NATIONAL SECURITY AND INFRASTRUCTURE INVESTMENT REVIEW

RESPONSE OF GLOBAL INFRASTRUCTURE INVESTOR ASSOCIATION TO BEIS CONSULTATION ON LONG TERM PROPOSALS

INTRODUCTION

The Global Infrastructure Investor Association ("**GIIA**") welcomes the opportunity to respond to the second part of the Government consultation on the proposals set out in the Green Paper entitled "National Security and Infrastructure Investment Review", dated 17 October 2017 (the **"Green Paper"**). The GIIA is keen to work constructively with the Government, to achieve an outcome which reflects the concerns of its members and ensures that any new regime does not adversely affect their incentives to invest in the UK.

The GIIA represents 62 global infrastructure investors (with total combined assets under management of approximately $500 billion across 6 continents) and key advisors to the sector. It is therefore well placed to provide the Government with the views of the global infrastructure investor community. A list of GIIA members is provided in Annex 1.

We confirm that nothing in this response is confidential. We also confirm that we would be happy to be contacted by BEIS in relation to our response.

GENERAL COMMENTS

Before providing more detailed comments below, GIIA would like to emphasise the following introductory points:

(a) GIIA promotes a level playing field in the global market so that private capital can be deployed freely for the benefit of infrastructure investment. GIIA and its members also recognise the importance of national security protections in critical infrastructure assets and therefore do not take issue with the concept of a more developed national security regime being introduced in the UK as many other countries have done.

(b) However, it is crucial that the Government considers the risk of any potential adverse effects on foreign direct investment ("**FDI"**) into the UK arising from the proposed changes outlined in the Green Paper. As the UK seeks to define its future trading relationship with Europe and the rest of the world, this is particularly important and is also consistent with the Government's stated aim to remain open for foreign investment. The UK has long been an important and welcoming destination for foreign capital, and this well-regarded reputation should not be negatively impacted as a result of any national security clearance regime.

(c) It is also very important that any new regime is clear, both as to its scope and the circumstances in which concerns may arise, transparent and applied consistently, and efficiently.

(d) GIIA members would welcome a clear statement from the Government that the new regime would not be applied retrospectively to pre-existing foreign investment in the UK.

This response is structured in two parts.

Part 1 sets out key principles which we believe should guide the Government in developing its proposals further. These principles are intended to indicate the main concerns and priorities of our members based on their significant experience as investors in a broad range of infrastructure businesses in a wide variety of countries.

Part 2 provides specific answers to the questions posed in Chapter 9 of the Green Paper. Where our answers to questions in the Green Paper have been effectively provided in Part 1 of this response, an appropriate cross-reference is made.

PART 1

PRINCIPLES – SCOPE

1. MANDATORY NOTIFICATION REGIME AND CALL-IN POWERS

1.1 Subject to certain minimum criteria being met, the preference of our members is for a mandatory notification regime. They consider that this would be the most appropriate and proportionate means of achieving the Government's stated objectives of protecting national security, whilst ensuring clarity and minimising uncertainty for businesses and investors.

1.2 In particular, GIIA considers a mandatory notification regime to be preferable to a voluntary regime for the following reasons:

(a) Provided the circumstances in which a transaction is subject to the regime are clear and focused on situations where there is a genuine likelihood of national security concerns arising, a mandatory regime would ensure greater deal certainty, particularly from the buyers' perspective. Uncertainty as to whether a transaction may be called-in for national security review is unhelpful for the infrastructure investor community. A mandatory regime should ensure a 'level playing field' among participants in the market, allowing a greater degree of certainty and predictability for investors. Such a 'level playing field' is a highly desirable outcome for our members.

(b) We agree with the Government's observation that, where voluntary regimes operate with success (such as the UK merger control regime), this is a result of such regimes having been in place for many years and thus investors being able to benefit from substantial experience of government/regulator behaviour. Should the Government introduce a new voluntary regime there would inevitably be a period of uncertainty and our members consider such uncertainty undesirable and unnecessary.

(c) There are valid concerns that a mandatory regime would lead to a substantial volume of "no-issues" notifications, which would place burdens on both the decision-making body and on businesses in areas within the scope of the regime. However, experience in other jurisdictions shows that a voluntary regime can create similar issues as the inherent lack of certainty leads to notification 'creep' and may result in a very high number of notifications, including in respect of deals that raise no national security concerns. As a result of this, we do not believe that concerns regarding notification volumes are confined to a mandatory regime.

(d) The volume of "no issues" notifications under a mandatory regime can be significantly reduced by applying sensible and clear thresholds as to when a transaction is caught. However, for a mandatory regime to function successfully, it is vital that there should be absolute clarity in terms of the scope of the regime and that it is targeted at situations where there is a genuine likelihood of national security concerns arising (see section 2 below and the response to Question 16 in Part 2 below).

(e) To minimise unnecessary impacts on deals, particularly in auction sale scenarios, our members would welcome both the possibility of obtaining "pre-clearance", and also receiving meaningful confidential/informal advice on both questions of scope and the likelihood of substantive concerns (see section 8 below).

1.3 To the extent the Government feels it necessary to maintain a call-in power to operate alongside a mandatory regime, it is essential that such a power is designed for limited use in exceptional circumstances only, such circumstances being clearly and transparently

defined. We consider that a broad, poorly defined call-in power would raise significant risks both for market certainty and the attractiveness of the UK as a key investment destination.

2. DEFINITION OF "ESSENTIAL FUNCTIONS"

2.1 GIIA members are concerned that the scope of the "Essential Functions" in Annex C may be too broad and go beyond what is necessary to protect the UK's national security. The rationale for the current Government view that the identified businesses should (or may) be subject to a national security regime has not been clearly set out. The sectors subject to a mandatory regime ought to be widely-acknowledged to constitute critical infrastructure that justifies additional oversight. It also needs to be clearly established that existing regulatory controls are insufficient to address national security concerns. Given the existing national security powers that exist in some of the relevant sectors, the Green Paper does not clearly explain why these are insufficient. This is considered further in the response to Question 16 in Part 2 below.

2.2 We note that Annex C does provide quantitative thresholds in certain cases, but nevertheless, the Government's stated expectation is that "*fewer than 100 transactions per year*" would be subject to notification. This is concerning as close to 100 notifications a year would involve a vast increase in the number of cases assessed for national security impacts. As the Government is aware, in the last 15 years, the Government has only intervened on national security grounds in seven cases under the existing regime (i.e. one case every two years). This raises questions as to the proportionality of the proposed regime.

2.3 Given that the language in the Green Paper does not make clear whether the Government is envisaging close to 100 notifications a year, or potentially a significantly smaller number, we would also welcome a more precise estimate from the Government on how many transactions it anticipates will fall within the scope of the identified "Essential Functions".

2.4 We note that some of the identified essential functions have no quantitative or other thresholds. Whilst the GIIA recognises that "one size fits all" financial thresholds may not be appropriate in a national security context, it is not apparent why *any* transaction in some of the identified sectors should be caught, regardless of the size of the target business.

2.5 In addition, many of the current criteria are too vague or uncertain to provide sufficient clarity to investors (or sellers). The definition of sectors subject to any national security clearance regime should not be open to interpretation. This is considered further in the response to Question 16 in Part 2 below.

3. DEFINITION OF "FOREIGN"

3.1 We note that the Government appears to be envisaging that any mandatory regime would only apply to "foreign" investors (see paragraphs 128-129), but that any call-in regime would apply to *any* investor, including UK investors (see paragraph 118). The logic of this difference in approach is not entirely clear to the GIIA.

3.2 In any event, assuming a distinction is to be drawn on the basis of the nationality of the investor, it would be crucial for there to be clear rules determining the nationality of an investor. However, we note that the Green Paper does not comment on this issue.

3.3 This question is particularly relevant to structures where ownership and control are distinct, as is the case for many GIIA members. Infrastructure funds make investments on behalf of the investors in their funds. These investors may be pension holders or other investors. Such investors typically own the funds being invested. However, they are typically "passive investors" who have no role in how their money is managed, with investment decision-making being the preserve of the fund manager.

3.4 Reflecting this, in the GIIA's view, it is sensible to focus on foreign *control* rather than foreign *ownership.* In the context of infrastructure or other investment funds, this typically

means management control. Such an approach mirrors the approach of competition authorities in a merger control context (see, for example, paragraph 15 of the European Commission's Consolidated Jurisdictional Notice under the EU Merger Regulation). Accordingly, in this context, the test should focus on the fund manager, which may often be a general partner in a limited partnership structure.

3.5 However, the test should take account of factual realities. For example, a general partner may be domiciled outside the UK but benefit from substantive asset management services from an asset management function located in the UK, which exercises management control on the general partner's behalf. It may not be appropriate to regard an entity subject to such a control structure as subject to foreign control.

3.6 It should be noted that focusing on fund investors and limited partners would potentially greatly expand the universe of investors caught, despite such investors having limited or no influence over how entities controlled by such funds are managed.

3.7 In cases where the fund manager is controlled by an entity in a different jurisdiction, our view is that the controlling chain of the manager should be analysed and nationality for this purpose should typically be determined by reference to the nationality of the ultimate controller of the fund manager. Again, this reflects the approach of anti-trust authorities who will look at the activities of the whole corporate group of the directly controlling entity. However, where substantive asset management activities are carried out in the UK as described above, and the asset manager can demonstrate independence from foreign ownership/control, a different approach may be called for.

3.8 In any event, as noted above, it is crucial that the legislation sets out clear rules as to how nationality is to be determined. For example, this would need to make clear how the Channel Islands, Isle of Man and other Crown dependencies are treated.

4. SIGNIFICANT INFLUENCE/CONTROL

4.1 We note that the Government has proposed that the acquisition of significant influence or control should be defined according to a two-limb test:

- "*the acquisition of more than 25% of a company's shares or votes*"; and/or
- "*any other transaction that gives (directly or indirectly) significant influence or control over that company or over its assets or businesses in the UK*".[1]

4.2 GIIA members believe that the first limb of this text is broadly sensible as it provides significant clarity and is an appropriate benchmark. However, the test should apply to 25% of the voting rights only, not simply the shares. Focusing on shares only would in some cases catch purely passive/financial investors with no (or very limited) voting rights.

4.3 In addition, GIIA members are concerned that the second limb may be overly broad and that in any event it risks creating a serious lack of clarity regarding the scope of transactions covered by the regime. The GIIA recognises that a simple bright-line equity threshold may not capture some situations where significant influence is in fact acquired. However, rather than establishing a bespoke test for significant influence or control beyond 25% voting rights, the GIIA would suggest that the Government either:

(a) uses an established control/influence test, such as the material influence test used in UK merger control; or

[1] See paragraph 118 of the Green Paper (and paragraph 128 in relation to mandatory regime).

(b) establishes very clear rules on what specific circumstances (e.g. specific veto rights) would give rise to significant influence or control.

For example, the simple right to appoint a director will not, in and of itself, give rise to material influence for UK merger control purposes, and the GIIA does not believe that such a right should, in and of itself, trigger any foreign investment/national security review process which the Government introduces. Although the statutory guidance on the meaning of significant influence or control in the context of the Register of People with Significant Control (PSC), which the Government indicates it may use, also seems to clearly indicate that a mere directorship would not give rise to significant influence, the PSC regime is not well established and the GIIA is concerned that reliance on it could cause uncertainty. In any event, there is a significant risk that considerable uncertainty would result for an extended period in the event that a bespoke test is established unless the thresholds are very clear.

4.4 Accordingly, to the extent the new regime seeks to capture situations beyond 25% voting rights, this should be defined with as great clarity as possible in the legislation. If the legislation does not establish bright-line thresholds, Government guidance on the meaning of "*other means of significant influence or control*" should, as far as possible, be in the form of an exhaustive list of alternative means of control, beyond which businesses and investors can have a high degree of certainty that the new regime would not apply.

4.5 In addition, the legislation should make clear how the regime will apply to acquisitions made by consortia. Infrastructure assets are often acquired by consortia of infrastructure investors. The legislation should make clear whether an assessment will need to occur as to whether *each* of those investors will acquire significant influence or control, with there then being a national security assessment for *each* of the relevant investors (noting that some of the investors may be foreign and others may not), or for example, whether this is only necessary for the largest shareholder(s). The legislation will also need to make clear whether an investor individually acquiring a stake which would not normally give rise to significant influence or control may be viewed collectively with other investors as acquiring such control where they are "acting in concert" (e.g. as part of an acquisition consortium). More generally, the Government will need to consider whether something akin to the associated persons test under section 127 of the Enterprise Act 2002 will apply.

PRINCIPLES – PROCESS

5. DECISION-MAKING BODY

5.1 Decision-making under any well-functioning national security review regime needs to be predictable, consistent and free from political influence. The UK has a tradition of independent regulators and transparent decision-making, backed by the rule of law, and this should be upheld in the national security context. Reflecting this, GIIA members have a strong preference for a specialist, independent body to adjudicate on cases. If decisions are taken entirely by Ministers or their departments, there is a clear risk that decisions will become politicised, or perceived as such. An independent body would remove the risk of national security being used as a tool for political expediency, as GIIA members have seen in other jurisdictions.

5.2 The specialist, independent body should:

(a) ideally be responsible for all decision-making under the proposed regime; or

(b) at the very least, advise a political decision-maker on the decisions he/she makes under the proposed regime (in the same way that the Competition and Markets Authority ("**CMA"**) advises the Government on public interest intervention cases within the phase 2 merger control regime).

5.3 If the Government is not prepared to accept that all decisions are taken by such an independent body, GIIA members would recommend that straightforward/Phase 1 cases are taken by such a body, with only decisions in more complex cases being assessed by a political decision-maker, ideally on the basis of advice from the independent body, as described above.

5.4 The GIIA also believes that it is important for consistency and predictability that, to the extent decisions are not taken solely by a specialist, independent body, they are taken by a single Cabinet level decision-maker within Government, rather than there being different decision-makers depending on the sector concerned.

5.5 The GIIA notes that an independent decision-maker or advisory body would also facilitate the provision of consistent and balanced informal advice. It is also important that representatives of the decision-making body are available for interaction with the transaction parties during the course of a review process, as well as in advance of formal notification.

5.6 In any event, whoever the decision-making (and/or advisory) body is, it is vital that they are sufficiently resourced to process applications in a timely and efficient manner.

6. TIMETABLE FOR DECISION-MAKING

6.1 It is imperative that there is a clear, fixed timetable for decisions. This should be as short as possible bearing in mind the objective of swift decision-making described above. It is essential any new regime does not unnecessarily delay infrastructure investments.

6.2 We therefore propose a timeframe of one month in which to make a decision in simple cases (with a deemed clearance at the end of the one month period in the absence of an explicit decision), with an additional 45 days for more complex cases. This broadly aligns with review periods in, for example, Australia and the United States. However, it is important that only cases which raise genuine national security issues go into Phase 2 (unfortunately, this is not always the case elsewhere). This emphasises the need for appropriate resourcing/funding of the decision-making body, and for such a body to be politically independent and not subject to political interference.

6.3 We note that the review periods proposed above are shorter than under the UK merger control framework. The GIIA considers that reviews conducted under a national security regime should be less complex and less likely to require third party input than a competition assessment and the process should be faster as a result. The GIIA also notes that the UK merger control timeframes are lengthy by international standards, in part reflecting the voluntary nature of the regime, which means that most cases being considered under the regime are relatively complex. It should be possible to conclude relatively quickly that most cases notified under a mandatory national security regime do not raise concerns. The GIIA therefore believes the above periods should be sufficiently long. As noted above, they are also in line with international comparators.

7. PUBLICATION OF DECISIONS

7.1 With certain exceptions (please see section 8 below), where the transaction and parties are public, GIIA members generally support the statement at paragraph 152 of the Green Paper that the outcome of reviews should be published. However, greater clarity as to the Government's intentions in this regard would be welcomed. In particular, does this mean that the reasons for decisions would also be published, or merely the ultimate decision? The aims of transparency and predictability would certainly be enhanced if the reasoning for decisions was also published, albeit the GIIA recognises that certain information would need to be redacted for national security reasons.

8. PRE-CLEARANCE AND CONFIDENTIAL ADVICE

8.1 GIIA members would, in general, welcome an opportunity for "pre-clearance". This refers to the possibility of obtaining confidential clearance (rather than merely informal advice) in advance of a contractual deal being agreed. Such a regime exists in Australia and is generally viewed favourably by GIIA members, many of whom are experienced investors in the country. Infrastructure assets are typically sold by way of auction and this option is particularly useful in the context of auctions, where vendors (and bidders) can remove uncertainty and competitive advantage for certain bidders regarding national security clearance by having all bidders pre-cleared by Australia's Foreign Investment Review Board ("**FIRB**").

8.2 Given that in such circumstances a deal would not have been agreed (or typically published), it would be essential that such a process worked on an entirely private/confidential basis. To the extent that the Government wishes decisions to be published (as the GIIA would in principle support, as noted above), this could be dealt with by subsequently publishing the decision relating to the winning bidder only (assuming a deal proceeds).

8.3 GIIA members also support the availability of confidential informal advice, both as to the applicability of the review process and its likely outcome, being available to companies considering an investment. The parameters and timescales for such advice would need to be transparent, being clearly set out either in the legislation or in related guidelines, but should recognise the fast moving nature of many transactions and the need for infrastructure investors to have an informed view within a reasonable period of time. For example, we note that, where available, informal advice under UK merger control can usually be obtained within 10 working days of submission and we would recommend a similar timetable under the national security regime.

PART 2: RESPONSE TO CONSULTATION 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?**

GIIA members have a clear preference for a mandatory regime over a call-in regime (subject to the caveats referred to in section 2 of Part 1 above). To the extent that a voluntary/call-in regime is to be retained (which the GIIA would hope was only for use in exceptional cases), the GIIA would strongly encourage a clear separation between the national security and competition assessments.

However, consistent with the comments made above, any call-in regime should only capture businesses or assets which are genuinely of critical importance to the UK's national security.

In addition, the GIIA does not believe that any such call-in regime should apply to any acquisition of significant influence or control over *any* UK business entity, as appears to be envisaged. There should be some sort of *de minimis* threshold for the size of the business concerned in circumstances where this operates alongside a mandatory regime. Moreover, the circumstances which would trigger a call-in should also be clearly spelled out

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 National Security and Infrastructure Investment Review investments into which Government could intervene?**

Given its position on a call-in regime, the GIIA has no particular views on this question.

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?**

See the comments at section 4 in Part 1 above. The GIIA and its members have concerns that the second part of such a test could give rise to significant uncertainty for an extended period, and that it would therefore be preferable to link the test to a well-established (and well-understood) definition of control/influence. Very clear legislation and guidance will be essential if a different approach is adopted.

10. **What do you think should constitute significant influence or control in this regime? Can you give examples to support this view?**

See the comments at section 4 in Part 1 above.

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?**

Again, GIIA members would in principle prefer a mandatory regime over a call-in regime. However, it is accepted that if a call-in regime is to be retained in any form, a power to intervene following completion would be necessary. The GIIA believes that such a period should not exceed three months following completion (or publicity if later), and two months would be preferable. Although there is a four month period in the context of UK merger control, this is the period within which the CMA must make a reference for a detailed Phase 2 investigation. In order to take such a step in practice the CMA would need to commence its investigation close to two months post-completion.

In addition, as noted above, the regime should make clear that it involves a "one-off" review at the time of an acquisition and is not intended to allow for continuous monitoring or intervention.

12. **What are your views about any 'call-in' power being expanded to new projects?**

The GIIA believes that an expansion of powers (whether under a call-in regime or a mandatory regime) to include new projects and bare assets would require careful examination. In particular, the Green Paper does not articulate in detail why these proposals are thought to be necessary. In any event, clarity in the legislation as to what was covered would be essential. For example, would there be any linkage to the essential functions in Annex C of the Green Paper? Would an extension to an existing project (e.g. a new airport terminal at a dominant airport, or an extension to an electricity distribution network operated by a regulated distribution network operator) be covered or only entirely new projects? The latter would certainly be strongly preferable given that there should be no retrospective review of existing holdings.

Investors will need to have more clarity as to what is envisaged before being able to comment in any detail. As noted previously, the predictability of any regime is of critical importance to infrastructure investors.

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

See response to Question 12 above.

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?**

See the comments in section 1 of Part 1 above. In particular, GIIA members would support a mandatory regime rather than a call-in regime. However, GIIA members support the policy

of operating the regime strictly by reference to national security considerations only, and that any call-in regime should lead to only a very small number of interventions. As noted above, the circumstances in which the relevant body may intervene under a call-in regime should be clearly set out, ideally in the legislation rather than guidance. GIIA members would also support the availability of confidential informal advice.

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?**

See section 1 of Part 1 above.

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?**

See the initial comments at section 2 of Part 1 above. The GIIA comments further on the Annex C categories as follows:

(a) Civil Nuclear: GIIA members have no particular comments at this stage.

(b) Communications: We note that, as set out in the Green Paper (Annex A), the Secretary of State has power to give directions to Ofcom (and directly to postal operators) for the purposes of national security, including a power to direct suspension or restriction of a person's entitlement to provide networks, services etc. As such, it is not clear to the GIIA why these powers are insufficient in circumstances where the Government appears to have reached such a conclusion in the context of other sectors where there are similar powers (e.g. water).

In any event, GIIA members have noted that the list of functions covered appears to be broad and that the specific need for each of the identified functions to be subject to a mandatory notification regime has not been articulated.

In addition, the basis on which the satellite infrastructure category would be operated is not clear. The GIIA understands that most satellites may be used to provide some form of safety of life communications: would this in each case make them "*required*" for such purpose? Moreover, the GIIA notes that nearly all satellites with UK coverage also cover a much larger geographic area. This raises questions as to the proportionality of requiring any acquisition of significant influence or control over such a satellite being subject to mandatory notification.

More generally, it is unclear how the thresholds identified in the Green Paper (where they exist) were set and the rationale for choosing them. This should be explained. It would also be helpful for BEIS to provide more clarity as to which specific current entities it envisages would be covered.

Finally, additional clarity on the national security implications of domain registration would be welcome.

(c) Defence: no comment at this stage.

(d) Energy: Given the powers set out in Annex A of the Green Paper, the GIIA would welcome clarification as to why these powers are not considered sufficient to address national security concerns, particularly in the upstream oil and gas sector, and in electricity and gas generation and transmission.

Consistent with the comments above, it is also unclear how the quantitative thresholds set out (where they exist) have been determined as appropriate for triggering a national security assessment. Some of the proposed categories are also insufficiently clear. Again, greater clarity should be provided as to which entities would be caught. For example:

- The energy networks category has no quantitative threshold. Does this mean it also applies to all independent distribution network operators (IDNOs), independent gas transports (IGTs) and/or offshore transmission operators (OFTOs)? If so, why are they crucial from a national security perspective? What does "*ensuring continued supply as far as possible on the supply chain*" mean?

- Are all interconnectors, long range gas storage facilities and LNG terminals considered to "*contribute to the security of supply*"? If not, how should investors determine whether a particular facility is covered?

- When does large scale power generation have the "*capacity to significantly impact balancing of the electricity system if disrupted*"? How does this apply in the context of portfolios of generation assets?

- When do energy suppliers have "*significant customer bases*" and why are they crucial from a national security basis given they do not actually deliver energy?

- Is it really necessary for distribution and delivery of petroleum-based fuels to be covered by the regime, particularly where done by road, rail or ship?

(e) Transport: Given the existing powers to direct licensees in the interests of national security as referred to in Annex A of the Green Paper, it is not clear to GIIA members why there is a need for additional powers in relation to any of airports, harbour authorities or air traffic control services. With respect to air traffic control services, the GIIA also notes that the Government holds a golden share in NATS.

More specifically, it is again unclear in certain instances how the thresholds were identified and the rationale for establishing such thresholds. For example, the 5% traffic market share for statutory harbour authorities is a low threshold. This contrasts with the proposed requirement for dominance in the case of airports, which seems more appropriate and has an existing statutory basis in the Civil Aviation Act 2012 and subsequent CAA guidance.

17. **Do you have views on whether certain parts of the Government and Emergency services sectors should be covered by a mandatory regime?**

GIIA members generally have limited comments on these proposals at this stage. However, the GIIA would encourage the Government to consider further whether procurement processes do or can provide sufficient protections. Moreover, if emergency services control room services are to be covered, clarity as to the precise scope would be essential.

The GIIA also notes that the Government category is currently unclear as to scope and this should be clarified.

18. **Are there other sectors to which any mandatory notification regime (if introduced) should apply?**

No.

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?**

As noted previously, it is of critical importance that the scope of any national security regime is clearly identifiable and that investors (and the wider public) understand which businesses, assets and projects are subject to enhanced oversight.

There is a significant risk that providing an unfettered power for Government to expand the scope of the regime to specific entities not covered by the identified essential functions would both result in a high degree of uncertainty, and adversely affect the UK's positive image as an open destination for infrastructure investment. There is also scope for mis-use if real constraints are not placed on the exercise of any such powers.

To reiterate, it is crucial for Government to be open and upfront as to what it believes capable of triggering genuine national security concerns. Whilst the GIIA recognises that the evolving nature of national security considerations may make changes desirable over time, we would strongly recommend avoiding the risk of politicisation of national security assessments which could arise should any regime be subject to too frequent expansions based on a "from time to time" approach.

20. **What are your views about the potential power for Government to bring specific plots of land into scope of a mandatory regime? National Security and Infrastructure Investment Review**

Please see the response to Question 19 above.

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 GIIA has no particular views at this stage.

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?**

As noted in section 1 of Part 1 above, GIIA members have a strong preference for a mandatory regime over a call-in regime. Any call-in regime which operated alongside a mandatory regime should be intended to be used only in exceptional and clearly defined circumstances.

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

The GIIA accepts that some such powers will be necessary, but has no other views at this stage.

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

Guidance with respect to the assessment process would not only be useful, it would be essential. Amongst other things, this would need to cover the scope of the regime, the decision-making process, how confidential advice may be obtained, the information required in notifications, the factors which may raise concerns or lead to a Phase 2 review, how concerns may be addressed through remedies (including pre-prepared undertakings for common situations), and the circumstances which are likely to lead to a prohibition.

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

Little detail is provided in the Green Paper on this issue, but the proposed powers to impose conditions, and to block or unwind deals in principle seem reasonable, provided the circumstances in which they may be exercised are clearly spelled out in the legislation.

GIIA members in general also support the proposal that decisions should be subject to judicial review, and that this should be a full merits review, albeit with appropriate protections to protect the UK's national security. The UK has an established tradition of

Government decisions being subject to judicial review, and this should be preserved in this context.

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?**

The GIIA supports a clear separation between the competition and national security assessments (subject to the point that GIIA members see merit in the Enterprise Act test of material influence applying in the national security context also, as described in section 4 of Part 1 above). In particular, as noted in section 6 of Part 1 above, the GIIA believes that the timescales for national security assessments should be shorter than those which apply for competition assessments.

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?**

The regime should indeed be as transparent as possible. A non-transparent and unpredictable regime will create uncertainty for investors and will ultimately make the UK a less attractive place for infrastructure investors. Therefore, as noted in section 7 of Part 1 above, the GIIA supports the proposal that outcomes of reviews should be published, and indeed, believes that this should extend to the publication of reasons for decisions, subject to necessary redactions for confidentiality or national security reasons. As noted elsewhere, transparency and predictability can also be enhanced by clear legislation and detailed guidance as to how the regime will be applied.

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?**

The GIIA has no comments at this stage.

29. **What impact, if any, do you anticipate these proposals having on the capital market or UK infrastructure businesses' ability to raise financing?**

Whilst any new national security review regime would inevitably have some impacts, at least for businesses falling within the scope of a mandatory regime, the extent of those impacts can be minimised by following the principles we have outlined in our response of a clear, proportionate, transparent and predictable regime, which arrives at decisions swiftly and from which undue political influence is removed.

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?**

This point does not directly go to costs and benefits, but the GIIA notes that the Green Paper does not provide any indication as to whether fees would be charged for reviews under either a mandatory or call-in regime. Any fees should of course be reasonable and it would be sensible to graduate them by reference to the size of the target business, as under UK merger control.

Finally, notwithstanding the current position on the UK's exit from the European Union, GIIA members would request that the Government takes into account the parallel EU proposals on FDI in arriving at its final proposed position.

ANNEX 1

List of GIIA Members

3i Group plc
Aberdeen Asset Management
Abu Dhabi Investment Authority
Alberta Investment Management Corporation
Alinda Capital Partners
Allen & Overy
Allianz Capital Partners GmbH
AMP Capital
Antin Infrastructure Partners
APG Asset Management N.V.
Aquila Capital
Arcus Infrastructure Partners LLP
Ardian
Ashurst LLP
Basalt Infrastructure Partners LLP
Berwin Leighton Paisner LLP
BlackRock Real Assets
British Columbia Investment Management Corporation
Brookfield Infrastructure Group L.P
Caisse de depot et placement du Quebec
Canada Pension Plan Investment Board
CBRE Caledon
Credit Suisse Energy Infrastructure Partners AG
Curzon Trinitas Ltd
Dalmore Capital
Deloitte
Deutsche Asset Management
DIF
EDF Invest
Ernst & Young LLP
Ferguson Partners Europe Ltd.
First State Investments
Freshfields
GIC
Global Infrastructure Partners
Goldman Sachs Infrastructure Partners
Hastings Funds Management Limited
Hermes Investment Management
Hogan Lovells
IDFC Alternatives Limited

IFC Asset Management Company, LLC
IFM Investors Pty Ltd
Infracapital
Investment Management Corporation of Ontario
John Laing Group plc
KPMG LLP
Macquarie Infrastructure and Real Assets (Europe) Limited
Marguerite Adviser S.A
Marsh Ltd
Morgan Stanley Infrastructure Inc.
OMERS Infrastructure Management Inc
Ontario Teachers' Pension Plan
OPTrust
Partners Group
Pembani Remgro
PGGM
PSP Investments
PWC
Sullivan & Cromwell LLP
Swiss Life Asset Managers
UBS Infrastructure Asset Management
Wren House Infrastructure Management