Department for
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Department for
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20 April 2021

Dear Amanda,

National Security and Investment Bill – Scottish securities

Thank you for your letter of 8 April regarding your concerns about the treatment of Scottish securities in the National Security and Investment (NSI) Bill. I am grateful for the continued engagement of the Law Society of Scotland on this important legislation.

Last week's Lords Report Stage included substantive debate on this issue after your proposed amendment was tabled by Lord Bruce of Bennachie and Baroness McIntosh of Pickering.

As Lord Callanan said in the House in his response to their remarks, the Government has reflected carefully following Lords Grand Committee and the constructive meeting with representatives from your organisation on 15 March, but continues to consider that an exclusion would not be appropriate. In such circumstances, the legal title to shares will – as a matter of fact – have been acquired by the lender and it is important that we do not inadvertently create a loophole that those who wish us harm might seek to exploit.

Whilst we note that the proposed amendment was updated from the version you previously suggested, in order to only exempt acquisitions by way of security where no effective control is obtained, the Government considers that such an approach would create difficulties, particularly for the mandatory regime. It would introduce a new, subjective concept of "no effective control" to the Bill that would sit uncomfortably with the need for acquirers to be able to objectively determine their legal obligations.

Nonetheless, the Government continues to consider that the Bill as drafted is likely to have a limited impact on such matters. As you know, the Bill broadly mirrors the existing approach of the People with Significant Control (PSC) register, which does not exclude legal owners of shares which have been acquired by way of security. That has been in place since 2016 and has had no discernible effect on the willingness of lenders to provide finance in Scotland. The Government also considers that it would be an odd outcome for such circumstances to amount to a person having significant control under the PSC regime but not to be recognised as acquiring control under the NSI regime.

The mandatory notification and clearance element of the regime is proposed to apply only to certain acquisitions of control over entities of a specified description within 17 sectors of the economy. The number of circumstances requiring notification where a lender acquires the legal title to shares at or above the thresholds in the Bill is therefore likely to be low – and this will be further helped by the removal of the 15% threshold (agreed by the House of Lords last week) from the scope of the mandatory regime.

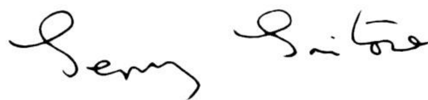
We will, however, keep this matter under close review following the implementation of the new regime. Clause 6 of the Bill provides the Secretary of State with the power to make notifiable acquisition regulations to amend the scope of the mandatory regime. That could be used in future, if considered appropriate, to exclude circumstances related to acquisitions by way of security from the mandatory regime.

In your letter you mentioned the Companies Act 2006 precedent. The Government has not departed from this as the Bill mirrors paragraph 23 of Schedule 1A to that Act, which in turn mirrors paragraph 7 of Schedule 6 in relation to rights attached to shares held by way of security. Also, the term “subsidiary” does not appear in the Bill so there is no need to mirror its definition in section 1159 of the Companies Act 2006.

Your letter also referred to the call-in power being available more generally up to five years after a trigger event takes place and the uncertainty that this might create. I should make clear that this five-year period only applies to cases which have not been notified, so does not concern notified acquisitions in the mandatory regime. Moreover, the Government has consistently emphasised that ordinary lending arrangements are unlikely to raise national security risks so there is no expectation that, barring the circumstances discussed above, such cases should be notified unless such risks are present. If a trigger event has been notified and cleared it cannot be called in again, subject to an exception relating to false or misleading information, so the Government considers that this will provide certainty to acquirers, including lenders.

I hope this is a helpful explanation of the Government’s position on these matters and thank you again for your letter. I am copying this letter to Lord Bruce of Bennachie and Baroness Mcintosh of Pickering, and I will be placing a copy of this letter in the Libraries of the House.

Yours sincerely,



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