NATIONAL SECURITY AND INFRASTRUCTURE INVESTMENT REVIEW

RESPONSE OF GLOBAL INFRASTRUCTURE INVESTOR ASSOCIATION TO THE UK NATIONAL SECURITY AND INVESTMENT WHITE PAPER

16 OCTOBER 2018

INTRODUCTION

The Global Infrastructure Investor Association ("**GIIA**") welcomes the opportunity to respond to the Government consultation on the proposals set out in the White Paper entitled "National Security and Infrastructure Investment Review", dated 24 July 2018 (the **"White Paper"**) and the draft statement of policy intent published on the same date (the "**Draft Statement**"). The GIIA is keen to work constructively with the Government to achieve an outcome which addresses 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 over 50 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.

KEY POINTS

GIIA does not object to the principle of a national security regime for investment in infrastructure and notes that many countries have such regimes. The proposed regime set out in the White Paper (the "**Proposed Regime**") does provide greater clarity than the previous Green Paper. Nonetheless, discussions with GIIA members have identified several key concerns with the Proposed Regime, which we hope can be addressed as the Government's proposals continue to develop:

1. The Government does not clearly explain the reasoning behind the apparently very significant increase in the number of transactions which may raise national security concerns. In particular, the Government suggests that it expects around 100 transactions a year to merit a full national security assessment, with around 50 of those necessitating some sort of remedy. Whilst it is understood that this latter figure may include cases that have been resolved informally without a formal intervention under the public interest regime under the Enterprise Act 2002 ("**EA02**"), this nevertheless appears to be a huge increase in the number of transactions which raise concerns and there is no clear explanation for this, bearing in mind that the Government simultaneously states that the vast majority of foreign investment raises no concerns. This creates significant uncertainty for investors as to the Government's concerns and uncertainty does not create a positive environment for investment. It also suggests that the Government may have adopted an overly conservative approach. This also risks dampening investors' willingness to invest in the UK.

2. A related point is that a regime involving 200 notifications a year (probably more in the early years if greater clarity is not provided) will require a very large investment in appropriate resources to run the regime in a fair, proportionate and (in particular) efficient manner. GIIA members are concerned that the relevant Government body may become overwhelmed by the volume of work. If this happens, this will make the UK less attractive as a destination for foreign (and UK) investment. This is also a further reason why greater clarity is required on key points and the Government should consider streamlining the regime to exclude certain types of investment/investor.

3. A crucial issue for GIIA members is further clarity on the circumstances (if any) in which they may be thought likely to give rise to acquirer risk. Clearly, infrastructure investors invest in businesses which fall within the core areas and other "key parts" of the economy, in

circumstances where they would in theory have the ability to engage in disruptive or destructive actions. Whether a full national security assessment will be required and remedies may be necessary will therefore frequently turn on acquirer risk. Here, the guidance in the Draft Statement is extremely brief and provides GIIA members with no real clarity. Whilst the GIIA recognises that the Government wishes to have significant discretion in this area, if further guidance cannot be provided, this is likely to lead to a very significant number of cautious notifications and hugely increase the importance of informal advice as a means of providing clarity to investors as to whether they, and potential partners, could raise national security issues. A lack of boundaries in this area also raises concerns as to potential "mission creep" and the risk of decision-making motivated by protectionism.

the government has an opportunity to provide significant additional clarity to the market by including an affirmative statement in the legislation or policy guidance about the low risk presented by financial investors into infrastructure assets. A statement referencing the positive treatment of institutional investors with a track record of financial investment into infrastructure assets would provide reassurance to infrastructure investors that they are not considered problematic buyers.

4. Informal advice will in any event be crucial. Particularly in the early years of the regime, it is envisaged that GIIA members will need to have the ability to engage with the relevant Government body to establish on a confidential basis whether:

    a. they are in principle (i.e. unconnected to any particular transaction) likely to raise acquirer risk issues if they invest in relevant UK businesses/assets;

    b. whether particular potential consortium partners for a particular business/asset are likely to raise national security issues; and

    c. when acting as a seller, particular potential purchasers for a particular business/asset are likely to raise national security concerns,

    If such confidential conversations cannot be had in the absence of particular transactions and at the early stages of particular transactions, this will hugely complicate the process of putting together consortia for acquisitions, particularly in the context of auction processes. Whilst the GIIA accepts that the Government will be unable to give binding assurances in the context of informal advice discussions, it will be crucial that the informal advice provided is reliable. To this end, GIIA members believe it would help greatly if they could be provided with designated contact points to promote efficiency and consistency over time.

5. GIIA members consider that part of the test for determining whether a trigger event has taken place is unnecessarily based on a new legal test, "significant influence or control". As explained in response to **Question 1**, the GIIA considers that it would be preferable for this part of the test to be the same as the material influence test under the EA02. We believe that this would meet the policy objective of Government of having a flexible test, but would avoid the inherent uncertainties in introducing a test which is distinct from those used in EU and UK merger control, as well as the significant influence or control test under the Companies Act 2006. If the Government persists with the current proposed test, it will need to provide greater clarity as to the circumstances in which significant influence arises, for example where a right to appoint a director is held.

6. The GIIA would also urge the Government to consider the benefit for stakeholders of clear-cut safe harbours, for example, a *de minimis* threshold below which influence could not be established, e.g. a shareholding of below 10 per cent without any director appointment rights or vetoes beyond standard minority protection rights. Moreover, in the context of investment funds, the GIIA believes that it should be made clear that limited partners in a classic limited partnership structure where they are passive investors and decision-making rests with the general partner/manager should not be captured by the regime. In any event, this should be the starting presumption.

7. A related point is that greater clarity is needed as to the treatment of investment consortia. The GIIA notes the comments at paragraph 3.113 to 3.114 of the White Paper that two or more parties acting with a common purpose will be treated as a single person. The application of this to acquisition consortia needs to be clarified. For example, the GIIA questions whether it would be appropriate for each member of an acquisition consortium to be treated as a single person for the purposes of the regime with the result that each of them would, regardless of stake in the consortium or associated rights, be regarded as acquiring significant influence just because the consortium acquisition vehicle is acquiring such influence. Instead, there would seem to be merit in the shareholders' agreement (or similar) between the consortium members being analysed to establish the indirect rights of the consortium members in the underlying business, and only assessing under the Proposed Regime those consortium members which actually have the indirect right to exercise significant/material influence over the underlying business.

8. The GIIA considers that the timescales for the Proposed Regime are too long and are likely to have a negative impact on deal planning and potentially foreign investment into the UK, as discussed further in response to **Questions 4 and 6**. The GIIA and its members urge the Government to:

    a. reduce the initial phase 1 (screening) assessment to a maximum of 25 working days;

    b. reduce the period for full national security assessments to a maximum of 50 working days; and

    c. ensure that the ability to "stop the clock" is discretionary rather than automatic when information requests are sent out, and is only exercisable where it is necessary and proportionate to do so, for example, if a response to an information request has not been provided within 5 working days.

9. As discussed further in response to **Question 3**, the Government has not addressed concerns raised by the GIIA at the Green Paper stage in relation to the scope of the core areas. Although this is less critical in a voluntary notification regime, it remains an area where further work would be beneficial. Members also note that the scope of the core areas – especially in relation to communications – have expanded considerably.

10. The GIIA considers that the indicative list of potential conditions (Annex B of the White Paper) appears broadly sensible. The GIIA also welcomes the statements that any remedies imposed would need to be proportionate to the risk identified and that no other more adequate and proportionate power is available to remedy the issue. The GIIA considers that it would also be helpful to include an express obligation on the Senior Minister to consider the impact on the affected businesses. The GIIA notes that it is vital for future foreign investment into the UK that the UK is not seen as imposing (or able to impose) disproportionate remedies and/or engaging in protectionism. GIIA members are concerned that such a position has in practice been reached in at least one prominent overseas jurisdiction (see responses to **Questions 7 and 8**).

11. Finally, GIIA members would welcome an unequivocal statement from the Government that the new regime would not be applied retrospectively to pre-existing investments, in particular investments which occurred in the 6 months prior to the new regime coming into force.

RESPONSE TO CONSULTATION QUESTIONS

1. **What are your views about the proposed tests for trigger events that could be called in for scrutiny if they met the call-in test?**

1.1 The GIIA considers that Trigger Events 2, 3, and 5 should be defined by reference to the test for "material influence" under EA02.[1]

1.2 In addition, although this view is not shared by all GIIA members, the GIIA considers that there would be merit in aligning the look-back period under the Proposed Regime to four months (as opposed to six months), to be consistent with EA02 (as with the EA02, the regime could provide that the four month period would only begin to run once the transaction was made public).

The test for significant influence or control lacks clarity

1.3 The White Paper and Draft Statement introduces a new legal test: "significant influence or control", which is based on an expanded concept of 'significant influence or control' set out in legislation focused on UK corporate transparency. This test is relevant for Trigger Events 2, 3, and 5. Although the Government indicates that this test has been drawn from the similar test under the Companies Act 2006, paragraph 3.41 of the White Paper makes clear that this is intended to be a wider, and therefore entirely new, test.

1.4 The GIIA considers that there is currently ambiguity as to the scope of the proposed test. In particular, there is a clear inconsistency between:

(a) The description of the test as an expansion (i.e. a broadening) of the concept of 'significant influence or control' under the Companies Act, which suggests that the test is one that is intended to capture mere influence;[2] and

(b) The description of "significant influence" in the Draft Statement, which refers to an ability to "*ensure* that an entity generally adopts the activities which they desire" (emphasis added), which appears to suggest a test with a relatively high standard.[3]

1.5 There is also a lack of clarity under the Draft Statement as to the circumstances in which the ability to appoint a director will give rise to significant influence or control (see further below). For example, it seems unlikely that the ability to appoint a director would allow an investor to "*ensure that an entity generally adopts the activities which they desire*". Similarly, a veto right over adoption of a business plan or raising of debt (as referred to in paragraph 5.17 of the Statement of Policy Intent) would also seem unlikely to lead to such a degree of influence or control.

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[1] Acquisition of significant influence or control over an entity ("**Trigger Event 2**"); Trigger event 3: Further acquisitions of significant influence or control over an entity ("**Trigger Event 3**"); and Acquisition of significant influence or control over an asset ("**Trigger Event 5**").

[2] See paragraph 5.04 of the Draft Statement, which explains that the test "*expands the concept of 'significant influence or control' set out in the People with Significant Influence and Control Register (published under Schedule 1A of the Companies Act 2006) which is focused on UK corporate transparency …"*

[3] See paragraph 5.10 of the Draft Statement: "*significant influence and control are alternatives. In terms of entities and assets, "significant influence" or "control" are indicated by the following*:

- *where a person can direct the activities of an entity, this would be indicative of "control"*
- *where a person can ensure that an entity generally adopts the activities which they desire, this would be indicative of "significant influence"*
- *when a person has absolute decision rights over the operation of an asset this would be indicative of control …*
- *where a person can ensure the asset is being operated in the way they desire this would be indicative of "significant influence".*

1.6 These difficulties would be largely resolved if the Government instead used the established test for material influence under EA02. The GIIA believes that the material influence test meets the Government criterion of a flexible test, and has the considerable advantage over any new test of established precedent/case law. Moreover, there is a clear benefit for investors in the same test being used to determine control, and therefore notifiability, for the purposes of merger control and national security. This would avoid the need for investors and their advisers to apply yet another control test to acquisitions (on top of the different tests for control which apply, for example, under EU merger control, UK merger control and the Companies Act 2006).

The test for material influence (section 26 EA02) provides a more appropriate framework

1.7 The GIIA and its members therefore consider that it would be preferable for the Draft Statement to be focused on the test for material influence set out in Section 26 EA02.

1.8 The ability to exercise material influence is the lowest level of control that may give rise to a relevant merger situation in UK law. It is a concept that has been a feature of UK merger control law for several decades (the EA02 wording was modelled on equivalent provisions in the Fair Trading Act 1973). As a result, it has been the subject of a number of important legal precedents and is discussed in CMA guidance.

1.9 To date, material influence has very rarely been found with a shareholding below 15 per cent, and the GIIA believes the same should be true under the national security regime. A shareholding below 15 per cent, without a right to appoint a Board member (or equivalent management position) or otherwise influence the commercial affairs of a company, should not amount to a position of material or significant influence for the purposes of the new regime.

Additional comments in relation to Board members

1.10 As noted above, the GIIA considers that the guidance on the circumstances in which a right to appoint or remove board members may amount to control or significant influence is currently unclear. In particular, paragraph 3.41 of the White Paper suggests that "'significant influence or control for the purposes of the legislation *would* be gained when a party acquires a right to appoint a Board member".[4] However, the Draft Statement suggests the position is more nuanced and that this will not always be the case. For example, this will depend on the composition of the Board/how many board members there are and whether the relevant board member has particularly important responsibilities.[5].

1.11 The GIIA agrees that the position should be more nuanced. However, the key point is that these are precisely the sort of issues which are relevant to an assessment of whether material influence exists under EA02. There is therefore no need for a new test.

1.12 For example, in First Milk/Robert Wiseman (7 April 2005), the OFT concluded that First Milk's 15 per cent shareholding was sufficient to confer material influence in circumstances where First Milk also had the right to nominate one non-executive director to the Robert Wiseman board. The OFT noted that this director would be the director with the most experience of raw milk procurement and that his views would therefore be accorded particular weight by the rest of the board in relation to this particular activity. In addition, there was a milk supply agreement in place between First Milk and Robert Wiseman. Taking these factors into account, the OFT concluded that First Milk may be able to influence Robert Wiseman's policy and thus asserted jurisdiction to review the transaction.

1.13 In contrast, in Project Canvas (19 May 2010), a newly established joint venture between seven equal shareholders who each appointed one board member did not give rise to

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[4] Emphasis added.

[5] Draft Statement, paragraph 5.20-5.21.

material influence, essentially on the basis that none of them would be able to exercise any more influence than the others.

Safe harbours

1.14 We would urge the Government to consider the benefit for stakeholders of clear-cut safe harbours, for example, a *de minimis* threshold below which influence could not be established, e.g. a shareholding of less than 10 per cent without any director appointment rights or vetoes beyond standard minority protection rights. If such transactions are not clearly excluded from the regime, there is a significant risk that a large number of such transactions would clog up the regime in circumstances where it should be clear that the risk of national security issues arising is extremely low.

1.15 Moreover, in the context of investment funds, the GIIA believes that it should be made clear that limited partners in a classic limited partnership structure where they are passive investors and decision-making rests with the general partner/manager should not be captured by the regime. In any event, this should be the starting presumption. (The general partner/manager should of course be open to scrutiny to the extent that the investing fund which it manages acquires significant/material influence). This would also have the advantage of being consistent with how control is viewed under the EU and UK merger control regimes.

Consortia

1.16 The treatment of consortium arrangements is an issue of particular sensitivity to the GIIA and its members, as infrastructure assets are often acquired by consortia of infrastructure investors. This was an issue raised in the GIIA's response to the Green Paper.

1.17 We note that paragraphs 3.113 to 3.114 of the White Paper states that two or more parties acting with a common purpose will be treated as a single person.

1.18 The GIIA requests that the legislation makes clear how the regime will apply to acquisitions made by consortia. For example, the GIIA questions whether it would be appropriate for each member of an acquisition consortium to be treated as a single person for the purposes of the regime if the result of that was that each of them would, regardless of stake in the consortium or associated rights, be regarded as acquiring significant influence just because the consortium acquisition vehicle is acquiring such influence. Instead, there would seem to be merit in the shareholders' agreement (or similar) between the consortium members being analysed to establish the indirect rights of the consortium members in the underlying business, and only assessing under the Proposed Regime those consortium members which actually have the indirect right to exercise significant/material influence over the underlying business.

1.19 As discussed further below, the make-up of consortia, particularly in auction situations, is also very likely to be something on which early informal advice from the Government will be essential.

2. **What are your views about the proposed role of a statement of policy intent?**

2.1 Members of the GIIA have no issue with the proposed role of a statement of policy intent and agree that it is helpful to give it statutory force. Members consider that it is important that the statement, and revisions to it, are subject to adequate Parliamentary scrutiny. Members assume that that further drafts of the statement of policy intent will be prepared for consideration in parallel with scrutiny of the legislation implementing the Proposed Regime.

3. **What are your views about the content of the draft statement of policy intent published alongside this document?**

3.1 The GIIA welcomes the publication of the Draft Statement alongside the publication of the White Paper. We set out below the comments of the GIIA and its members in relation to the Draft Statement.

Chapter 2: Target event risk, and Annex A: The Core Areas

3.2 GIIA members are concerned that there remains significant uncertainty regarding the scope of the core areas. Whilst this is of less importance in the context of a voluntary regime than a mandatory regime, greater clarity as to the scope of the core areas would help to reduce unnecessary notifications, alleviating the administrative burden on the Government and therefore the cost of the regime. We comment below on some specific issues.

Energy

3.3 The White Paper and Draft Statement leave unaddressed the GIIA's specific concerns raised in its response to the Green Paper, namely:[6]

(a) The energy networks category has no quantitative threshold. Does this mean it also applies to all independent distribution network operators (IDNOs), independent gas transporters (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?

(b) 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?

(c) 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?

(d) 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?

(e) 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?

Communications

3.4 We note that the scope of the "core" communications sector has expanded significantly since the publication of the Green Paper. The GIIA noted in its response to the Green Paper that the list of functions covered appeared to be broad and yet it has now been expanded further. It would be helpful if the Government could explain the rationale for these amendments. As noted in the GIIA's Green Paper response, it would also be helpful if the Government would articulate the logic of each listed activity falling within the core areas, bearing in mind the various pre-existing powers which the Secretary of State has for the purposes of national security.

Transport

3.5 It remains unclear how the thresholds have been determined. In particular, the 5 per cent traffic market share threshold for statutory harbour authorities seems low when compared to the dominance threshold for airports.

Regulated sectors

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[6] See Part A, Section 9, Definition of "Essential Functions" and Part B, Response to Question 21.

3.6 The GIIA would suggest that the Government ensures that appropriate input is obtained from sector regulators (such as Ofgem and Ofcom) as part of decision-making in transactions in the regulated sectors.

Chapter 3: Trigger event risk

3.7 The GIIA considers that it would be helpful for the Government to state more clearly the relationship between trigger event risk and acquirer risk. Our understanding is that the "trigger event risk" is an assessment of the *ability* to engage in disruptive/destructive actions, whereas the *likelihood* of the acquirer engaging in such actions is a question for the acquirer risk assessment. This could usefully be confirmed.

Chapter 4: Acquirer risk

3.8 As noted in the Introduction, a crucial issue for GIIA members is further clarity on the circumstances (if any) in which they may be thought likely to give rise to acquirer risk. Infrastructure investors such as the GIIA members frequently invest in businesses which fall within the core areas, as well as the other identified "key parts" of the economy. In some instances, they will also acquire sufficient influence to have the ability in theory to engage in disruptive or destructive actions. In such cases, whether a full national security assessment will be required and remedies may be necessary will therefore largely turn on acquirer risk.

3.9 Despite the fundamental importance of this, the guidance in the Draft Statement is very brief and provides GIIA members with no real clarity. Whilst the GIIA recognises that the Government wishes to have significant discretion in this area, if further guidance cannot be provided in the legislation or the final statement of policy intent ("**Final Statement**"), this is likely to lead to a very significant number of cautious notifications, significantly increasing the resources required to operate the regime. It will also mean that informal advice as a means of providing clarity to investors as to whether they, and potential partners, could raise national security issues will become extremely important. Finally, a lack of guidance in this area also increases the risk that future governments might be tempted to engage in protectionism, or otherwise to pursue policy goals wider than protecting national security.

3.10 The GIIA notes with approval the statement in paragraph 4.05 of the Draft Statement that an entity's track record in relation to other acquisitions will be a relevant consideration. Most GIIA members have significant investments in the UK, often including in core areas. However, it is unclear whether such a track record means that the Government would not (or is highly unlikely to) have concerns. Clarity on this would be welcome.

3.11 The GIIA also notes with approval the statement that most acquirers do not pose a risk to national security[7] . Furthermore, for those GIIA members that are pension funds, the statement in paragraph 4.13 that pension funds are long-standing investors in entities that operate the UK's national infrastructure, is welcome as it seems to indicate that such investors should not raise concerns. However, the Draft Statement goes on to state that often "*such parties choose not to interfere in [the relevant entity's] operation*". This seems to imply that if such entities do "*interfere*", they may raise concerns. Given that most infrastructure investors, including pension funds, are not generally entirely passive investors, further clarity on what is intended here would be welcome. For example, is "interference" intended to refer to activities that might reasonably be interpreted as going beyond exercising good governance (for example, gaining direct and unmonitored access to a company's IT infrastructure)?

3.12 Furthermore, is the Government drawing a distinction between pension fund investors and other infrastructure investors that are not pension funds, such as managed infrastructure funds (whose investors may be pension funds or other investors) or insurance companies?

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[7] Paragraph 4.11.

If so, what is the logic of the distinction given that the mandates of any type of infrastructure investor will generally make clear that they invest for financial or commercial reasons?

3.13 GIIA members assume that none of them would be regarded as hostile actors. This response therefore does not dwell on the fact that (for understandable reasons) the Government provides little clarity on which states it may view as hostile states.

3.14 However, a high proportion of GIIA members are in some respect "foreign". It is therefore important for such GIIA members to understand in what circumstance them being "foreign" may lead to national security concerns. As a general rule, infrastructure investors will be driven by the desire to achieve a financial return for their investors and delivery of high quality outcomes for customers and other stakeholders. Accordingly, GIIA members would welcome any comfort which the Government can provide that "foreign" infrastructure investors will not be treated with any greater suspicion than British ones, at least in circumstances where it is clear that the fund manager has operational independence to invest on the basis of financial/commercial criteria. Again, it is important that decision-making does not drift into protectionism.

3.15 GIIA members would also welcome clarification as to the treatment of sovereign wealth funds. Will it be Government policy to treat them more cautiously than other infrastructure investors? Would the Government look to examine the operational independence of the fund/fund manager from the relevant State?

3.16 It would be helpful for GIIA investors if some form of "white list" could be created for acceptable investors, whether particular investors, or investors of a particular type (such as pension funds) or investors from nations with favoured trading investment relationships with the UK.

3.17 Although this is less important than in a mandatory regime aimed only at foreign investors, the GIIA also notes that clarification as to what "foreign" means would be helpful for many of its members. In an investment fund context, there will be a fund manager (often a general partner), the fund itself, entities which control/own the fund manager and the investors in the fund (who typically technically own the fund but have little or no influence over how the money in the fund is invested). Each of those may have different nationalities. It is assumed that in considering "foreignness" in this context, and indeed relevant entities more generally, the Government would focus on the fund manager and its controllers as the entities which determine how the fund acts/invests rather than (for example) the underlying investors or the fund itself. Such an approach is generally adopted under EU and UK merger control. If this is not the intention, the Government should make this clear.

<u>Chapter 5: Guidance as to the interpretation of significant influence or control</u>

3.18 This is a crucial issue for GIIA members; the comments of the GIIA and its members are set out above, in response to Question 1.

4. **Does the proposed notification process provide sufficient predictability and transparency? If not, what changes to the proposed regime would deliver this?**

4.1 A number of important aspects of the proposed notification process appear not to provide sufficient predictability and transparency.

<u>Unexplained increase in the anticipated number of notifications</u>

4.2 At the outset, we note that the White Paper envisages around 200 notifications per year (paragraph 5.02), and that the Government's initial analysis indicates that it would 'call in' about half of the 200 notifications it expects to receive each year for a "full national security assessment" (paragraphs 7.06 and 8.02). The White Paper also suggests that remedies are expected to be imposed in around half of those cases subject to a full national security assessment (paragraph 22, page 12), so in around 50 cases a year, or essentially one deal

every week. We note that these figures are, counter-intuitively, a significant increase from the envisaged figures in the Green Paper, even though the Government is no longer contemplating a mandatory regime. Of course, the proposed call-in regime is broader in scope than the mandatory regime mooted in the Green Paper. Nevertheless, by any measure, these are very significant numbers when compared with the existing level of public interest interventions and reviews on national security grounds,. Indeed, for the past decade, there has typically been an annual rate of less than one intervention notice issued on national security grounds The huge increase in the number of transactions deemed worthy of national security concern, combined with parallel statements that the vast majority of foreign nationals pose no national security risk,[8] makes it hard for investors to determine which sorts of transactions and which sort of investors are likely to raise concerns. Ultimately, the concern is that an overly conservative position is being taken, leading to unnecessary market intervention.

4.3 The GIIA and its members therefore think it would be very helpful if further clarity on the Government's thinking lying behind the very substantial increase in expected interventions could be provided. In particular, it would be helpful to understand in more detail (to the extent the Government is in a position to do so, it being recognised that the Government will be constrained in what it is able and willing to disclose publicly) the types of transactions that the Government envisages falling within each of the three respective buckets (in particular, those meriting a national security assessment and those where remedies may be required). In addition, if it is possible to do so, it would be very helpful to the GIIA and its members (and infrastructure investors more generally) if the Government was able to provide an indication of the specific types of infrastructure investment transactions that it would be likely to wish to review under the proposed regime. These issues are closely connected with the question of acquirer risk considered in the response to the previous question.

Informal advice and pre-clearance

4.4 The GIIA and its members welcome the Government's proposal that informal advice would be made available (paragraph 5.06 of the White Paper). As noted in our introductory remarks, in order to ensure that this advice is as useful as possible, it will be very important that the Senior Minister has access to sufficient resources to provide efficient and reliable informal advice. Further comments on the nature of the supporting agency are made in section 5 below.

4.5 We note that the CMA typically provides informal advice within two weeks. The GIIA and its members would welcome confirmation that informal advice under the national security regime would be provided within a similar timescale. More generally, it will be very important that, as with the CMA, clear published guidance is provided as to the process for informal advice, and its parameters.

4.6 As noted above, particularly in the early years of the regime, the GIIA and its members believe that informal advice will be crucial in providing clarity to investors, as to whether they may be viewed as raising acquirer risk, both generally, and in the context of particular transactions. In particular, GIIA members would welcome confirmation that informal advice will be available to establish **on a confidential basis** whether:

(a) investors are in principle (i.e. unconnected to any particular transaction) likely to raise acquirer risk issues if they invest in relevant UK businesses/assets;

(b) particular businesses/assets are likely to be sensitive;

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[8] See, e.g. page 27 of the Draft Statement.

(c) particular potential consortium partners are likely to raise national security issues; and

(d) when acting as a seller, particular potential purchasers are likely to raise national security concerns.

4.7 If such confidential conversations cannot be had in the absence of particular transactions and at the early stages of transactions, this will hugely complicate the process of putting together consortia for acquisitions, particularly in the context of auction processes.

4.8 Whilst the GIIA accepts that the Government will be unable to give binding assurances in the context of informal advice discussions, it will be crucial that the informal advice provided is reliable and in particular is not simply used as a bargaining tool between the authority and investors.

4.9 GIIA members believe it would help greatly if they could be provided with designated contact points to promote efficiency and consistency over time, both in informal advice discussions and notifications. In this regard, GIIA members would expect their designated contact point to be open to informal telephone conversations to have initial discussions regarding potential transactions.

4.10 In addition to informal advice, GIIA members would again urge the Government to consider the possibility of formal pre-clearance being granted for transactions in advance of a deal being agreed. Since the envisaged screening process under the Proposed Regime will not involve publicity, as a minimum, this could involve the Government confirming that it would not seek to commence a full national security assessment with respect to any investors which were participating in an auction for a particular business. This would greatly simplify auction processes. As noted in the GIIA's Green Paper response, pre-clearance is available under the FIRB regime in Australia.

Screening

4.11 As set out in the Executive Summary, the GIIA and its members urge the Government to consider shortening the initial screening timetable to a maximum of 25 working days (i.e. 15 working days plus a possible extension of up to 10 working days). GIIA members consider that this should be sufficient time to carry out an initial screening exercise in all cases. We would also suggest that the Senior Minister is given a discretion as to the precise length of the extension up to 10 working days, and that in any event, the Senior Minister should be under a duty to issue his decision as soon as reasonably practicable.

Statistics

4.12 In addition, the GIIA believes that it would be very helpful if the Government committed to publishing statistics on the average time taken to complete screening assessments, so that stakeholders can understand how the process is working in practice. These statistics should also measure the length of any pre-notification discussions between notifying parties and the Government. Such information is made available by the CMA in the context of UK merger control.[9]

5. **What are your views about the proposed legal test for the exercise of the call-in power? Does it provide sufficient clarity about how it would operate?**

5.1 The GIIA considers that the two limb test set out in the White Paper should be reformulated as a three limb test.

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[9] See: https://www.gov.uk/government/publications/phase-1-merger-enquiry-outcomes. The published document is updated on a monthly basis.

(a) Limb 1 – reasonable suspicion that it is or may be the case the trigger event has taken place or will do so

(b) Limb 2 – trigger event may give rise to a national security risk

(c) Limb 3 – the Senior Minister considers that the aim of protecting national security could not be achieved by other, less intrusive measures, than exercising the call-in power.

5.2 The proposed third limb reflects the section of the White Paper that sets out that the call-in power should only be exercised "where necessary and proportionate" (paragraphs 6.21 to 6.23). The GIIA sees considerable merit in the principles underlying this important constraint on the Government's powers being embedded in the legislation.

5.3 In addition:

(a) the Final Statement should include clear guidance on the points summarised at paragraph 6.23 of the White Paper, preferably including one example for each of the core national infrastructure sectors, in addition to the examples in the White Paper; and

(b) the figure at page 7 of the Draft Statement should be amended to reflect the need for the Senior Minister to determine that exercise of the call-in power is necessary and proportionate.

Decision-maker

5.4 The GIIA and its members welcome the statement in paragraph 6.07 that there will be a single decision-maker for all decisions under the regime. We do not therefore understand the need for the "Senior Minister" to be defined to cover various Ministers (see paragraph 6.08), given that, by the time the legislation has passed through Parliament, we would expect that a decision will have been taken as to who the decision-maker will be. As such, there appears to be no need for the legislation to refer to the "Senior Minister" and, in the interests of good governance it would be preferable to refer to the "Secretary of State". In any event, the legislation needs to make very clear that there is a single decision-maker, for example, to ensure that other Secretaries of State (or the Prime Minister or Chancellor) cannot step in and exercise statutory decision-making powers under the legislation where they see fit.

5.5 The White Paper does not discuss how the Senior Minister will be supported in performing his/her role, beyond noting that the Government will continue to explore whether a new spending power is required in the legislation (see paragraph 8.65). As discussed in our introductory remarks, it is crucial that the regime is sufficiently resourced, both in terms of numbers of staff, but also the experience and quality of those staff. The GIIA noted in its response to the Green Paper that its members had a strong preference for a specialist, independent body to adjudicate on cases, or at least to advise a political decision-maker. The Government appears to have decided that the decision-maker will be a Minister, which GIIA members can understand in the context of a national security regime. Nevertheless, some GIIA members retain a preference for an independent body to carry out the initial screening process, to minimise the risk of political decision-making.

5.6 If there will be no such independent body, the GIIA's preference would be that the Senior Minister is supported by a secretariat that comprises civil servants with public and private sector experience (with appropriate security clearance where needed). Such a secretariat could rely on the support of different government agencies (including the security services) and would need to be staffed with individuals who have experience of dealing with cross-departmental issues. The secretariat will need to include staff with market knowledge and sectoral experience. The Government might consider structuring the secretariat by sector

so that the staff build up experience over time. In any event, consistency of decision-making is vital and an independent secretariat with sufficient resources and experienced staff would facilitate that.

5.7 As noted above, GIIA members would welcome a designated contact point for particular investors, as this would greatly assist investors in obtaining an efficient service under the regime, as their contact becomes familiar with the business over time. For example, this would avoid unnecessary and repetitive questions regarding an investor's operations or structure.

5.8 Given the potential interaction of the regime with the role of sector regulators such as Ofcom and Ofgem, there may also be merit in the Government considering formal secondment programmes in order to benefit from the sector and regulatory expertise held by officials at these agencies.

6. **What are your views about the proposed process for how trigger events, once called in, will be assessed?**

6.1 As noted in our introductory remarks, the proposed timetable covering both initial screening and the national security assessment, is too long, even ignoring the proposed "stop the clock" arrangement considered below. When a transaction has already been through an initial screening process, potentially lasting 5 or 6 weeks (that process no doubt preceded by pre-notification discussions and/or informal advice), it should not be necessary for the parties to have to wait potentially a further 15 weeks for a decision. In this regard, the GIIA reiterates its view put forward in its response to the Green Paper that national security reviews should be less complex and less likely to require third party input than a competition assessment and the process should therefore be quicker as a result.

6.2 The GIIA believes that the proposed potential total period for the screening and full assessment (again excluding extensions due to stop-the-clock provisions) of 21 weeks plus holidays is long by international standards, exceeding the formal time periods for national security assessments in (for example) each of Australia, Germany and France (although it is accepted that pre-notification discussions may be lengthy in some of those jurisdictions).

6.3 The GIIA therefore considers that 25 working days for the detailed assessment should suffice in most cases, but with a possible extension of an additional 25 working days. When combined with our proposed maximum 25 working days for the initial screening process, this gives rise to a total assessment period of up to 15 working weeks, which GIIA members consider to be more reasonable.

6.4 GIIA members have significant concerns in relation to the Government's proposal that there should be automatic clock pauses when awaiting responses to information requests. These concerns are compounded in the context of the proposed lengthy timetable. We would urge the Government to reconsider this proposal and instead to have a discretion to stop the clock if a request is not completed within a specified period, such as 5 working days. An important point in this respect is that parties could effectively be held to ransom by third parties who may be asked questions by the Government, as recognised at paragraph 7.37 of the White Paper, where it is suggested that the Senior Minister could 'un-pause' the clock if the delay was "unfairly harming the acquiring party's interest". There is a clear risk that such an approach could encourage regulatory gaming, by making third parties aware that they can delay a transaction by simply not answering questions for a long time. Any incentive to this effect should be avoided.

<u>Publicity</u>

6.5 The White Paper indicates that high-level reasons will be published at the time of a call-in (paragraph 7.45) and again at the stage of an approval subject to conditions (paragraph

8.34). Although this is not stated, it is assumed that the proposal is also to publish high-level reasons for any prohibition decision, and for any approval without conditions.

6.6 GIIA members have differing views as to whether publication of high-level reasons is sufficient, or whether it would be preferable to have publication of the full decision with redactions as appropriate for national security considerations, as well as general confidentiality considerations. To the extent that the approach of publishing only high-level reasons is maintained, it is very important that those reasons contain sufficient detail to allow investors and their advisers to determine what is driving decisions and can adjust their approaches and expectations accordingly.

6.7 It will of course be important that parties to decisions obtain more than high-level reasons for the Senior Minister's decision, not least so that they can determine whether the appropriate procedures have been followed and whether they may have a right to appeal.

7. **What are your views about the proposed remedies available to the Senior Minister in order to protect national security risks raised by a trigger event?**

7.1 The list of proposed indicative remedies appears to be broadly sensible. We also strongly support the Government's proposal that a particular remedy may only be imposed if the Senior Minister:

(a) reasonably believes that a national security risk is posed by the trigger event;

(b) reasonably considers that it is necessary to impose a remedy for national security purposes

(c) the remedy is proportionate to the risk identified;

(d) considers that there is no other more adequate and proportionate power available for them to exercise; and

(e) has considered representations from the parties.[10]

7.2 The GIIA considers that it would also be helpful to include an express obligation on the Senior Minister to consider as part of its assessment of the proportionality of any conditions imposed, the impact on the affected businesses. The GIIA notes that it is vital for future foreign investment into the UK that the UK is not seen as imposing (or able to impose) disproportionate remedies and/or engaging in protectionism. GIIA members have expressed concern about the possibility of a national security regime being used, or misused, to impose disproportionate remedies on parties, as they feel has occurred in at least one prominent international jurisdiction. This has a negative impact on investment and the UK government should ensure that the Proposed Regime does not lead to similar outcomes in the UK.

7.3 With respect to paragraphs 8.48 to 8.54 of the White Paper, in those rare cases where the Government considers that a full unwind order is needed, the Government appears to be suggesting that it could require the previous owner to re-take ownership of the relevant business. The White Paper suggests in paragraph 8.52 that a similar approach is taken under UK merger control. This is not the case. The CMA remedies guidance which the White Paper refers to does not discuss the possibility of forcing the previous owner to re-take ownership and the GIIA understands that this is not something the CMA ever does (or its predecessors ever did). Instead, a "problematic" owner may be required to divest the business/its interest to a third party which does not raise competition concerns. It is not

[10] Paragraph 8.13 of the White Paper.

clear to the GIIA why a similar approach would be inappropriate for a national security regime.

7.4 The Government's apparently proposed approach would also seem to be inconsistent with the concept of a voluntary regime and is likely to mean that in many cases sellers will insist on making deals conditional on national security clearance, rather than the usual position under voluntary regimes (such as UK merger control) where the risk is on the purchaser rather than the seller. This would further increase the number of notifications.

7.5 If the Government does believe that it needs to have a "last resort" power to require a seller to re-take ownership, the GIIA would strongly urge the Government to make clear that this is a genuine last resort, and that the usual position (in those rare cases where it is determined the buyer cannot continue to own the relevant business) is that the problematic owner would be required to divest to a suitable third party. As in the merger control context, this would need to be accompanied by a power to appoint a divestiture trustee to make the sale (for no minimum price) if the problematic owner fails to do so within a set time period.

7.6 Given the comment in paragraph 8.16 of the White Paper that conditions may be imposed on "any party", it would also be helpful if the Government could provide clarity on the circumstances, if any, in which remedies might be imposed on third parties (i.e. parties that are not: (i) notifying parties; (ii) associated with a notifying party, or (iii) the entity being acquired). Further detail on possible remedies and other solutions would also be helpful.

8. **What are your views about the proposed powers within the regime for the Senior Minister to gather information to inform a decision whether to call in a trigger event, to inform their national security assessment, and to monitor compliance with remedies?**

8.1 The GIIA would suggest that the legislation and/or guidance makes clear that information gathering powers should only be used in respect of third parties where it is reasonable and necessary to do so. The comments in response to Question 6 above regarding the risk of deals being held up by third parties who fail to answer questions is also noted.

9. **What are your views about the proposed range of sanctions that would be available in order to protect national security?**

9.1 GIIA members have concerns about the introduction of criminal offences. The GIIA does not consider that the Government has provided sufficient evidence to support the introduction of the full suite of criminal sanctions it proposes. The GIIA strongly doubts that there is a genuine need for such sanctions, bearing in mind the very substantial civil penalties that are also proposed. The GIIA considers that:

(a) Criminal offences should only be used in exceptional circumstances, for example where an individual has had a civil penalty imposed and has still failed to comply.

(b) Failure to provide information or documents should not be a criminal offence. In the context of a voluntary notification system, the GIIA considers that it is inappropriate to draw comparisons with the CMA's investigation powers relating to the criminal cartel offence under section 188 EA02.

9.2 Should the Government still consider that it may wish to include criminal offences within the national security regime, the GIIA would suggest that criminal sanctions are not introduced at the outset, but that instead a review of the new legislative arrangements is carried out after 3 or 5 years to assess whether the "stick" of criminal sanctions is genuinely necessary.

10. **What are your views about the proposed means of ensuring judicial oversight of the new regime?**

10.1 The GIIA notes that the Government envisages appeals based on judicial review principles, not judicial review as such. In particular, the White Paper envisages that appeals can generally only be made against the lawfulness of a decision, not its merits. As such, the GIIA has some concerns that judicial oversight of the new regime may not meet the Government's stated intention of "*ensuring proper robust and transparent oversight*" (paragraph 10.01).

10.2 Of course, this depends what the applicable "judicial review principles" would be. However, GIIA members would be concerned if the regime did not involve an ability to challenge a decision on the basis of irrationality/Wednesbury unreasonableness. This is an important safeguard against political decision-making. The GIIA notes that Government decisions in this area could potentially have very significant financial implications for affected parties and it is therefore essential that thorough judicial oversight is available.

10.3 We agree that appeals against civil financial penalties should be subject to a full merits appeal, and that the standard criminal procedure should apply in respect of appeals against criminal sanctions.[11]

10.4 The GIIA understands the need for Closed Material Proceedings in order to protect national security. However, confidentiality is also important from the parties' perspective. The GIIA considers that thought will therefore need to be given to whether confidentiality ring arrangements may be appropriate in certain circumstances. Such arrangements are routinely used in competition litigation and enable parties' external counsel (barristers and solicitors) to be permitted to review certain sensitive information that is not available to the clients.

10.5 The GIIA notes that the White Paper is silent on the possibility of interim action. Given the potentially significant consequences of the Government's powers under the proposed regime, it will be important that the High Court is able to impose interim measures (e.g. injunctions).

11. **What are your views about the proposed manner in which the new regime will interact with the UK competition regime, EU legislation and other statutory processes?**

CMA

11.1 The GIIA and its members recognise that there are benefits from severing the link between the review of a trigger event for national security purposes and for the purposes of any competition review and/or another public interest ground.

11.2 It appears that the main scenario where the Government may wish to intervene in respect of CMA remedies is where the Government and CMA are undertaking parallel review of a trigger event and the CMA approves a divestment of part of a business, but the proposed purchaser raises national security issues. In circumstances where the Government intends that the relevant trigger event may not be completed until Government consent has been obtained (conditional or otherwise), we are unclear why it is necessary for the Government to be able to require/request the CMA to re-consider any remedies it has accepted, or to pause its competition assessment, as the White Paper proposes. It should be straightforward for the legislation (including through appropriate amendment to the EA02 if necessary) to make clear that any decision of the Senior Minister under the national security legislation trumps any decision of the CMA under EA02.

11.3 In any event, the GIIA does not agree that there should no time limitation for the use of these powers (as proposed at paragraph 11.23 of the White Paper). The CMA typically

[11] As noted above, the GIIA's starting position is that the case for broad-ranging criminal sanctions has not been made out.

imposes remedies and undertakings in around 12 cases per year. It should therefore be possible for the Government to liaise closely with the CMA and to exercise its powers within a relatively short period, such as one month.

11.4 The GIIA assumes that the envisaged power (see paragraph 11.26) for the Government to share information with the CMA will only be applicable where the CMA has commenced a merger control investigation under EA02. The CMA should not be automatically informed about notifications under the national security regime. In this regard, the Government should clarify what it means when it says that it will seek the parties' consent to share information where this is "unrelated" to the specific national security assessment. This seems to imply that information could be shared without consent where it *is* related to a specific national security assessment. A similar point is made later in relation to other regulators (paragraph 11.43). Greater clarity is required in relation to the circumstances in which consent would not be required.

The Takeover Code

11.5 It will be important, as the Government notes, to work closely with the Takeover Panel to ensure that the Proposed Regime interacts effectively with the Takeover Code.

EU FDI Screening Regulation

11.6 The GIIA and its members note that, once the UK leaves the EU, the UK may become a third country for the purposes of the EU FDI Screening Regulation. The GIIA and its members therefore request that careful consideration is given to how the UK reforms will take account of the proposed FDI Screening Regulation, i.e. enhanced cooperation and information sharing between EU Member States.

Interaction with other statutory and regulatory processes

11.7 The GIIA notes that the White Paper deals only briefly with the interaction of the new regime with other statutory and regulatory processes. The GIIA urges the Government to engage with each of the industry regulators (such as Ofgem, Ofcom and Ofwat) to develop proposals setting out the interactions between the regulators and the Government under the new regime. The GIIA considers that these procedures should be set out in the primary legislation.

Freedom of Information Act

11.8 GIIA members would welcome commentary from the Government on its approach to Freedom of Information Act ("**FOIA**") requests under the new regime. Members would want to ensure that commercially sensitive information was not disclosed publicly as a result of FOIA requests. The GIIA assumes that relevant parties would be given an opportunity to comment before any potentially sensitive material was published.

ANNEX 1

List of GIIA Members

Full Members
3i Group plc
Aberdeen Asset Management
Abu Dhabi Investment Authority
Alberta Investment Management Corporation
Alinda Capital Partners
Allianz Capital Partners GmbH
AMP Capital
Antin Infrastructure Partners
APG Asset Management N.V.
Aquila Capital
Arcus Infrastructure Partners LLP
Ardian
Basalt Infrastructure Partners LLP
Blackstone Infrastructure Partners
British Columbia Investment Management Corporation
Brookfield Infrastructure Group L.P
Caisse de depot et placement du Quebec
California Public Employees' Retirement System
Canada Pension Plan Investment Board
CBRE Caledon
Corsair Infrastructure Partners
Credit Suisse Energy Infrastructure Partners AG
Dalmore Capital
DIF
DWS
EDF Invest
First State Investments
GIC
Global Infrastructure Partners
Goldman Sachs Infrastructure Partners
Hermes Investment Management
IFC Asset Management Company, LLC
IFM Investors Pty Ltd
Infracapital
InfraRed Capital Partners Limited
Investment Management Corporation of Ontario
John Laing Group plc
Macquarie Infrastructure and Real Assets (Europe) Limited
Marguerite Adviser S.A
Morgan Stanley Infrastructure Inc.
OMERS Infrastructure Management Inc
Ontario Teachers' Pension Plan
OPTrust
Partners Group
Pembani Remgro
PGGM
PSP Investments
StepStone Group Real Assets LP
Swiss Life Asset Managers
UBS Infrastructure Asset Management
Vantage Infrastructure

Wren House Infrastructure Management

Associate Members
Allen & Overy
Ashurst LLP
Bryan Cave Leighton Paisner LLP
Clifford Chance LLP
CMS Cameron McKenna Nabarro Olswang LLP
Credit Suisse Investment Banking and Capital Markets
Curzon Trinitas Ltd
Deloitte
Ernst & Young LLP
Ferguson Partners Europe Ltd
Freshfields Bruckhaus Deringer
Hogan Lovells
KPMG LLP
Marsh Ltd
PWC
Sullivan & Cromwell LLP