

16 October 2018

National Security and Investment Consultation
Consumer and Competition Policy Directorate
Department for Business, Energy & Industrial Strategy,
1st Floor, 1 Victoria Street,
London, SW1H 0ET



Dear Sir or Madam

Proposal for a New National Security and Investment Regime

The role of the Financial Markets Law Committee (the "FMLC" or the "Committee") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed.

On 24 July 2018, the U.K. Department for Business, Energy & Industrial Strategy published a White Paper setting out the proposal for a new national security and investment regime (the "**Proposed Regime**") as a component of HM Government's plan to reform its powers to protect national security and guard against hostile actors' acquisition of control over entities or assets.¹ The Proposed Regime covers loans—to ensure that acquisitions cannot "avoid scrutiny by being artificially structured as a loan"—and states that, in those rare instances when loans could give rise to national security concerns, they will be considered notifiable investments and may be called in by the Government for appropriate screening.² The FMLC is grateful to have the opportunity to comment on the Proposed Regime.

As you know, the White Paper sets out circumstances in which a loan relationship and/or an associated enforcement of collateral might lead to concerns that a lender, who is hostile to the UK, might gain "significant influence or control" over one or more obligors or one or more assets of national security interest. These include, generally, situations in which more than 50% of an asset or significant influence or control over an entity is acquired. More specifically, the White Paper identifies the following three stages of a transaction which could potentially give rise to national security concerns: (i) agreement; (ii) default; and (iii) acquisition. Each of these stages may constitute a "trigger event" for further government scrutiny if it results in the lender acquiring ownership or significant influence or control over the underlying asset.³

Parties to transactions will be asked to assess at each stage whether national security concerns arise and, on a voluntary basis, to notify HM Government. Equally, HM Government has the power to call in transactions which cause concern. Once notified or called in, HM Government will undertake a review. If the review concludes that the transaction raises national security concerns, HM Government may allow the transaction to proceed with conditions or, if its concerns cannot be dealt with through

¹ Department for Business, Energy & Industrial Strategy, *National Security and Investment: A consultation on proposed legislative reforms*, (24 July 2018), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728310/20180723_-_National_security_and_investment_-_final_version_for_printing_1.pdf.

² *Ibid.*, p. 46

³ The White Paper sets out example scenarios for each of these stages. See, *ibid.*, p. 48.

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the imposition of conditions, it may block the transaction altogether. If the transaction has already taken place, HM Government can require it to be unwound.

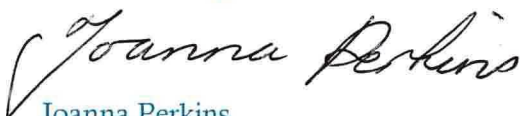
While the FMLC understands the purpose and need for the new Proposed Regime, it would like to draw attention to the following concerns on which clarification would be helpful.

1. Syndicated loans: Any assessment as to whether a transaction raises national security concerns will be more complex in the case of a syndicated loan, where it is unusual for any single lender to acquire significant influence or control over an entity or asset (although a lender can request information from the obligors). The White Paper does not clarify whether, should one lender in a syndicate be considered by HM Government to be "hostile" in the manner described above, other lenders would be able to enforce their security, especially if the hostile lender has no independent ability to control or significantly influence the secured asset and/or the chargor even if such charged asset and/or chargor has national security implications.
2. Unwinding a loan/collateral: The Proposed Regime empowers the Government to unwind loans, which is likely to be challenging in practice given the nature of loans as funding transactions: for example, where the loan has been used to make an acquisition, would the acquisition also be affected, thereby prejudicing the third-party seller? Consideration could usefully be given to offering clarification as to the factors HM Government will take into account when deciding whether to unwind a transaction.

To assist parties to loan transactions in assessing whether the transaction may trigger a national security concern, HM Government has published a draft Statement of Policy Intent (the "**Statement**").⁴ While the Statement offers guidance and illustrative examples, it does not provide market participants with rules or thresholds by which they might assess whether their transactions might trigger national security concerns and which would help uphold legal certainty. The FMLC is sympathetic to the reasons why HM Government wishes to maintain flexibility but takes the view that legal and market certainty and stability are best served by "bright lines". As and when HM Government responds to comments on the White Paper or publishes the Bill, the FMLC may have further comments to make on the interaction of the national security regime with the working of the financial markets.

In the meanwhile, I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter. Please do not hesitate to contact me should you wish to arrange a meeting or if you have any questions.

Yours sincerely,



Joanna Perkins
FMLC Chief Executive⁵

⁴ Department for Business, Energy & Industrial Strategy, *National Security and Investment: Draft Statutory Statement of Policy Intent*, (July 2018), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728311/20180717_Statement_of_policy_intent_-_shared_with_comms.pdf

⁵ The FMLC is grateful to Deborah Neale of Clifford Chance LLP for raising this issue and for her comments and suggestions on the letter.