6 January 2021

Dear Sir/Madam

Consultation on secondary legislation to define the sectors subject to mandatory notification in the National Security and Investment Bill 2020

The Universities Superannuation Scheme (USS) welcomes the opportunity to respond to the above consultation in response to the National Security & Investment Bill 2020.

By way of background, Universities Superannuation Scheme was established in 1974 as the principal pension scheme for universities and other higher education institutions in the UK. It has more than 400,000 members across more than 350 institutions and is one of the largest pension schemes in the UK, with total fund assets of approximately £68 billion (as at 31 March 2020). The purpose of the trustee company is to work with higher education employers to build a secure financial future for our members and their families.

USS recognises the need for government to be able to scrutinise the national security implications of investments in UK entities whilst, at the same time ensuring an appropriate balance is struck to maintain the confidence of investors in the UK market and to avoid unintended consequences of the Bill.

We supported the proposals as outlined in the White Paper in 2018 on the condition that the scope of the national security reviews is limited to critical assets to ensure clarity for both current and potential investors. In our response to the Green Paper, we suggested this could be achieved through a more specific definition of national security concerns and a specific list of essential functions. We outline below our residual concerns regarding the Bill and the inconsistencies with the guiding principles that have underpinned its policy development including "certainty, transparency and predictability of the regime to businesses and investors and ensuring that the UK is the best place to invest in a business."

1. **Call for clarity of scope and process**

Although we welcome the government's confirmation that the scope of the Bill is limited to national security, rather than a wider public interest test, **we have residual concerns regarding a lack of clarity as to what activities and sectors will be within scope, particularly given the lack of a definition of 'national security' within the Bill.** This lack of clarity could potentially lead to investors inadvertently failing to notify the government of transactions later deemed to be within scope or, more likely, to err on the side of caution and provide notification of all transactions potentially leading to a significant backlog of pending transactions. **Our concern regarding the potential number of transactions to be assessed by government is coupled by the retrospective nature of this legislation.**

Ultimately, this lack of clarity has the potential to reduce certainty and predictability in the system impacting business and investor confidence in the UK.

USS recognises the government's desire to retain flexibility on this issue and welcomes the government's statement that it intends to use these powers only to safeguard national defence and security. However, without a strict definition included in the legislation it is possible that future

governments may seek to use its powers to intervene in transactions for short-term or domestic political reasons that run counter to their original intended use.

We therefore call for a clear definition of "national security", or at least firm guidance as to the factors considered. For example, we note that Australia's 2015 Foreign Investment Policy provides a non-exhaustive list of the factors that are typically considered when determining whether a transaction is considered a potential threat to national security.

Secondly, we note the Secretary of State will have broad powers to impose remedies that are necessary and proportionate to prevent, remedy or mitigate national security risk – including restrictions/limitations on certain actions, divestments and even unwinding the transaction. We understand the Government no longer intends to publish decisions on its approach to calling in and clearing transactions. **We would find any clarification on the approach the Government intends to take on remedies, and what type of remedy would be likely to apply in particular circumstances, to be helpful in providing greater deal certainty**.

2. **Notification process**

Although we note the proposed timeline laid out for the notification process in the Bill, we remain concerned about the possibility for delays in the review and decision process for reasons outlined above.

While the Government has stated that the vast majority of transactions will require no intervention and will be allowed to proceed quickly, it is likely that each year well over over a thousand notifications will be received, and between 75-90 trigger events called in. This number may very well increase as a result of a lack of clarity as to the mandatory notification regime (as described above), with many investors opting to self-notify to avoid any possible risk of retrospective action.

It is therefore essential that BEIS has the requisite level of skilled resource to be able to accommodate these notifications in a thorough yet timely manner, not least to ensure commercially and price sensitive information is effectively overseen.

3. **Safeguards for UK-based investors**

USS recognises the need for government to be able to scrutinise the national security implications of investments in UK entities and, as mentioned above, for the regime to be as flexible as possible to capture all eventualities. However, as a UK-based investor **it is essential that there is further clarity as to how domestic acquirers will be treated in any transaction** if we are to have confidence in the proposed regime. As pension funds that are based in the UK and serve the interests of British beneficiaries it is hard to conceive of USS (or other UK pension funds) making a transaction involving the purchase of a UK entity which would present a national security risk – however broad the definition.

Corresponding legislation in Australian (Foreign Investment Review Board (FIRB) and in the US (The American Committee of Foreign Investment in the United States) are both clearly aimed at foreign investors reinforcing the need for a carve out in the Bill for UK-based pension funds.

USS supports the comment made by the Minister for Business and Industry at committee stage of the National Security and Investment Bill that evidence "that acquisitions by institutional investors and pension funds are routinely being notified but very rarely remedied or even called in" could

"build the case for using the powers in [clause 6] to make exemptions to the definition of a notifiable acquisition." We would welcome a commitment from the Government that a review of available evidence could take place in future, including a timetable for such a review, particularly with regards to UK-based pension funds.

4. Ensuring consistency with other market practices

The Bill currently considers that a person gains control of a qualifying entity if they acquire an interest greater than 25% of votes or shares. However, this is inconsistent with the trigger event threshold of 30% used under the Takeover Code's definition. This discrepancy will result in companies having to file additional regulatory disclosures at multiple thresholds, as well as requiring additional monitoring conditions in place to identify when those thresholds are reached.

As such, USS agrees with the recommendation made by the Investment Association that the proposed threshold be raised to 30%, to bring it in line with the Takeover Code.

We also understand the National Security & Investment review and any merger control review will be undertaken in tandem but that the timeframe for the NS&I review will last longer than the merger control review. We also understand that the Secretary of State will be able to overrule the CMA in respect of any remedies it may impose where these run contrary to national security interests. **We consider the tandem track review would benefit from a high degree of collaboration between Government and CMA so that a transaction can be de-risked from a NS&I and anti-trust perspective as soon as possible and with consistent messaging from each body.**

In summary, USS recognises the need for government to be able to scrutinise the national security implications of investments in UK entities. However, as a UK-based investor it is essential that there is further clarity as to how domestic acquirers will be treated in any transaction if we are to have confidence in the proposed regime. The sheer number of potential notifications as well as the retrospective nature of the review process are also significant causes for concern for which investors will need further clarification on the application of the Bill if the UK is going to remain an attractive market for investment for both domestic and overseas investors.

USS looks forward to continuing our engagement with government in the weeks ahead to ensure that an appropriate balance is struck between addressing genuine security concerns and maintaining the confidence of investors in the UK market.

I hope that our submission will assist with your deliberations and please do not hesitate to contact me should you require any additional information or would like us to elaborate on any of the above points.

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