useful? If so, what would it most helpfully cover?
6.	What do you think are the most important costs and benefits from the proposed threshold changes to the Enterprise Act 2002 for the defined sectors? What could be the potential size of these costs and benefits?

The Government's investment vetting process

102. National security assessments are necessarily confidential, dealing with sensitive material the disclosure of which could have serious and far-reaching repercussions. However, the Government wishes to provide as much clarity about this process as possible to explain to businesses the process through

[29] See, for example, Competition and Markets Authority (2014), 'Mergers – the CMA's jurisdiction and procedure'.

which transactions are taken, and to enable them to engage with Government about particular cases.

103. The Government has established a cross-Government forum to bring together relevant departments and agencies to consider the implications of foreign investment for national security and ensure that Ministers are provided with timely advice on such investment, as required. Chaired by the Deputy National Security Adviser, the Investment Security Group ensures that the Government takes a joined-up and co-ordinated approach to scrutinising transactions for national security concerns.

104. Businesses and investors who wish to engage with the Government about transactions that may have a national security dimension should contact the department that has responsibility for their sector. The Government will ensure that it is straightforward for businesses and investors to get in touch with their respective departments. For instances where this is not clear the Government has established a single point of contact to direct enquiries to the appropriate department.[30]

Conclusion

105. A staged approach is right to deal with the challenges raised by these issues. It is right that we take prompt action to deal with specific issues. The Government intends to press ahead with the specific amendments needed immediately after consultation to address gaps in our powers. It welcomes views about how precisely it best does this, particularly in relation to definitions of the two sectors to which new jurisdictional tests would apply, and the precise thresholds for these tests.

106. The next chapter sets out the Government's proposals for long-term reform.

[30] Relevant enquiries should be directed to publicinterestandmergers@beis.gov.uk.

Chapter 8: Options for long-term reform

Summary

The Government seeks views from businesses and investors, domestic and foreign, about the long-term reforms that the UK should pursue in order to protect its national security while retaining the open approach to trade and investment that has served us well.

This chapter sets out a number of different approaches on which it would welcome respondents' views. These options are not mutually exclusive – a package of complementary reforms could include some or all of the measures set out below or further suggestions proposed by respondents:

- an **expanded version of the 'call-in' power** modelled on the existing power within the Enterprise Act 2002, to allow Government to scrutinise a broader range of transactions for national security concerns within a voluntary notification regime, including new projects and bare asset sales;
- **a mandatory notification regime** for foreign investment into the provision of a focused set of 'essential functions' in key parts of the economy, for example the civil nuclear and defence sectors. Mandatory notification could also be required for foreign investment in key new projects and/or foreign investment in specific businesses or assets.

For transactions that the Government scrutinises (whether notified under a mandatory regime, voluntarily notified or otherwise called in by the Government):

- as under the existing regime, the Government would be able to approve, impose conditions on, or, in extremis, prevent or unwind a transaction;
- any intervention could only take place when necessary and proportionate for national security reasons and would be subject to safeguards and an appropriate review mechanism.

Introduction

107. This chapter sets out the Government's proposals for reforms to ensure that business transactions cannot undermine our national security – in particular, to bring greater clarity to businesses and investors, and to ensure our national security is protected for the future.

108. In light of the national security issues discussed in chapter 3, the Government has concluded that long-term reform is required. It wishes to bring greater clarity to its current processes, particularly in light of its review of other countries' regimes which provide for greater certainty.

109. The country's national security must be paramount and the Government believes that the current system should be changed. However, it wishes to

make changes in a manner that preserves the country's open approach to investment and trade. This chapter, therefore, proposes a number of different options for consultation that could be pursued to deliver these objectives.

Long-term reforms – options for consultation

110. In reforming the UK's approach, the Government wishes to address the issues and gaps identified earlier in this Green Paper, including the following:

- national security concerns can arise in, but are not limited to, national infrastructure-related businesses or assets. However national security-related powers in these sectors are inconsistent and limited in places;
- national security risks may arise in transactions unrelated to competition issues, and may also arise in relation to new projects, proximate sites and sales of bare assets – none of which are currently covered by the Enterprise Act 2002 powers;
- a reliance on voluntary notification or use of the call-in power also carries the risk that the Government may be unaware of transactions that could raise national security concerns; and
- uncertainty for businesses - by solely relying on voluntary notification or a call-in power, businesses cannot be certain which transactions the Government may or may not be interested in

111. In addressing these issues, the Government wishes to ensure that its reforms are targeted and proportionate. This Green Paper seeks respondents' views about how best to achieve this.

112. The remainder of this section describes a number of potential reforms that the Government could pursue to achieve our aims. Each has relative merits to businesses and investors whose views the Government seeks in order to determine the way forward. The Government is clear, however, that reform is required and that national security must be prioritised in its decision-making.

113. The potential reforms covered in this section are:

- an **expanded version of the 'call-in' power,** modelled on the existing power within the Enterprise Act 2002 to allow Government to scrutinise a broader range of transactions for national security concerns within a voluntary notification regime, including potentially new projects or assets;
- a **mandatory notification regime** for foreign investment into the provision of a focused set of 'essential functions' in key parts of the economy, for example the civil nuclear and defence sectors. Mandatory notification could also be required for new projects that could reasonably be expected in future to provide essential functions and/or foreign investment in specific businesses or assets.

114. The potential reforms are not mutually exclusive. That is to say, a reform package could include a combination or all of the proposals, in order to provide the best balance between the Government's need to know and ability to act

where needed, certainty for businesses and investors, and the burden placed on businesses in complying with the regime.

Long-term option – an expanded call-in power as part of a voluntary notification regime

The merits of retaining a voluntary notification regime

115. There are obvious benefits for business in the Government continuing in the tradition of a wholly voluntary regime, notwithstanding the concern that it may mean that some transactions are not notified for consideration. This ensures that the majority of mergers that do not raise national security concerns are not held up unnecessarily by notification.

116. There are also disadvantages for business in a wholly voluntary regime: it maximises the level of uncertainty for investors over whether particular transactions are likely to fall in scope. While the US operates a system of voluntary notification, investors and businesses have the advantage of some forty years of experience of the regime which gives them greater certainty as to the US Government's areas of interest.

117. The Government is considering retaining the principle of a wholly voluntary regime in the UK, but is clear that in this case the range of transactions into which it can intervene would need to be expanded to reflect national security concerns. However expanding the scope of the call-in power may also increase uncertainty for businesses. The Government therefore welcomes views as to how it could offer greater clarity to businesses in an expanded voluntary regime.

The expanded types of investments to which any new 'call-in' power should apply

118. Under this option, the Secretary of State would be able to make a special "national security intervention" where they reasonably believed that national security risks were raised by the acquisition of significant influence or control over any UK business entity by any investor (either domestic or foreign).[31] The Government is currently minded for this to be defined, in part, as the acquisition of more than 25% of a company's shares or votes. This would be in line with the figure used by the CMA when assessing whether a merger may raise competition concerns. Alongside this would be a 'second limb' to the test for any other transaction that gives (directly or indirectly) significant influence or control over that company or over its assets or businesses in the UK.

[31] The current Enterprise Act 2002 power allows a public interest intervention to take place when there is an acquisition of material influence, and does not distinguish on the basis of nationality. In practice, to date, no public interest intervention for national security reasons under this Act has yet involved a domestic investor.

119. This would, in effect, remove the requirement for there to be a relevant merger situation (i.e. two enterprises ceasing to be distinct and the jurisdictional tests in the Enterprise Act being met) and would more clearly separate national security vetting processes from competition assessments, which would retain the £70 million turnover and 25% share of supply jurisdictional tests.

120. The Government would want to ensure that businesses are clear about the scope and implications of any new transaction test. It would seek to do this through (for example) a list of indicative, but not exhaustive, alternative means by which an investor can obtain significant influence or control. This could draw on existing guidance[32] but could also reflect additional issues specific to national security and national infrastructure, such as an investor obtaining unrestricted access to sensitive sites or data.

Green Paper Questions

7.	What are your views about the benefits and costs of amending the current voluntary regime to more clearly separate national security concerns and the competition assessment?
8.	What are your views about extending the scope of the Government's powers in relation to national security to include a wider range of investments into which Government could intervene?
9.	Do you agree that the definitions for those investments into which the Government can intervene should be (1) more than 25% of shares or voting rights and/or (2) other means of significant influence or control?
10.	What do you think should constitute significant influence or control in this regime? Can you give examples to support this view?

121. As with the current Enterprise Act 2002 regime, investors would be able to voluntarily notify the Government if they thought a transaction potentially raised national security concerns. Again, in line with the current regime, the Government would be minded to introduce a call-in 'window', in order to intervene in a transaction after it had occurred. The Government welcomes

[32] Including the Competition and Markets Authority's "Mergers: Guidance on the CMA's jurisdiction and procedure", and the Department for Business, Energy and Industrial Strategy's Statutory Guidance on the meaning of "significant influence or control" over companies in the context of the Register of People with Significant Control as required under paragraph 24(3) of Schedule 1A to the Companies Act 2006 as amended by Schedule 3 to the Small Business, Enterprise and Employment Act 2015

views on whether a three-month window would be appropriate, which would be similar to the current provision under the Enterprise Act.[33]

122. Once a transaction had been either voluntarily notified and/or called in by the Secretary of State, it would be scrutinised for national security concerns. Where necessary and proportionate, the Secretary of State would take appropriate action as described in paragraph 147. The Government envisages that this would be a separate process from the existing competition process, given its sole focus on national security. The Government would be keen to ensure that any additional process worked effectively with the existing competition and public interest regime. Further detail on the processes that would be followed as part of reforms are described in more detail later in this chapter.

Green Paper Question

11.	Do you agree that, if it pursued an expanded 'call-in' power, the Government should retain the ability to intervene in an investment after the event for national security reasons? Is three months an appropriate period for this?

Potential other types of transactions to which any expanded call-in power should apply

123. A further step would be to extend these powers to new projects – in particular, developments and other business activities that are not yet functioning enterprises but can reasonably be expected to, in the future, become businesses whose activities may have national security interests.

124. Additionally, this 'call-in' power could also be extended to the sales of bare assets (i.e. assets such as machinery or intellectual property transferred without the other elements of a stand-alone business). This would be a significant extension of the Government's current powers but would ensure that Government had comprehensive backstop powers to prevent national security risks arising from ownership and control from being realised.

[33] Under the Enterprise Act 2002, the deadline is that the merger must have occurred no more than four months before a reference is made to CMA Phase 2 investigation. In practice, the Secretary of State would need to intervene within the 4 month window but in time to allow a "Phase 1" public intervention process to complete. This would mean intervening around 60 to 80 days after a relevant merger situation takes place, to allow time for the CMA to report and for the Secretary of State to consider any undertakings offered and consult on them, although this could be expedited where necessary.

Green Paper Questions

12.	What are your views about any 'call-in' power being expanded to new projects?
13.	What are your views about any 'call-in' power being expanded to bare asset sales?

125. The Government recognises that any expansion of the call-in power would increase uncertainty for businesses and would remove the "safe harbours" currently provided by the jurisdictional thresholds in the Enterprise Act 2002. The Government intends that any proposed expanded powers would only be used in respect of national security and to intervene only in the very small number of cases where it considered there were national security risks. As is the case now, businesses and investors would be able to make their own assessment as to whether a transaction would be likely to raise national security concerns and therefore to voluntarily notify the Government prior to completion. In order to further reduce uncertainty, the Government could also provide informal advice to businesses about whether it has national security concerns in particular investments.

126. The Government would welcome views as to how it could best operate an expanded call-in power in a proportionate way, and in a way which provided sufficient transparency and clarity to businesses and investors.

Green Paper Question

14.	How could the Government best ensure that the expanded call-in power is exercised in a proportionate way and to provide sufficient transparency and clarity to businesses?

Long-term option – a mandatory notification regime

The merits of a mandatory notification regime

127. As noted in chapter 5, a number of other developed and open countries have introduced a mandatory regime. Like elsewhere, if introduced to the UK, a mandatory regime would provide greater transparency and certainty to all businesses and investors around the process; but also carries with it an additional reporting burden and cost.

128. The Government's assessment is that there are some areas of the economy where it would, as a general rule, wish to scrutinise all foreign investment which

granted significant influence or control in the manner described above in relation to a potential expanded call-in power. There are also clear benefits in providing certainty for businesses and investors about those areas through mandatory notification. But this would mean requiring that the majority of foreign investments into these areas (which would likely raise no national security concerns but meet the threshold tests) would have to be notified to the Government.

129. In particular, all foreign investors in specified sectors would need to secure the Government's approval before the transaction could take legal effect, and would therefore be required to provide information on the investment to be reviewed within an agreed timeframe. It is expected that for the majority of transactions, the Government would give rapid approval.

The scope of any mandatory notification regime

130. The Government has considered carefully the balance between the need to know and the potential burden on businesses. In line with its principle of proportionality, the Government would want any mandatory notification regime to be focused only on those specific activities where corporate ownership or control can pose legitimate national security risks. It is minded to do this through covering only those companies:

- which undertake, or are crucial to the undertaking of, the **essential functions** which the Government views as critical to ensuring the national security of the UK;
- where **foreign ownership or control** could pose a risk which there are no other reasonable means of adequately mitigating; and
- where existing licensing or regulatory regimes are **insufficient** to provide the Government with the information and powers required to protect national security.

131. The 13 sectors that make up the UK's national infrastructure provide a clear starting point for this scope. However, not all of the many businesses that operate in the energy sector, for example, carry out essential functions where foreign ownership or control could pose any risk to national security. Elsewhere, the nature of a sector or its risk profile means that Government considers that entire classes of business should not be covered automatically. There are also some areas of national infrastructure that may already be protected sufficiently through existing regulations and laws, or by other means.

132. Therefore, the Government proposes **that mandatory notification would be proportionate only for certain parts of key sectors**. Our current assessment is that these sectors should include, as a minimum, **civil nuclear, defence, energy, telecommunications, and the transport sector**. The Government is also minded to include the types of businesses identified earlier in respect of its secondary legislative proposals, namely, **the manufacture of military and dual-use items and advanced technology**. It is in these parts of the economy where Government is minded to conclude that the risks are such that a mandatory regime, if introduced, would be (part of) a proportionate response.

133. There may also be a case for including other key parts of the economy, including the **government and emergency services sectors**. In these areas, the Government is able to set some standards through its procurement processes, which provide some mitigation against the potential threat to these sectors. However, the significant impact of potential espionage and disruption in these two areas may potentially require further protections. The Government is interested in seeking respondents' views on what, if any, additions should (from the government and emergency services sectors, and elsewhere) appropriately be made to the scope of a mandatory notification regime, if introduced.

134. The Government is clear that it is only parts of each of the sectors above where a mandatory regime could apply. It has identified a set of "**essential functions**" which further narrow the areas where mandatory notification should take place to the particular activities where national security risks from investments are most pronounced. Annex C sets these out for the sectors identified above.

135. The Government is mindful of potential future developments in infrastructure and in technologies, and intends that, if mandatory notification was to be introduced, the initial list of key critical sectors and essential functions should be able to be amended in future through secondary legislation.

136. There may also be a case for **certain individual businesses or assets** to be included in the scope of the mandatory notification regime, even though the wider sector that they operate in is not in scope (i.e., no "essential functions" have been defined). Such a power may be particularly useful in the case of businesses which supply critical services or goods to national infrastructure firms – by specifying individual businesses as subject to mandatory screening rather than an entire supply chain, the Government can ensure the tightest possible focus for its regime while still giving certainty about where its national security interests lie.

137. The Government would therefore welcome views on whether, within a mandatory notification regime, it should also be able to exercise a power to bring certain named individual businesses or assets within scope of a mandatory notification regime. Any such power of this sort would need to be carefully designed to ensure its proportionate use and to provide clarity to businesses. The Government would welcome views as to how best this power could be designed.

138. For transparency, the Government envisages that the names of such businesses and assets would be published upon the exercise of this power except when publishing would give rise to clear national security threats or other public interest reasons not to do so. The Government would need to be able to update its list of individual businesses and assets in scope through a clear and proportionate process. It welcomes respondents' views as to how the power could be designed to ensure this would be the case.

Green Paper Questions

15.	What are your views on the merits of a mandatory notification regime? What are your views on the potential benefits and costs of a mandatory regime?
16.	Do you have views about the draft definitions of essential functions in Annex C? Would they be appropriate for the scope of any future mandatory regime?
17.	Do you have views on whether certain parts of the Government and Emergency services sectors should be covered by a mandatory regime?
18.	Are there other sectors to which any mandatory notification regime (if introduced) should apply?
19.	What are your views about the potential power for Government specifying to which businesses or assets a mandatory regime should apply? How could this power best be designed?

139. We also seek respondents' views on the merits of the Government having a power to bring particular plots of **land** in the UK into scope of a mandatory regime, where that land was in proximity to a national security-sensitive site. This would only apply where foreign ownership or control of such land, buildings or other fixed structures was considered to give rise to a potential national security risk (for example, the risk of espionage or sabotage).

Green Paper Question

20.	What are your views about the potential power for Government to bring specific plots of land into scope of a mandatory regime?

Sanctions

140. The introduction of a mandatory regime as described above would require clear sanctions to be attached to non-compliance. These could include, for example, criminal offences, financial penalties and/or director disqualification.

Green Paper Question

21.	Do you have any views about how sanctions for non-compliance with a mandatory regime should operate, including how compliance could best be incentivised?

The relative merits of the broad options for reform

141. As noted above, there are both benefits and costs of a mandatory regime compared to an expanded call-in power. A mandatory notification system provides greater clarity to Government, investors and businesses, but could lead to a larger number of unnecessary notifications for transactions that raise no national security concerns.

142. For any given risks, the smaller the scope of the mandatory regime, the more frequently a call-in power may be used. If used relatively frequently, a call-in power would be likely to lead to an increase in unnecessary voluntary notifications while still leaving potential gaps in the Government's knowledge of transactions that might pose national security risks.

143. The Government is interested in seeking respondents' views as to the relative balance between these reforms, in making changes that effectively address national security threats while maintaining a welcoming environment for investment.

Green Paper Question

22.	What are your views on the relative merits of introducing *either* an expanded call-in power *or* a mandatory notification regime for specific businesses or assets, *or* both an expanded call-in power and a mandatory notification regime?

Power to request information for national security purposes

144. To accompany any package of reforms, the Government would require **powers to request information** from companies that come within the regime's scope where this is necessary and proportionate for reasons of national security.

Green Paper Question

23.	Do you have any views about the introduction of an information-related power?

The process for scrutiny of transactions

145. The Government is clear that the reforms in this area should be solely and firmly focused on national security-related issues. Any reforms ultimately pursued should not require the Government to be involved in commercial deals, or signal opposition to foreign investment in any part of our economy. There should be no areas of the UK economy automatically off limits to foreign investment. The powers within the regime would only be exercised where necessary and proportionate. Under a mandatory regime, it would be likely that the vast majority of proposed transactions notified would proceed as planned.

146. The Government recognises that investors and businesses will wish to be clear about the process it will follow and the timing of the scrutiny procedure. The Government would aim to set out a clear, short timeframe within which investors would receive a decision.

Green Paper Question

24.	Would public guidance about the assessment process be useful? If so, what issues could it most usefully cover?

The means by which the Government could intervene in transactions

147. Following its national security assessment of a transaction, the Government proposes that any new regime should mirror the powers available to the Secretary of State under the existing public interest regime, as set out in the Enterprise Act 2002 (specifically Part 3 and Schedule 8) – namely the ability to impose conditions on the deal or, in extremis, to block it altogether. For transactions that took place before Government consideration of national security issues, it would have the power (as the CMA does) to unwind deals should that be necessary and proportionate to protect national security. The Government wishes any new regime to have an effective mechanism for affected parties to seek judicial review of the Secretary of State's decision.

Green Paper Question

25.	Do you consider the proposed approach to Government intervention to be appropriate for a wholly national security-related regime?

How the regime will interact with the remaining public interest regime and other corporate requirements

148. Whichever of the above reforms, or a combination of these, is pursued, would involve a significant amendment of the Enterprise Act 2002. In doing so, the Government would wish to retain the independence of the Competition and Markets Authority and a clear separation between competition- and national security-related assessments. The Government is also clear that it does not wish to amend the process for other public interest-related assessments, namely those in relation to financial stability or media plurality.

149. Therefore, the Government wishes to design and implement its reforms so that they interface effectively with the wider competition and public interest regime (for example, for deals that could jointly raise national security, competition and financial stability concerns) and other corporate requirements (such as the Takeover Panel's Code on Takeovers and Mergers).

Green Paper Question

26.	Do you have any views about how any new reforms can best be designed to interact effectively and in an administratively efficient manner alongside any competition assessment being conducted by the CMA, the existing public interest regime and other corporate reporting requirements?

Compliance with international law and transparency

150. Until the UK leaves the European Union, the Government will continue to be bound by, and comply with, its framework of directives and regulations. The Government recognises that the Court of Justice of the European Union has established a high threshold for any interference with the free movement of capital and freedom of establishment. In addition, the EU Merger Regulation will continue to apply to concentrations that meet its threshold tests. Nevertheless, the Government considers that it should be possible to design reforms (with a narrow scope, clear and significant thresholds, and a focus only on national security matters) which complies with both EU treaties and subsequent case law.

151. The UK is, and will remain, a member of the World Trade Organisation (WTO) upon its exit from the European Union. The UK will continue to ensure it fully meets its obligations under its bilateral investment treaties, as well as the WTO General Agreement on Trade in Services which sets out WTO members' rights and freedoms in relation to investing in the UK's markets. It will also continue to act in accordance with its commitments on freedom of investment as a member of the Organisation for Economic Cooperation and Development (OECD). The UK will remain an open economy that welcomes foreign investment.

152. The Government wishes to design a regime that is as transparent as possible to provide certainty for investors and businesses, while providing for the ability to mitigate security risks that can arise from foreign ownership. It is proposed that key information about the regime such as any specific businesses which the Government brings into its scope through the exercise of a power and the outcomes of reviews would be published except when publishing would give rise to clear national security threats or other public interest reasons not to do so.

Green Paper Question

27.	Do you have any views about how the reforms can be designed to be as transparent as possible for investors and companies given the national security focus?

Costs and benefits

153. The Government aims to design a regime that minimises costs to business whilst also having the maximum benefit to both businesses and society. It is therefore important that we are aware of all possible costs and benefits so we can take these into account when designing the regime. As well as the costs and benefits to businesses and society, the Government is also interested in the potential impact this regime may have on financing UK infrastructure.

154. Whichever package of reforms is pursued the Government does not expect to impact significantly on many businesses or transactions given its desire for targeted and proportionate reforms. For example, we currently estimate that there would be fewer than 100 transactions per year involving significant foreign investments into those businesses that undertake the essential functions in Annex C and which we propose would be in scope of a mandatory regime.

155. Given the frequency of use of the current powers under the Enterprise Act since its introduction in 2002 (as noted earlier, the Government has intervened only seven times for the purposes of protecting national security), we expect that only a small proportion of these transactions would be likely to be subject to conditions or, in extremis, blocked outright.

Green Paper Question	
28.	If you have experience investing in countries with foreign investment regimes, could you describe the costs and benefits involved, including familiarisation, administrative and legal costs and the costs of any delays?
29.	What impact, if any, do you anticipate these proposals having on the capital market or UK infrastructure businesses' ability to raise financing?
30.	Are there any other important costs and benefits you haven't already discussed from adopting these reforms that could inform the Government's analysis?

Conclusion

156. The Government wishes to understand respondents' views about the complex and often opposing issues and views inherent in this area of policy. It has set out two broad potential avenues of reform – retaining a voluntary regime but for a broader set of transactions, and a mandatory regime focused on key businesses or assets. A package of reform could include some or all of these options.

157. All proposals and options are intended to help protect national security without disrupting or discouraging the vast majority of foreign investment, which the Government warmly welcomes. The Government is determined that the UK will remain an open international trading partner and a global champion of trade and investment.

Chapter 9: List of consultation questions

Below is a list of the consultation questions included in the Green Paper, on which the Government would welcome respondents' views. Please refer to the 'General Information' section for details about the means by which you can submit views.

Green Paper Questions

1.	Do you think the proposed definitions for the dual-use and military and advanced technology sectors provide sufficient clarity and certainty to businesses and investors?
2.	Do you think the scope of the new thresholds should reflect updates to the relevant Strategic Export Control lists? Do you think that enterprises that design or manufacture items subject to *temporary* export controls should also be in scope?
3.	Are the proposed definitions sufficiently focused on sectors where national security concerns may arise? If not, what amended definitions would help achieve this?
4.	Do you agree that the new jurisdictional tests in the Enterprise Act 2002 for businesses in the above defined sectors should be: • a turnover of over £1 million, rather than £70 million as now; and/or • a merger or takeover involving a target with 25% or more share of supply (i.e. with no need for an increase), or which meets the current test of creating or enhancing a share of supply of 25% or more.
5.	Would Government guidance in relation to its views about the amendments, including their solely national security focus, be useful? If so, what would it most helpfully cover?
6.	What do you think are the most important costs and benefits from the proposed threshold changes to the Enterprise Act 2002 for the defined sectors? What could be the potential size of these costs and benefits?
7.	What are your views about the benefits and costs of amending the current voluntary regime to more clearly separate national security concerns and the competition assessment?
8.	What are your views about extending the scope of the Government's powers in relation to national security to include a wider range of

	investments into which Government could intervene?
9.	Do you agree that the definitions for those investments into which the Government can intervene should be (1) more than 25% of shares or voting rights and/or (2) other means of significant influence or control?
10.	What do you think should constitute significant influence or control in this regime? Can you give examples to support this view?
11.	Do you agree that, if it pursued an expanded 'call-in' power, the Government should retain the ability to intervene in an investment after the event for national security reasons? Is three months an appropriate period for this?
12.	What are your views about any 'call-in' power being expanded to new projects?
13.	What are your views about any 'call-in' power being expanded to bare asset sales?
14.	How could the Government best ensure that the expanded call-in power is exercised in a proportionate way and to provide sufficient transparency and clarity to businesses?
15.	What are your views on the merits of a mandatory notification regime? What are your views on the potential benefits and costs of a mandatory regime?
16.	Do you have views about the draft definitions of essential functions in Annex C? Would they be appropriate for the scope of any future mandatory regime?
17.	Do you have views on whether certain parts of the Government and Emergency services sectors should be covered by a mandatory regime?
18.	Are there other sectors to which any mandatory notification regime (if introduced) should apply?
19.	What are your views about the potential power for Government specifying to which businesses or assets a mandatory regime should apply? How could this power best be designed?
20.	What are your views about the potential power for Government to bring specific plots of land into scope of a mandatory regime?

21.	Do you have any views about how sanctions for non-compliance with a mandatory regime should operate, including how compliance could best be incentivised?
22.	What are your views on the relative merits of introducing *either* an expanded call-in power *or* a mandatory notification regime for specific businesses or assets, *or* both an expanded call-in power and a mandatory notification regime?
23.	Do you have any views about the introduction of an information-related power?
24.	Would public guidance about the assessment process be useful? If so, what issues could it most usefully cover?
25.	Do you consider the proposed approach to Government intervention to be appropriate for a wholly national security-related regime?
26.	Do you have any views about how any new reforms can best be designed to interact effectively and in an administratively efficient manner alongside any competition assessment being conducted by the CMA, the existing public interest regime and other corporate reporting requirements?
27.	Do you have any views about how the reforms can be designed to be as transparent as possible for investors and companies given the national security focus?
28.	If you have experience investing in countries with foreign investment regimes, could you describe the costs and benefits involved, including familiarisation, administrative and legal costs and the costs of any delays?
29.	What impact, if any, do you anticipate these proposals having on the capital market or UK infrastructure businesses' ability to raise financing?
30.	Are there any other important costs and benefits you haven't already discussed from adopting these reforms that could inform the Government's analysis?

Annex A: Current approach to national infrastructure sectors

This table only provides a high-level summary of complex legal and regulatory obligations across sectors. It does not set out the details of regulations implemented by the Devolved Administration where the sector responsibility is devolved. It is *not* designed to be comprehensive, nor a statement of Government policy.

Sector:	Is there a regulator within the sector?	National Security or Resilience a key duty of regulator?	Licencing or General Authorisation scheme?	Notification or approval required for change of ownership or control?[34]	Government or regulator powers to direct for National Security purposes?
Chemicals	✓ The Health and Safety Executive (HSE) is the national regulator for workplace health and safety, including the chemical sector. HSE, as part of the Control of Major Accident Hazards regulations Competent Authority (together with the relevant environment agencies and the Office for Nuclear Regulation (ONR)regulates the major hazard sector that includes many chemical sites. Within the HSE, the Chemicals Regulation Division is responsible for the regulation of biocides, pesticides, detergents, chemicals covered by Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) regulation, and for compliance with the Classification, Labelling and Packaging Regulation.	✗ The Health and Safety Executive's mission is 'the prevention of death, injury and ill health to those at work and those affected by work'. This does not include matters of national security, but good health and safety management may be said to contribute to site resilience The primary aim of the HSE's Chemicals Regulation Division is to ensure the safe use of biocides, industrial chemicals, pesticides and detergents to protect the health of people and the environment.	✗ There is no licensing scheme that deals with issues of national security or resilience as that is not HSE's core business. Licencing does exist for the control of precursor chemicals to ensure the effective control of chemicals used in the illicit manufacture of narcotic drugs and psychotropic substances.	✓ Under the Control of Major Accident Hazards Regulation, operators of sites must provide the Competent Authority (CA) with information about the place of business (including the name of the operator) prior to the commencement of operations and must inform the CA of significant changes to inventory or process on site.	✗ None as outside of HSE remit

[34] Note this is not necessarily for National Security-related reasons.

Sector:	Is there a regulator within the sector?	National Security or Resilience a key duty of regulator?	Licencing or General Authorisation scheme?	Notification or approval required for change of ownership or control?[34]	Government or regulator powers to direct for National Security purposes?
Civil Nuclear	✓ The mission of the Office for Nuclear Regulation's (ONR) is to provide efficient and effective regulation of the nuclear industry, holding it to account on behalf of the public. The ONR independently regulates nuclear safety and security at 37 nuclear licensed sites in the UK. It also regulates transport and ensures that safeguards obligations for the UK are met. Its duty is to ensure that the nuclear industry controls its hazards effectively, has a culture of continuous improvement and maintains high standards.	✓ The ONR has the responsibility for overseeing and enforcing a security regime across the UK civil nuclear sector to ensure that nuclear facilities, nuclear material held at locations and in transport, and sensitive information and technology are protected from theft, and sabotage.	✓ The ONR sets out site licence conditions that each licensee must comply with in different ways; such as, with a safety case to meet a stage in the plant's life, or with arrangements and procedures to meet a license condition. The conditions set out the general safety requirements to deal with the risks on a nuclear site. In addition it is a legal requirement that organisations in the UK civil nuclear sector produce and implement Nuclear Site Security Plans or Transport Security Statements that are approved by ONR.	✓ The Secretary of State for Business, Energy and Industrial Strategy will shortly issue a direction to the ONR to require notice from key elements of the civil nuclear sector to provide it prior notice of a change (or proposed change) of control or ownership, or of the establishment of a significant interest in the company of which the entity is aware. Separately, Government has a golden share in British Energy (existing nuclear fleet) requiring notification and approval for changes over 15%. Government intends to take a golden share in future nuclear power stations after Hinkley Point C, details of which will be decided nearer the time.	✓ Where the Secretary of State considers it to be necessary or desirable in the interests of national security, he may give directions to the ONR that modify the ONRs functions, or confer additional functions on it. The Secretary of State is also able to give a direction to ONR in a specific instance with regard to a regulatory function, in exceptional circumstances relating to national security and only for ONR's nuclear security purposes. The Energy Act 1976 provides the Government with specific powers to take control of generation or transmission systems. Also includes powers to direct nuclear sites in exceptional circumstances. The 1946 Atomic Energy Act provides certain additional powers for Government to intervene.

Sector:	Is there a regulator within the sector?	National Security or Resilience a key duty of regulator?	Licencing or General Authorisation scheme?	Notification or approval required for change of ownership or control?[34]	Government or regulator powers to direct for National Security purposes?
Communications sector: **Telecoms, broadcasting, postal services**	✓ Ofcom is the communications regulator in the UK. It regulates the TV, radio and video-on-demand sectors, fixed-line telecoms, mobiles and postal services, plus the airwaves over which wireless devices operate.	✘ The Communications Act 2003 (ss.105A-105D) includes measures for the security of Telecommunications and Broadcasting and provides Ofcom regulatory and enforcement powers. For postal services its duty to ensure a financially sustainable universal postal service, takes precedence over its competition duty	✓ Communication providers do not require licenses to operate. They operate under the terms of the General Conditions defined by Ofcom, but which stem from the Communications Act 2003 and the Postal Services Act 2011	✘ None	✓ The Secretary of State has power to give general or specific directions for (inter alia) the purposes of national security to Ofcom as to how to carry out their functions including, to suspend or restrict a person's entitlement to provide networks, services or associated facilities. In postal services, the Secretary of State has a power to direct Ofcom or a postal operator to do, or not do, something in the interests of national security.

Sector:	Is there a regulator within the sector?	National Security or Resilience a key duty of regulator?	Licencing or General Authorisation scheme?	Notification or approval required for change of ownership or control?[34]	Government or regulator powers to direct for National Security purposes?
Defence	✘ No.	✘ n/a	✘ Where a company undertaking government business requires access to sensitive data or equipment. it must be willing to meet the relevant security requirements and attain List X status. A List X site or facility is a commercial site on UK soil that is approved to hold UK Government protectively marked information marked as SECRET and above. It is applied to a company's specific site, or facility within that site, and not to the company as a whole. The Principal Security Adviser within MOD Defence Equipment & Support (DE&S) administers the arrangements for companies on List X.	✓ Where, for example, the Ministry of Defence contracts directly with a supplier there are ways in which the Department can monitor transfers of contractual responsibility and/or change of control. This is achieved through established defence conditions (DEFCONs) which form part of the contractual arrangement with the supplier. Where a contractor is required to attain List X status it must notify, for example, the MOD of any change in the circumstances of the company that may have a bearing on its security status and its ability to carry out its classified contracts. This includes changes of ownership or control.	✘ As described in Chapter 2, the Government holds golden shares in a number of companies, including: • Atomic Weapons Establishment plc.; • BAE Systems Marine (Holdings) Ltd; • Devonport Royal Dockyard Ltd; • Rosyth Royal Dockyard Ltd; • QinetiQ Group plc.; • QinetiQ Holdings Ltd; • QinetiQ Ltd; • CLH Pipeline System Ltd • BAE Systems plc.; and • Rolls-Royce plc.

Sector:	Is there a regulator within the sector?	National Security or Resilience a key duty of regulator?	Licencing or General Authorisation scheme?	Notification or approval required for change of ownership or control?[34]	Government or regulator powers to direct for National Security purposes?
Emergency Services	✓ The conduct of health service providers in the UK are overseen by a number of regulators, including, in England, the Care Quality Commission. Individual police forces in England and Wales are overseen by Police and Crime Commissioners and Police and Crime Panels. Police Scotland is overseen by the Scottish Police Authority. Oversight of the Police Service of Northern Ireland is carried out by the Northern Ireland Policing Board. HM Inspectorate of Constabulary and HM Inspectorate of Constabulary in Scotland inspect police forces in Great Britain, while the Independent Police Complaints Commission handles complaints made against police forces in Great Britain. Complaints against the PSNI are investigated by the Police Ombudsman for Northern Ireland. Fire services in England are overseen by the Chief Fire and Rescue Adviser and by HM Chief Inspector of Fire Services. In Scotland equivalent functions are performed by HM Fire Services Inspectorate for Scotland. Northern Ireland Fire and Rescue Service is overseen by the Northern Ireland Fire and Rescue Service Board.	✗ While not a specific duty, resilience is a key consideration in the emergency services sector.	✗ There is no licensing or General Authorisation scheme	**n/a** There is no general requirement for the notification or approval for change of ownership or control but individual contracts may specify this.	✗ Fire and Rescue Services Act 2004 gives the Secretary of State powers to direct English Fire and Rescue Services actions in the interest of National Security. Section 40 of the Police Act 1996 allows for the Secretary of State to direct the PCC to take remedial measures where the force in England or Wales is generally or in particular respects not efficient or not effective. Section 96A of the Police Act 1996 provides that where the Secretary of State considers that performance of any English or Welsh force in respect of any national or international functions is not satisfactory she may direct the PCC to take measures.

Sector:	Is there a regulator within the sector?	National Security or Resilience a key duty of regulator?	Licencing or General Authorisation scheme?	Notification or approval required for change of ownership or control?[34]	Government or regulator powers to direct for National Security purposes?
Energy	✓ **Downstream gas and electricity:** Ofgem is the Office of Gas and Electricity Markets. **Upstream oil and gas:** Oil and Gas Authority (OGA) is the regulator for upstream oil and gas **Downstream oil** No sector specific regulator for Downstream oil although HSE and EA have some responsibilities for Health and Safety and Environmental issues	✗ **Downstream gas and electricity:** Ofgem's principal objective when carrying out its functions is to protect the interests of existing and future electricity and gas consumers. It does this in a variety of ways including: - promoting value for money - promoting security of supply and sustainability, for present and future generations of consumers, domestic and industrial users - the supervision and development of markets and competition - regulation and the delivery of Government schemes. **Upstream oil and gas:** The OGA's role is to regulate, influence and promote the UK oil and gas industry In exercising its functions, the OGA must have regard to security of supply. **Downstream oil** None	✓ **Downstream gas and electricity:** Ofgem licences contain conditions with which licence holders must comply, including conditions in relation to becoming a party to, and complying with, industry codes and standards. Industry codes and standards establish rules that govern market operation and the terms for connection and access to energy networks. **Upstream oil and gas:** The OGA grants licences that confer exclusive rights to 'search and bore for and get' petroleum and grant pipeline authorisations **Downstream oil:** None	✗ **Downstream gas and electricity:** There is no formal notification procedure to inform the Government of transfers of ownership, but in some areas licences cannot be transferred without the consent of the Secretary of State. **Upstream oil and gas:** OGA approval is required to transfer licences or ownership of pipelines. Change in control may result in revocation. **Downstream oil:** Under the Control of Major Accident Hazards Regulation, operators of sites must provide the Competent Authority with information about the place of business (including the name of the operator) prior to the commencement of operations.	✓ **Downstream gas and electricity:** The Energy Act 1976 allows an Order in Council to be made to enable the Secretary of State to give directions to companies in order to control generation or transmission systems when there is an actual or imminent threat of emergency. **Upstream oil and gas:** The Energy Act 2016 allows the Secretary of State to direct the exercise of the OGA's functions if in the interest of national security or otherwise in public interest. **Downstream oil** Partial. Under Offshore Safety Act 1992 the Secretary of State has the power to direct for the purpose of preserving the security of any offshore installation, onshore terminal or oil refinery. This is limited in scope to sites receiving crude oil from UK offshore installation. Energy Act 1976 allows an Order in Council giving Secretary of State a power to direct supply of fuel when there is an actual or imminent threat of emergency

Sector:	Is there a regulator within the sector?	National Security or Resilience a key duty of regulator?	Licencing or General Authorisation scheme?	Notification or approval required for change of ownership or control?[34]	Government or regulator powers to direct for National Security purposes?
Financial Services	✓ The Prudential Regulations Authority (PRA) was established on 1 April 2013 following amendments to the Financial Services and Markets Act 2000 made by the Financial Services Act 2012. The PRA is the UK financial services regulator responsible for the prudential regulation of systemically important firms, including banks and insurers. Although originally established as a subsidiary of the Bank of England, under provision in the Bank of England and Financial Services Act 2016 the subsidiary status of the PRA will come to an end and its functions will transfer to the Bank of England. The Financial Conduct Authority (FCA) is the conduct regulator for 56,000 financial services firms and financial markets in the UK and the prudential regulator for over 24,000 of those firms.	✘ The PRA has three statutory objectives: a general objective to promote the safety and soundness of the firms it regulates; an objective specific to insurance firms, to contribute to the securing of an appropriate degree of protection for those who are or may become insurance policyholders; and a secondary objective to facilitate effective competition. The FCA's strategic objective is to ensure that relevant markets function well and its operational objectives are to: secure an appropriate degree of protection for consumers ("the consumer protection objective"), protecting and enhancing the integrity of the UK financial system ("the integrity objective") and promoting competition in the interests of consumers in markets for regulated financial services ("the competition objective").	✓ The Financial Services and Markets Act 2000 provides the basis for the regulatory perimeter for UK financial services regulation. This establishes the "general prohibition" which provides that no person may carry on a regulated activity in the UK, or purport to do so, unless they are an authorised person or an exempt person. Regulated activities are specified in delegated legislation. Any person who has been granted permission by the appropriate regulator will be an "authorised person. The Financial Services and Markets Act 2000 also establishes the "approved persons" regime. An approved person is an individual who the FCA approves to do one or more activities, referred to as "controlled functions", for (or on behalf of) an authorised firm. The approved persons regime operates alongside the senior managers regime and certification regime, and the senior insurance managers regime, both of which came into force on 7 March 2016.	✓ Authorised firms are obliged to seek approval from the relevant financial regulator of any changes of ownership which cross specific thresholds. No change in control can be enacted until the financial regulator has approved the change. The regime for changes of control for authorised firms and specific exemptions are set out in the Financial Services and Markets Act.	✓ The Public Interest regime in the Enterprise Act 2002 enables the Secretary of State to intervene in a merger in the event of a risk to financial stability, or National Security.

Sector:	Is there a regulator within the sector?	National Security or Resilience a key duty of regulator?	Licencing or General Authorisation scheme?	Notification or approval required for change of ownership or control?[34]	Government or regulator powers to direct for National Security purposes?
Food	✓ The Food Standard Agency's (England, Wales and Northern Ireland) and Food Standards Scotland's primary aim is to protect the health of the public, and the interests of consumers, in relation to food.	✗ The Food Standard Agency's primary aim is to protect the health of the public, and the interests of consumers, in relation to food.	✗	✗	✗
Government	✗	✗ UK Government has internal National security teams focused on Resilience and protection of National infrastructure	✗	✓ Where UK Government assets are publically owned any sale or intended sale will be subject to internal discussion and approval on National Security and other grounds	✓ Government maintains the national security teams and supporting internal structures to ensure appropriate powers to direct for National Security purposes as required.
Health	✓ There are a number of UK regulators within health and social care, these are listed below: - Health and social care regulators - Care Quality Commission - The Professional Standards Authority for Health and Social Care	✗ The role of the regulators include overseeing the health and social care professions by regulating individual professionals or to ensure health and social care services provide people with safe, effective, compassionate, high-quality care and encourage them to improve. The regulators do not have a key duty in national security or resilience	✗	✗	✗

Sector:	Is there a regulator within the sector?	National Security or Resilience a key duty of regulator?	Licencing or General Authorisation scheme?	Notification or approval required for change of ownership or control?[34]	Government or regulator powers to direct for National Security purposes?
Space	✓ The UK Space Agency is responsible for regulating the UK civil space activities and ensuring we meet international treaty obligations	✗ Not a key duty of the regulator. The Outer Space Act (OSA) is primarily concerned with ensuring compliance with the international obligations of the UK. However, the OSA does set out that the Secretary of State shall not grant a licence unless he is satisfied that the activities authorised by the licence: (a) will not jeopardise public health or the safety of persons or property; (b) will be consistent with the international obligations of the UK; and (c) will not impair the national security of the UK.	✓ The Outer Space Act (OSA) is the legal basis for the regulation of activities in outer space carried out by organisations or individuals established in the UK or one of its Crown Dependencies or certain Overseas Territories. Activities licensed under the OSA - (a) launching or procuring the launch of a space object; (b) operating a space object; and (c) any activity in outer space.	✓ Yes, an OSA licence may be transferred with the written consent of the Secretary of State and in such other cases as may be prescribed.	✗
Water	✓ Ofwat is the independent economic regulator of the water sector in England and Wales. In Scotland there is the Drinking Water Quality Regulator for Scotland and in Northern Ireland there is the Utility Regulator.	✓ Under the Water Industry Act 1991 (as amended), Ofwat has statutory duties to secure that the functions of undertakers and licensees are properly carried out. It also has a statutory duty to further the resilience objective (to secure the long-term resilience of water companies' water supply and wastewater systems; and to secure that they take steps to enable them, in the long term, to meet the need for water supplies and wastewater services).	✓ Undertakers and licensee are appointed / licensed in accordance with the Water Industry Act 1991 (as amended).	✗ There is no mandatory notification regarding change in ownership or control of undertakers or licensees.	✓ The Water Industry Act 1991 (as amended) enables the Government to direct undertakers or licensees in the interests of national security. The Water Industry (Scotland) Act 2002 (Directions in the Interests of National Security) Order 2002 gives UK and Scottish Ministers powers to give directions to Scottish Water for national security purposes. The Water and Sewerage Services (Northern Ireland) Order 2006 gives this

Sector:	Is there a regulator within the sector?	National Security or Resilience a key duty of regulator?	Licencing or General Authorisation scheme?	Notification or approval required for change of ownership or control?[34]	Government or regulator powers to direct for National Security purposes?
					direction in Northern Ireland.
Transport	✓ There are a variety of regulators responsible for some, but not all of the different sub-sectors.	× The Civil Aviation Authority is responsible for safety, security and economic regulation of UK *aviation* as well as consumer protection. The Office of Rail and Road (*ORR*) is the independent safety and economic regulator for Britain's railways	✓ There are different schemes for different modes **Aviation** Economically dominant airports are regulated by the CAA for price control under the Civil Aviation Act 2012. No regulatory powers require them to notify the CAA regarding a change of ownership. **National Air Traffic Services** NATS (En Route) plc. (NERL), a wholly owned subsidiary of NATS, is licensed to provide air navigation services in respect of controlled airspace. NERL is required by the licence to notify to the SoS as soon as practicable after it becomes aware of any changes, transaction or arrangement which would enable a person or group of persons directly or indirectly to control or materially to influence the policy of, the licence holder. (continues on next page)	× Varied picture by transport mode **Aviation:** The nature of airline or airport acquisitions or mergers means the majority are notified to the European Commission to see if they would significantly impede effective competition and operation of the aviation market. ***NATS:*** NATS has to monitor and inform the Government as soon as it is aware of any change. The Government can monitor as a shareholder of NATS. **Ports:** There are no formal monitoring powers on sale of shareholdings in private ports, though the Department may be given early notice of major sales as a courtesy. If a Trust Port wishes to be privatised then it must apply to the SoS. Local Authorities which own ports are not required to inform DfT of any changes in ownership. (continues on next page)	✓ The Secretary of State may give directions to licence holders in the interests of national security or international relations.

Sector:	Is there a regulator within the sector?	National Security or Resilience a key duty of regulator?	Licencing or General Authorisation scheme?	Notification or approval required for change of ownership or control?[34]	Government or regulator powers to direct for National Security purposes?
Transport (continued)			**Ports** HMG has appointment rights over a small number of trust ports but these provisions are not designed to be used to exercise management control of the port. The Ports Act 1991 gives the SoS an effective veto over the sale of trust ports themselves, though not necessarily of assets within them. Other ports have no restrictions on ownership. Equivalent provisions in Scotland are operated by Transport Scotland on behalf of the Scottish Ministers. The Department for Infrastructure is responsible for ports policy and the legislative framework in Northern Ireland. **Rail** Network Rail (NR) Infrastructure Limited (NRIL) is regulated by the Office of Rail and Road (ORR) and is licensed by the ORR under section 8 of the Railways Act 1993. Other operators of network, stations or light maintenance depots must be also be licensed under section 8 of the Railways Act 1993 or EU licensing requirements…	**Rail** A variety of controls are available with regard to change of ownership and/or control of different railway assets. For example: **Network Rail** (NR) – under its licence conditions, Network Rail Infrastructure Ltd (SoS is effective owner because sole member of NR) cannot dispose of land without SoS consent and must inform SoS and ORR about any change of ownership. **HS1** –HS1 Ltd, which has a 30 year concession to operate the line, cannot assign the concession. HS1 Ltd must provide satisfactory information to the SoS about a proposed change of ownership, including in relation to national security. SoS consent is needed for any change of ownership. **London Underground** – SoS consent is needed for TfL or its subsidiaries to dispose of (or grant a lease of more than 50 years over) operational land (sections 163 and 164 Greater London Act). (continues on next page)	

Sector:	Is there a regulator within the sector?	National Security or Resilience a key duty of regulator?	Licencing or General Authorisation scheme?	Notification or approval required for change of ownership or control?[34]	Government or regulator powers to direct for National Security purposes?
Transport (continued)			(Railway (Licensing of Railway Undertakings) Regulations 2005 or EEA equivalent), unless exempt (some smaller networks such as heritage railways are exempt, as are some larger networks, such as London Underground, HS1 Limited, the Channel Tunnel). Unless exempt, train operating companies (TOCs) and freight operating companies (FOCs) must be licensed under section 8 or EU licence requirements to operate passenger rail services or goods services or under section 8 to operate stations or freight terminals The main goods terminals are exempt, as are FOCs and TOCs running services on some smaller networks. **Strategic Road Network:** The Office for Rail and Road (ORR) acts as "Monitor" for HE monitoring and reporting to the SoS on how it is exercising its functions. It has enforcement powers (including powers to issue fines) in circumstances where HE has failed to comply with the Road Investment Strategy or directions issued by the	**Channel Tunnel** is bi-national (UK and French) infrastructure governed by the Treaty of Canterbury and a concession agreement between both governments and Eurotunnel. **TOCs and FOCs** are required by their operating licences to notify ORR of any change of control. There are also controls in TOCs franchising agreements with regard to changes of control/ownership (enforceable contractually and under sections 55 – 57 of the Railways Act 1993). **Strategic Road Network** Highways England manages the SRN in England. Highways England is a company limited by shares, wholly owned by the SoS. The trunk roads in Scotland are managed by Transport Scotland. The Department for Infrastructure is responsible for the provision and maintenance of public roads in Northern Ireland.	

Sector:	Is there a regulator within the sector?	National Security or Resilience a key duty of regulator?	Licencing or General Authorisation scheme?	Notification or approval required for change of ownership or control?[34]	Government or regulator powers to direct for National Security purposes?
			SoS. Road transport is devolved, and as such other powers and authorisation schemes are in place in addition to those detailed here		

Annex B: Summary of the approach of other countries to foreign investment in national infrastructure

	Australia	United States	France	Canada
Legislation	Powers are granted under the Foreign Acquisitions and Takeovers Act 1975, the Foreign Acquisitions and Takeovers Fees Impositions Act 2015 and associated regulations. These were amended in 2015 to provide new penalties, application fees and lower thresholds for agricultural land. They were further amended in 2016 to allow review of non-government foreign investors acquiring an interest in critical state-owned infrastructure assets.	Committee of Foreign Investment in United Status (CFIUS) created by Executive Order 11858, 'Foreign Investment in the United States 1975'. The provisions were amended in 1988 to grant the President the authority to block proposed mergers, acquisitions and takeovers that threaten national security. They were further amended in 2007 by the Foreign Investment and National Security Act.	The relevant powers were introduced in 2005 by Decree No 2005-1739. This was amended in 2014 to extend the business sectors to which the regime applies.	The relevant powers are granted under the Investment Canada Act 1985. This was amended in 2009 to allow Ministers to initiate a national security review.
Scope	The regime reviews foreign governments, and their entities, acquiring a direct interest (generally at least 10%), and non-government foreign investors acquiring a substantial interest (generally at least 20%) above certain thresholds. The framework also covers any acquisitions of critical state-owned infrastructure relevant to national security, as well as residential, commercial and agricultural land. The framework allows the consideration of whether a particular investment would be contrary to Australia's "national interest".	CFIUS can review any foreign investment that may raise national security concerns, or involve critical infrastructure.	Investments by foreign investors and French investors under foreign control in certain sectors that relate to national security and defence interests are subject to review. The regime focuses on national interests.	The regime applies to a non-Canadian investor acquiring control of an existing Canadian entity, or establishing an unrelated investment in the country. The regime evaluates investments on whether there is a "net benefit" to Canada.

	Australia	United States	France	Canada
Thresholds	AUS $1,094m: Non-government investors from FTA partner countries making acquisitions in non-sensitive businesses. AUS $252m: Other non-government investors, including those from FTA partner countries making acquisitions in sensitive businesses. AUS $0: Foreign government investors acquiring a direct interest or starting a new Australian business. Separate thresholds apply to the media sector (AUS $0), agribusiness (AUS $55m - $1,094m) and land proposals (AUS $0m - $1,094m), including 'sensitive land' containing critical infrastructure. Thresholds are indexed annually.	Transaction that could result in control of a US business.	Non-EU investors acquiring control or all or part of a business or more than one third of the share capital of a French company. EU investors acquiring control or all or part of a business of a French company French investor under foreign control acquiring all or part of a French company.	Net benefit review - C$600m for private sector WTO investments, will increase to C$800m in April 2017, and C$1bn in April 2019. C$375m for SOE WTO investments. These thresholds are based on enterprise value C$5m for direct and C$50m for indirect non-WTO investments and investments in a cultural business. The thresholds for investing in cultural businesses are based on asset value. National Security - can review transactions of any size.
Process	Mandatory. Foreign investors lodge applications electronically with the Foreign Investment Review Board (FIRB) in advance of any transaction. Fees apply. For transactions under AUS $1bn, fee of AUS $25,300. For those above AUS $1bn, fee of AUS $101,500. A separate tiered fee structure applies to land proposals	Voluntary. Company being acquired to notify Committee of Foreign Investment in United Status (CFIUS). No fee.	Mandatory. If authorisation required have to notify the Ministry of the Economy, Finances and Industry (MINEFI). If prior authorisation not required an admin notification may still need to be filed with MINEFI. No fee.	Mandatory. If above the threshold the investor applies to the Investment Review Division of Investment Canada (IRD) to demonstrate their investment will deliver a net benefit to Canada. If investing in a cultural business also apply to Canadian Heritage. If below the threshold investor to notify IRD before the transaction or within 30 days of closing. No fee.

	Australia	United States	France	Canada
Powers	Treasurer decides whether an investment is contrary to the national interest. The decision will be to raise no objections, block, or impose conditions. The treasurer can also require an interest to be disposed.	CFIUS can request a review of transactions not notified, and impose conditions. President may block if evidence that national security will be impaired	Can impose conditions or order divestment of any activity falling within a strategic sector.	Can request a national security review of any acquisition, impose conditions or reject an application.
Timescale	30 day review, may be extended for further 90 days by publishing an interim order, and may be extended for successive 90 day periods. Applicants can voluntarily extend the period, and will be informed of the decision within 10 days of it being made.	30 day review, then additional 45 days if CFIUS finds transaction is "foreign Government controlled". If report sent to President, President has 15 days to make a decision.	Two months, if no decision received within two months authorisation deemed granted.	Net benefit review - Minister of Industry has 45 days to review, can be extended by 30 days if required. Can be extended further if the Minister and company agree. National Security review - believed to total up to 200 days, and be extended on consent.
Cases/Use	In 2014-15, a total of 38,932 applications for foreign investment approval were considered, with 37,953 approved (of which 16,446 were subject to conditions). No applications were rejected, 799 were withdrawn and 180 were determined to be exempt, being outside the scope of the Policy or the Act. Of the 37,953 applications decided in 2014-15, 37,167 (mostly real estate) were decided under delegation by Treasury officials and 786 were decided by a Treasury minister. One divestment was made in 2014-15, this related to a property purchased by a foreign-owned company.	Around 100 cases notified each year (1988-2012). Before 2008, fewer than 10 went to the investigation stage each year, now 30 – 40% do. Very rare for deal to be blocked outright (fewer than one Presidential decision to block a deal each year) – companies normally withdraw decision or agree to mitigations before that point.	No publically available data on number of applications, anecdotally it is suggested that there are a large number of applications.	From 1985 through to 31 March 2015 there have been 14,400 notifications and 1,603 applications reviewed and approved. There is no public information on the number of cases rejected.

Annex C: Draft definitions of essential functions that could be used in any future mandatory notification regime

Sector	Draft essential functions	Government view
1. Sectors which, if it introduced a mandatory notification regime, Government is strongly minded to automatically *include* within its scope		
Civil Nuclear	1. The operation of civil nuclear reactors for the primary purpose of electricity generation (stakeholders performing this function hold a nuclear site licence for which the primary purpose is electricity generation). 2. Civil nuclear fuel production, specifically: i) enrichment ii) fuel fabrication (stakeholders performing this function hold a nuclear site licence for a site at which they conduct enrichment and/ or fuel fabrication). 3. Reprocessing, waste storage and disposal facilities for Category I-III nuclear material (stakeholders performing this function hold a nuclear site licence for a site at which they undertake one or more of reprocessing, waste storage or disposal of Category I-III nuclear material). 4. The transportation of Category I and II nuclear material (stakeholders performing this function are Class A Approved Carriers of nuclear material as defined in the Nuclear Industries Security Regulations 2003). 5. The decommissioning and clean-up of civil nuclear facilities (stakeholders performing this function are Site Licence Companies responsible for the decommissioning and clean-up of a civil nuclear site and those companies bidding for such a site licence).	The Government is strongly minded to define these sectors as essential functions, automatically bringing companies within the scope of the proposed new regime.
Communications	1. The provision of infrastructure in the UK relating to voice or data networks if the impairment of such infrastructure could cause the loss of a voice or data network to	

Sector	Draft essential functions	Government view
1. Sectors which, if it introduced a mandatory notification regime, Government is strongly minded to automatically *include* within its scope		
Communications (continued)	more than one million end users. 2. The provision of an Internet Exchange Point in the UK which facilitates the exchange of internet traffic, where that Internet Exchange Point connects three or more of the following electronic communication networks: a network that, if its infrastructure was impaired, could cause the loss of an electronic communication service to more than one million end-users. 3. Provision of the UK country code Top Level Domain (ccTLD) registry and the associated authoritative name servers. 4. The provision of emergency services networks. 5. The operation of broadcast infrastructure that carry national radio or television services. 6. The provision of Satellite infrastructure required for safety of life communications. 7. The provision of a submarine cable which conveys signals of any description.	The Government is strongly minded to define these sectors as essential functions, automatically bringing companies within the scope of the proposed new regime.
Defence	Those companies with facilities on List X and/or issued with a Security Aspects Letter.	
Energy	1. Upstream gas and petroleum infrastructure which has a throughput of more than 20million barrels of oil equivalent per annum. Including production, transport, storage or processing of oil and gas. 2. Energy networks that deliver secure, reliable electricity and gas to customers, ensuring continued supply as far as possible on the supply chain 3. Gas and electricity interconnectors, long range gas storage and Gas Reception Terminals, including Liquefied Natural Gas that contributes to the security of supply 4. Organisations owning large scale power generation of greater than 2GW with the	

Sector	Draft essential functions	Government view
1. Sectors which, if it introduced a mandatory notification regime, Government is strongly minded to automatically *include* within its scope		
Energy (continued)	capacity to significantly impact balancing of the electricity system if disrupted 5. Energy suppliers that provide energy to significant customer bases 6. The supply of petroleum-based road, aviation or heating fuels (including liquefied petroleum gas) to the UK market, by companies who provide or handle more than 500,000 Tonnes per annum, through at least one of the following activities: • the import of any of crude oil, intermediates, components and finished fuels • the storage of any of crude oil, intermediates, components and finished fuels • the production of intermediates, components and finished fuels through a range of refining or blending processes • the distribution of petroleum-based fuels to other storage sites throughout the UK by road, pipeline, rail or ship • the delivery of petroleum-based fuels to retail sites, airports or end users Where: • "intermediates" are petroleum or biomass derived substances which are intermediate products in the processing of crude oil and other feedstocks to fuels or fuel components • "components" are petroleum or biomass derived substances (e.g. biodiesel and ethanol) which are mixed with other components to produce finished fuels	The Government is strongly minded to define these sectors as essential functions, automatically bringing companies within the scope of the proposed new regime.
Transport	1. The ownership and operation of statutory harbour authorities which account for more than 5% of UK traffic 2. The operation of airports classed as dominant airports for economic regulation purposes as defined in the Civil Aviation Act 2012 3. The provision of en route air traffic control services	The Government acknowledges the strong regulatory protections already in place to mitigate national security risks. Comments would be welcomed on whether they are sufficient, whether the aims of the regime could be achieved through enhancements to existing protections, or whether there is a case for including some limited essential functions within automatic scope of the regime as set out here.

Sector	Draft essential functions	Government view
2. Sectors which, if it introduced a mandatory notification regime, Government believes there may be a case for including within scope		
Emergency services	1. The provision of emergency services control room services 2. The provision of main national IT systems to enable police operations (this currently covers the Police National Network, the Police National Database and the Police National Computer)	The Government acknowledges that internal processes for procurement provide some standards that reduce the national security risks in these areas. However, given the significant impact that potential espionage and disruption in these two areas could have, the Government suggests further protections could be required and welcomes views on this.
Government	1. To ensure resilient, secure means to oversee co-ordination of response in times of emergency, provide for UK national security and support to Defence and ensure the continued functioning of the state including protection of UK citizens	

Sector	Draft essential functions	Government view
3. Sectors which, if the Government introduced a mandatory notification regime, the Government is strongly minded not to automatically include within its scope		
Chemicals	No essential functions are to be included for these sectors (i.e. no company would be automatically covered by any mandatory notification regime).	The Government does not believe that there is a case for the automatic inclusion of chemicals businesses due to significant competition in this sector.
Financial services		The Government believes that there are significant regulatory safeguards in the financial services sector – including regulatory provisions, and provisions in the public interest regime which allow the Secretary of State to intervene in a merger in the event of any risk to financial stability.
Food		The Government does not believe that there is a case for the automatic inclusion of food businesses due to significant competition in this sector.
Health		The Government does not believe that there is a case for the automatic inclusion of health businesses as all such services are provided by the Government and the Devolved Administrations and there is direct control of the supply chain.
Space		The Government does not believe that there is a case for the automatic inclusion of the space sector due to key activities being already covered under the scope of the defence and communications sectors.
Water		The Government acknowledges the strong regulatory protections already in place to mitigate national security risks.

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