

Consultation response

AFME response to the Department for Business, Energy & Industrial Strategy's (BEIS) consultation titled "National Security and Investment – A consultation on proposed legislative reforms"

15 October 2018

The Association for Financial Markets in Europe (*AFME*) welcomes the opportunity to comment on the Department for Business, Energy & Industrial Strategy's (*BEIS*) consultation on proposed legislative reforms relating to national security and investment.

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA), a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is registered on the EU Transparency Register, registration number 65110063986-76. AFME was formed in November 2009 through the merger of the London Investment Banking Association (LIBA) and the European arm of SIFMA.

Introduction

AFME agrees that foreign investment and an active and competitive economy are key to the UK's growth and development. A small number of investment activities, mergers and transactions in the UK economy could potentially pose a risk to the national security of the UK and we recognise the importance of the UK Government being able to intervene in such cases. AFME supports a regulatory framework that strikes the right balance between certainty for investors and businesses and flexibility for the UK Government to protect national security.

In our view, there are merits in a number of the measures set out in BEIS's proposed framework. Those merits should be weighed against the risk of the proposed framework resulting in increased costs and uncertainty for investors and businesses.

We have structured our comments to address the following aspects of the proposed reforms:

- I. Transparency and market feedback
- II. Informal discussions with the UK Government regarding trigger events
- III. The UK Government's resources to review notifications
- IV. Proposed retrospective period for calling in trigger events
- V. Coordination with other regulators
- VI. Proportionality and costs
- VII. Conclusion

I. Transparency and market feedback mechanisms

We agree that there are wider interests, beyond those of the parties to a trigger event, in relation to the volume, type and nature of trigger events which the Government calls in.¹ We therefore welcome the Government's plan to publish any decision to call in a trigger event,² as this should allow the wider investor and business community to develop an understanding of how the proposed reforms will be implemented.

We understand that the proposed reforms will not provide safe harbours in relation to countries and/or businesses (i.e. transactions relating to specific countries and/or businesses and/or investors will not be automatically excluded from national security review). We recognise that including safe harbour provisions in legislation might be difficult as, among other things, such legislation may have to be revised frequently. We believe, however, that it would be helpful if Government provides guidance for investors and businesses in certain circumstances. Such guidance could, for example, apply to investors and businesses based on a sliding scale of factors (e.g. guidance for entities that were recently on an international watch list).

We anticipate that, as Government publicises the outcomes of investigations under the proposed reforms, a body of facts and circumstances will emerge which will provide investors and businesses with a degree of predictability as to how the UK Government may view certain transactions. We believe it would be helpful to centralise this knowledge in non-binding guidance notes. In our view, the greater the degree of certainty that Government can provide to investors and businesses, the lower the probability that the proposed reforms will cause disruptions to transactions.

We recognise that, for reasons relating to national security, the UK Government may need to retain the ability to keep specifics of certain investigations and/or remedies confidential. It will be important for Government to strike the right balance between maintaining such confidentiality and providing businesses and investors with timely information regarding investigations.

II. Informal discussions with Government relating to trigger events

We welcome in principle the proposals relating to "informal discussions" with the UK Government set out in Chapter 5 of the white paper. We note that it will be important for Government to provide more information on how such informal discussions would function in practice, including the extent to which investors and businesses would be able to rely on the outcomes of such discussions.

III. The UK Government's resources to review notifications

We note that the Government expects to "call in" around half of the 200 notifications it expects to receive each year.³ AFME believes that the UK Government should ensure that it has the capacity (both in terms of personnel and expertise) to review and decide on trigger events that will be called-in or voluntarily notified in an expedient manner.

IV. Proposed retrospective period for calling-in trigger events

We recognise the need for the UK Government to be able to address retroactively trigger events that raise national security concerns. In principle, the six month retrospective period set out in the white paper should be adequate. It will be important for Government to work with investors and businesses to avoid, to the greatest extent possible, instances of trigger events being called-in after the completion of the

¹ See paragraph 7.41 of the White Paper on National Security and Investment, available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728310/20180723 - National security and investment - final version for printing 1 .pdf

² See paragraph 7.43 of the White Paper on National Security and Investment.

³ See paragraph 7.06 of the White Paper on National Security and Investment.

event, as the disruption associated with retrospective intervention could negatively impact on the attractiveness of the UK as a location for foreign investment.

V. Coordination with the UK Takeover Panel

We understand that BEIS has engaged with the UK Takeover Panel and will continue to do so in future. We look forward to there being clarity on how the proposed reforms would interact with the UK Takeover Panel's rules.

VI. Proportionality and costs

As a general remark, it will be important for the UK Government to ensure that any implementation of the proposed reforms is carried out in a manner that is proportionate and sensitive to the costs that parties to relevant transactions may incur.

The proposed reforms should allow the UK Government to inform relevant parties to a transaction as early as possible when a trigger event cannot/will not be approved under any circumstances. At this stage the UK Government would not necessarily have to disclose why it expects that a trigger event cannot be approved. However, such early notification would allow parties to relevant transactions to reconsider whether to incur the expenses associated with proceeding with the transaction.

It will be especially important for the UK Government to ensure that the proposed reforms focus on national security and are shielded from unwarranted political interference. We therefore welcome the UK Government's statement that the proposed reforms are intended to focus narrowly on national security and not on wider public interest issues.⁴

We note that there will be no fee levied for screening notifications, nor for trigger events called in by the UK Government. However, there are likely to be adaptive costs (e.g. legal and/or business advisory fees) incurred by businesses and investors relating to the proposed reforms, which are difficult to quantify at this time given the lack of detailed information that is available about the proposed reforms. It will therefore be important for Government to continue to engage with investors and businesses as the proposed reforms are developed.

VII. Conclusion

AFME recognises the important role that foreign investment plays in the UK economy and acknowledges that the UK Government needs to be able to intervene in transactions that threaten the national security of the UK. AFME further believes that the Government's proposed reforms should be implemented in a manner that is transparent, predictable, and minimally intrusive, and that does not unnecessarily increase costs to investors and businesses.

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⁴ See paragraph 4 of the White Paper on National Security and Investment.