
# EXPLANATORY NOTES

# National Security and Investment Act 2021

Chapter 25

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# NATIONAL SECURITY AND INVESTMENT ACT 2021

# EXPLANATORY NOTES

## What these notes do

These Explanatory Notes relate to the National Security and Investment Act 2021 which received Royal Assent on 29 April 2021 (c. 25).

- These Explanatory Notes have been prepared by the Department for Business, Energy and Industrial Strategy in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Act will mean in practice; provide background information on the development of policy; and provide additional information on how the Act will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Act. They are not, and are not intended to be, a comprehensive description of the Act.

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*These Explanatory Notes relate to the National Security and Investment Act 2021 which received Royal Assent on 29 April 2021 (c. 25)*

# Overview of the Act

1 The Act establishes a statutory regime for Government scrutiny of, and intervention in, investments for the purposes of protecting national security. The regime makes provision for:

a. a power to issue "call-in" notices that the Secretary of State may use to call in acquisitions of control over qualifying entities or assets ("trigger events") to undertake a national security assessment whether or not they have been notified to the Government;

b. the Secretary of State to publish a statement on how he or she expects to use the power to give a call-in notice;

c. a mandatory notification system requiring proposed acquirers of certain shares or voting rights in specified qualifying entities to obtain clearance from the Secretary of State for their acquisitions before they take place;

d. powers which enable the Secretary of State to amend by regulations the acquisitions which fall within scope of the mandatory notification system;

e. a voluntary notification system which is intended to encourage notifications from parties who consider that their trigger event may raise national security concerns;

f. the statutory process that is to be used to assess specific trigger events for national security concerns;

g. remedies to address risks to national security, sanctions for non-compliance with the regime and the mechanism for legal challenge; and

h. interaction with the Competition and Markets Authority.

2 In addition, Section 59 of the Act amends the overseas disclosure gateway in the Enterprise Act 2002 removing the restriction on UK public authorities disclosing information that comes to them in connection with a merger investigation under that gateway.

# Policy background

3 The Government published a review of its powers to scrutinise and intervene in investments as a Green Paper on 17 October 2017, "National Security and Infrastructure Investment Review".

4 The Green Paper explained that, until now, the UK has used the Enterprise Act 2002 as the legislative basis to examine mergers for the purposes of national security and other areas of public concern. The Green Paper found that there was a case for reforming the Government's powers. It therefore proposed short and long-term measures to do so and held a public consultation, which closed on 17 November 2017.

5 The Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018 (S.I. 2018/578) and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018 (S.I. 2018/593) were made on 14 May 2018 to implement the short-term measures proposed in the Green Paper. These orders amended the "share of supply" and "turnover" thresholds to enable the Secretary of State to intervene in more mergers on public interest grounds in three sectors of the economy: military or dual-use goods which are subject to export control; computer processing units; and quantum technology.

6 Building on the Green Paper's proposals for long-term reform, the White Paper, "National Security and Investment: A consultation on proposed legislative reforms", was published on 24 July 2018 along with a draft "Statement of Policy Intent". The White Paper set out detailed proposals for how the Government proposes to reform its powers to protect national security from hostile actors using the ownership of, or influence over, businesses and assets to harm the country.

7 Following the 2019 General election, the Queen's Speech of December 2019 outlined the Government's intention to *"… work closely with international partners to help solve the most complex international security issues and promote peace and security globally. It will stand firm against those who threaten the values of the United Kingdom…"* (Queen's Speech, December 2019). The briefing pack accompanying the Queen's Speech detailed the ambitions of the National Security and Investment Bill. The briefing stated that the purpose of the Bill is: *"[to] Strengthen the Government's powers to scrutinise and intervene in business transactions (takeovers and mergers) to protect national security; and, provide businesses and investors with the certainty and transparency they need to do business in the UK."*

8 On 26 February 2020, the Government outlined its intention to overhaul its approach to foreign, defence, security and development policy. The Government indicated its intention of considering "the totality of global opportunities and challenges the UK faces and determining how the whole of government can be structured, equipped and mobilised to meet them." (Integrated Review, 26 February 2020).

9 Two Orders, the Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2020 (S.I. 2020/748) and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2020 (S.I. 2020/763) were made on 20 July 2020 to expand on the 2018 measures (see paragraph 5). These orders expanded the "share of supply" and "turnover" thresholds to enable the Secretary of State to intervene in mergers on public interest grounds in three additional sectors of the economy where the amended share of supply and turnover thresholds are met: artificial intelligence (AI), cryptographic authentication technologies and advanced materials.

10 The Government published its response to the National Security and Investment White Paper consultation on 11 October 2020. The Government stated that it had decided to make changes to the proposals it put forward in 2018, including the addition of a mandatory notification system for some transactions in specified sectors of the economy.

11 A draft Impact Assessment on the incoming regime was published on 11 November 2020.

# Legal background

## Legal background for Government intervention in mergers on national security grounds

12 The current legislative framework for the assessment of United Kingdom ("UK") mergers between enterprises (which include outright acquisitions) is contained in Part 3 of the Enterprise Act 2002 (the "Act"), which has been in force since 20 June 2003. Along with investigation of competition issues, this provides for Government intervention on public interest grounds in three types of case: public interest cases; special public interest cases; and European merger cases.

## Public interest cases

13 Section 42 of the Act allows the Secretary of State to intervene in a completed or anticipated merger where he or she has reasonable grounds to suspect it may be, or may if it comes to fruition become, a "relevant merger situation" (see the next paragraph) and believes that one or more of the public interest considerations specified in section 58 of the Act may be relevant to the case. Section 58 currently specifies national security, media plurality (an umbrella term covering a number of media-related considerations), the stability of the UK financial system, and the need to maintain in the UK the capability to combat, and to mitigate the effects of, public health emergencies, as public interest considerations.

14 Section 23 of the Act provides that a "relevant merger situation" arises where two or more enterprises cease to be distinct, and at least one of the following thresholds is met:

a. the enterprise taken over has a UK turnover of more than £70 million (the "turnover test"); or

b. the merger has resulted in the creation or enhancement of at least a 25% share of supply or purchase in, or in a substantial part of, the UK of goods or services of any description (the "share of supply test").

15 The Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018 (S.I. 2018/578) and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018 (S.I. 2018/593), both of which came into force on 11 June 2018, amended the share of supply test and the turnover test, respectively. The turnover threshold was lowered from £70 million to £1 million for takeovers of "relevant enterprises", i.e., those active in any of the following sectors: military or dual-use goods subject to export control; computer processing units; or quantum technology. The share of supply test was amended so that the test is additionally met if the takeover is of a "relevant enterprise" that already had at least a 25% share of supply or purchase in, or in a substantial part of, the UK of goods or services before the merger. The goods or services must be connected to the activities by virtue of which it qualifies as a "relevant enterprise". The Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2020 (S.I. 2020/748) and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2020 (S.I. 2020/763), both of which came into force on 21 July 2020, amended the list of "relevant enterprises" to include those active in any of the following sectors: artificial intelligence; cryptographic authentication technology; or advanced materials. These changes were made to enable the Secretary of State to intervene in additional mergers which might give rise to national security implications.

16 Pursuant to section 42(2) of the Act, the Secretary of State intervenes in a merger by giving an intervention notice (commonly known as a "public interest intervention notice") to the Competition and Markets Authority ("CMA"). This requires the CMA to investigate the merger (commonly known as a "Phase 1 investigation") and to provide a report to the Secretary of State containing its advice on jurisdictional, and, if any arise, competition, issues. In national security cases the CMA is also required to provide to the Secretary of State a summary of any national security-related representations it has received about the case, including from other Government departments.

17 After issuing an intervention notice, the Secretary of State may pursuant to paragraph 2 of Schedule 7 to the Act make an interim order prohibiting or restricting any pre-emptive action, that is, any action which might prejudice the intervention or impede any remedial action that might be taken on it.

18 Once he or she has the received the CMA's Phase 1 report, the Secretary of State may pursuant to section 45 of the Act make a "reference" to the CMA requiring it to carry out a more in-depth investigation (commonly known as a "Phase 2 investigation"), if he or she

believes that the merger may be, or may if it comes to fruition become, a "relevant merger situation" and that it might operate against the public interest. In making this decision, section 46 of the Act requires the Secretary of State to accept the advice of the CMA on jurisdictional and competition matters as set out in its report. He or she must also treat a competition issue identified by the CMA as being contrary to the public interest unless this is outweighed by other public interest considerations. Alternatively, pursuant to paragraph 3 of Schedule 7 to the Act, in lieu of making a Phase 2 reference the Secretary of State may accept whatever undertakings (commonly known as "undertakings-in-lieu") he or she considers appropriate from the parties to address the public interest issues identified. Under paragraph 5 of Schedule 7, where he or she considers that undertakings-in-lieu have not or will not be fulfilled, or where he or she considers that they were accepted on the basis of false or misleading information, the Secretary of State has the power to replace them with an order imposing remedies.

19 If a Phase 2 reference is made, section 50 of the Act requires the CMA to prepare a further report for the Secretary of State. Once he or she has received this report, the Secretary of State must pursuant to section 54 of the Act make a final decision on whether the merger is against the public interest, and, if he or she does so, he or she may pursuant to section 55 of the Act take whatever remedial action in his or her power he or she considers reasonable and practicable to address the public interest issues identified. This may be in the form of final undertakings accepted from the parties, as provided for by paragraph 9 of Schedule 7 to the Act, or in the form of an order imposing remedies, pursuant to paragraph 11 of Schedule 7. Under paragraph 10 of Schedule 7, the Secretary of State has an equivalent power to that in relation to undertakings-in-lieu to replace final undertakings with an order imposing remedies.

20 Pursuant to paragraph 20 of Schedule 8 to the Act, an order may make such provision as the Secretary of State considers to be appropriate in the interests of national security. Such provision may, in particular, include provision requiring a person to do, or not to do, particular things.

## Special public interest cases

21 Section 59 of the Act allows the Secretary of State to intervene in a limited number of mergers of special public interest on the basis of the public interest considerations specified in section 58 of the Act (which, as already stated, include national security) where the standard jurisdictional thresholds relating to turnover and share of supply are not satisfied. These include for example, mergers involving Government defence contractors authorised to hold or receive confidential information. The subsequent process is similar to the public interest intervention procedure set out above, except that there is no competition assessment.

## European merger cases

22 The European Council Merger Regulation (No 139/2004) gives the European Commission exclusive jurisdiction within the European Union ("EU") to assess mergers (which include outright acquisitions) with an EU dimension (i.e., those in which the parties meet certain global and EU-wide turnover thresholds) for any competition issues. This Regulation still applies in the UK in respect of merger reviews that the European Commission started before the end of the transition period, in accordance with Article 92 of the Withdrawal Agreement ("live EU cases"). Before the end of the transition period the Act provided a mechanism whereby, so long as the standard jurisdictional thresholds were met (see paragraphs 14-16 above), the Secretary of State was able to intervene in EU mergers on the basis of the public interest considerations specified in section 58 of the Act (other than the stability of the UK financial system, which is expressed as not applying in these cases), including national

security. This mechanism has been repealed but has been preserved for any live EU cases by the Competition (Amendment etc.) (EU Exit) Regulations 2019 (as amended). This would allow the Secretary of State to give the CMA a European intervention notice ("EIN") under section 67 of the Act in respect of any live EU case. The subsequent process is similar to the public interest intervention procedure set out above, except that it does not involve any competition assessment by the CMA, this being left to the European Commission[1].

## Legal background for Section 59 (Overseas information disclosure)

23 Part 9 of the Enterprise Act 2002 imposes a restriction on the disclosure of information that comes to a public authority in connection with, among other things, a merger investigation under Part 3 of the Enterprise Act 2002 or an antitrust investigation under the Competition Act 1998 ("specified information"). The restriction applies where the information relates to the affairs of an individual, during the lifetime of the individual, or any business of an undertaking, while the undertaking continues in existence, unless the disclosure is permitted by one of the disclosure gateways in Part 9.

24 A public authority may disclose specified information to an overseas public authority in the following circumstances:

a. where the public authority has obtained the necessary consents (section 239(1));

b. to comply with an EU obligation (section 240)[2]; or

c. for the purpose of facilitating the exercise by the public authority of its statutory functions (section 241(1)).

25 In addition, section 243(1), (2) and (12) of the Act, permits the disclosure of specified information to an overseas public authority where the disclosure is to facilitate the performance of an overseas public authority's functions. This gateway does not currently apply to information that comes to a public authority in connection with a merger investigation under Part 3 of the Enterprise Act 2002 (section 243(3)(d)).

1 The Competition (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/93) were amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020 (S.I. 2020/1343). The 2019 regulations, as amended, make transitional provision which reflects that under Part 3 of the Withdrawal Agreement the European Commission continues after the end of the transition period to assess the effects in the UK of mergers with a European dimension if the European Commission's merger review is initiated formally before the end of the transition period in accordance with Article 92 of the Withdrawal Agreement. The regulations also make transitional provision for an EIN process to continue after the end of the transition period, if the EIN was issued before the end of the transition period and the European Commission has retained exclusive competence over the merger in accordance with Article 92. The CMA will be solely responsible for investigating the effects in the UK of any merger which meets the UK jurisdictional test and in respect of which an investigation by the EU Commission has not been initiated before the end of the transition period.

2 Section 240 of the Enterprise Act 2002 was repealed by the Competition (Amendment etc.) (EU Exit) Regulations (S.I. 2019/93), Part 3, Reg.59. The Competition (Amendment etc.) (EU Exit) Regulations 2020 (S.I. 2020/1343) amend the 2019 regulations in order to save and modify the effect of section 240 so that the CMA can share information with the European Commission for the purposes of ongoing antitrust or merger cases for which the European Commission has continued competence after the end of the transition period in accordance with Article 92 of the Withdrawal Agreement.

# Territorial extent and application

26 Section 66 sets out the territorial extent of the Act. The extent of an Act can be different from its application. Application is about where an Act produces a practical effect rather than where it forms part of the law.

27 The Act extends and applies to the whole of the United Kingdom. In addition, repeals and amendments made by the Act have the same territorial extent as the legislation that they are repealing or amending.

28 The matters to which the provisions of the Act relate are not within the legislative competence of the Scottish Parliament, Senedd Cymru or the Northern Ireland Assembly, and no legislative consent motion was sought in relation to any provision of the Act.

# Commentary on provisions of Act

## Background: Overview of the National Security and Investment Regime

### National Security and Investment framework

29 The National Security and Investment regime replaces the Secretary of State's ability to scrutinise mergers which give rise to a national security consideration under the Enterprise Act 2002.

30 The Act provides powers for the Secretary of State to scrutinise and, where necessary, impose proportionate remedies on specific acquisitions of control of qualifying entities and assets. It also sets out a statutory process for the exercise of these powers.

31 The Secretary of State may scrutinise specific acquisitions of control of qualifying entities and assets by issuing "call-in notices". The acquisitions which are within scope of this function are collectively known as "trigger events". The Secretary of State may issue a call-in notice up to 5 years after a trigger event has taken place, so long as that 5 years does not reach back before 12 November 2020 (the first day after the Bill was introduced in Parliament).

32 The Act provides for the Secretary of State to publish a statement setting out how he or she expects to exercise the call-in power. The Secretary of State will not be able to call in any trigger events until such a statement has been published. Nothing in the statement will limit the Secretary of State's exercise of the call-in power.

### Mandatory notification

33 The Act provides for a mandatory notification requirement for acquisitions of certain shares or voting rights in the qualifying entities to be specified in regulations made by the Secretary of State, which are termed "notifiable acquisitions". Proposed acquirers must notify the Secretary of State of notifiable acquisitions before they take place in order to obtain clearance to go ahead.

34 A notifiable acquisition that is completed before being approved by the Secretary of State is void and of no legal effect. Additionally, the acquirer may be subject to criminal or civil penalties for completing the acquisition without clearance. The Secretary of State may retrospectively validate a notifiable acquisition. Regulations will specify how to notify the Secretary of State of notifiable acquisitions.

35 The Act provides a power for the Secretary of State to amend the acquisitions which are notifiable through regulations. The Secretary of State may also make regulations exempting acquisitions from the mandatory notification regime on the basis of the characteristics of the acquirer. These powers collectively allow the regime to reflect changing national security risks.

### Voluntary notification regime

36 Businesses and other entities who do not meet the criteria for mandatory notification may submit a notification to the Secretary of State if they consider that their trigger event could raise national security concerns. To help inform their assessment as to whether a voluntary notification should be issued, they make reference to the statutory statement about the exercise of the call-in power.

## National security assessment

37 The Secretary of State may give a call-in notice in respect of a trigger event that has taken place or is in progress or contemplation. The notice may be given up to 5 years after the trigger event took place, subject to this being done within 6 months of the Secretary of State becoming aware of the trigger event. While a trigger event is being assessed, the Secretary of State will be able to impose interim remedies in order to ensure that the effectiveness of the national security assessment or subsequent remedies is not prejudiced by action taken by the parties. For example, the Secretary of State might prohibit activities which would result in the integration of two businesses, or act to safeguard assets, until the national security assessment is complete.

38 To facilitate assessments, the Secretary of State will have powers for gathering information. There will be safeguards on the use and disclosure of such information.

39 If, following an assessment, the Secretary of State determines that a risk to national security has arisen or would arise from the trigger event, the Secretary of State has the power to impose proportionate remedies in a final order to prevent, remedy or mitigate that risk. Breach of any requirement in a final order may lead to a civil or criminal sanction.

40 Civil and criminal sanctions will also be available in the event of non-compliance with interim orders and information requests.

41 Decisions under the Act will be subject to judicial review or appeal. The Government will be able to apply for a closed material procedure to protect sensitive matters in these proceedings.

## Comparison between current framework and the National Security and Investment regime

42 The National Security and Investment regime will be separate from the processes and practice of the CMA's mergers framework under the Enterprise Act 2002. The mergers framework will continue to exist once the new regime has been implemented, but it will only apply to competition, media plurality, financial stability and public health emergency considerations; national security implications will be addressed entirely through the new legal framework.

43 The table below summarises and compares the Enterprise Act 2002 framework for national security public interest interventions and the new National Security and Investment regime. Further detail on the current framework for national security interventions under the Enterprise Act can be found on the legislation.gov.uk site and in CMA guidance (CMA2, Mergers: Guidance on the CMA's jurisdiction and procedure). Detail on the National Security and Investment Regime is contained in the "Commentary on Provisions" section.

| Table 1: Comparison between national security interventions under the Enterprise Act 2002 and the National Security and Investment Regime | | |
|---|---|---|
| | **Current system under the Enterprise Act 2002** | **National Security and Investment regime** |
| **Acquisitions within scope** | The Secretary of State may intervene in qualifying mergers between enterprises which raise specified public interest concerns, including on national security grounds. Further detail on this is available in the" Legal Background section". | The Secretary of State may intervene where they reasonably suspect that a "trigger event" has taken place or is in progress or contemplation, and this has given rise to, or may give rise to, a national security risk.<br><br>Trigger events include acquisitions of certain shares or voting rights in a qualifying entity; acquisition of material influence over such an entity; the acquisition of a right or an interest in a qualifying asset enabling the acquirer to use the asset or to control or direct how it is used. |
| **Notification to Government** | Parties may submit a merger notice to the CMA to notify them about a relevant merger situation.<br><br>Under the Public Interest Regime, the Secretary of State may intervene in a merger whether or not there has been a notification.<br><br>Following receipt and acceptance of a complete merger notice, the CMA must decide whether the duty to refer the merger for a Phase 2 investigation applies within 40 working days. | Pre-notification to the Secretary of State required for certain acquisitions, via a mandatory notice. Where this does not apply, parties to trigger events may submit a voluntary notice to the Secretary of State.<br><br>The Secretary of State may intervene in a completed or anticipated trigger event whether or not there has been a notification.<br><br>Following receipt and acceptance of a complete mandatory or voluntary notice, the Secretary of State must decide whether to issue a call-in notice within 30 working days. |

| Table 1: Comparison between national security interventions under the Enterprise Act 2002 and the National Security and Investment Regime | | |
|---|---|---|
| | **Current system under the Enterprise Act 2002** | **National Security and Investment regime** |
| **Government assessment** | If a merger situation meets the criteria for intervention on the grounds of national security, the Secretary of State may issue a" Public Interest Intervention Notice" (PIIN) to the CMA to initiate a Phase 1 investigation. Following receipt of the CMA's report on the merger, the Secretary of State has the option to clear the merger, clear the merger subject to undertakings offered by the parties to address the national security risks (see cell below on interventions and remedies), or refer the merger for a Phase 2 investigation.<br><br>A Phase 2 investigation is undertaken by an Inquiry Group formed by the CMA. Following the completion of the investigation they would provide their recommendations to the Secretary of State. The Secretary of State would then have the option to clear the merger, clear the merger subject to undertakings offered by the parties to address the national security risks or an order imposing remedies, or to block/unwind the merger.<br><br>The Secretary of State must make the decision to refer a merger for a Phase 2 investigation or to accept undertakings instead of making the reference within four months of the merger completing or, if it is completed without being made public, within four months of the merger being made public. | The Secretary of State will call in trigger events to undertake a national security assessment. The Secretary of State will use this process to determine whether to clear the trigger event either outright or subject to remedies, or (where this is necessary and proportionate) block or unwind it.<br><br>The Secretary of State has an initial 30 working days to conduct a national security assessment. This may be extended by the Secretary of State by 45 working days if certain conditions are met. If further assessment is required, the Secretary of State may agree an additional voluntary period with the acquirer if certain conditions are met. |

| Table 1: Comparison between national security interventions under the Enterprise Act 2002 and the National Security and Investment Regime | | |
|---|---|---|
| | **Current system under the Enterprise Act 2002** | **National Security and Investment regime** |
| **Intervention and remedies** | After intervening in a national security case, the Secretary of State may issue an interim order (by means of a statutory instrument subject to the negative resolution procedure) to prevent or reverse "pre-emptive action" by the parties which might prejudice the intervention. Such an order can come into force with immediate effect, where justified for the protection of national security. The CMA also has power to make a pre-emptive action order.<br><br>The Secretary of State or the CMA (as the case may be) may subsequently grant derogations from a pre-emptive action order on application by the parties.<br><br>As part of a Phase 1 investigation, if the national security concerns arising from a relevant merger situation are such that the Secretary of State would otherwise refer the merger for a Phase 2 investigation, the Secretary of State may accept undertakings as a remedy for the national security issues in lieu of making the reference.<br><br>Following a Phase 2 investigation, the Secretary of State may accept undertakings or impose remedies by order, including blocking/unwinding the merger, to address a national security risk. | A notifiable acquisition must be approved by the Secretary of State before completing. A notifiable acquisition that is completed without prior approval is void and of no legal effect.<br><br>The Secretary of State may during a national security assessment issue an interim order for the purpose of preventing or reversing action that might prejudice the exercise of his or her functions under the Act. Interim orders will not necessarily be made public.<br><br>The Secretary of State must before the end of the assessment period either notify the parties that no further action will be taken, or, where a national security risk has been identified, make a final order for the purpose of preventing, remedying, or mitigating that risk.<br><br>The Secretary of State must keep all orders under review and may vary or revoke them. Parties subject to an order may request that it be reviewed by the Secretary of State.<br><br>When the Secretary of State makes, varies, or revokes a final order, the Secretary of State must publish certain information about the trigger event and the order. |
| **Judicial review** | Litigants may apply to the Competition Appeal Tribunal (CAT) if aggrieved by a decision of the Secretary of State as part of the merger review process. The CAT will review the decision by applying the same principles as the High Court on an application for judicial review.<br><br>Cases must be brought within four weeks of the date on which the applicant was notified of the disputed decision, or the date of publication if earlier. | Litigants may apply to the High Court for judicial review, with a closed material procedure available to ensure sensitive information is protected.<br><br>Claims will need to be brought not more than 28 days after the grounds to make the claim first arose unless the court gives permission for the claim to be brought after the expiry of this time limit. |

# Part 1: Call-in for national security

## Chapter 1: Call-in power

44 Sections 1 and 2 collectively provide for the "call-in power". The call-in power may be used by the Secretary of State in relation to a trigger event which has given rise to, or may give rise to, a risk to national security (see Chapter 2 for details on trigger events). Sections 3 and 4 provide for the publication of a statement which sets out how the Secretary of State expects to exercise the call-in power and the parliamentary procedure for the statement. The Secretary of State must publish the statement before giving a call-in notice and must have regard to it when exercising the call-in power.

45 The Secretary of State will be able to call in any trigger event that raises national security concerns, including those which have not been notified to him or her. He or she will be able to do this when the trigger event is in contemplation or progress, or within a prescribed period of up to 5 years after a trigger event has taken place (but a call-in notice may not be given after the end of the period of 6 months beginning with the day on which the Secretary of State became aware of the trigger event where the trigger event has already occurred).

### Section 1: Call-in notice for national security purposes

46 Section 1 enables the Secretary of State to give a call-in notice in relation to a trigger event (see Chapter 2) which the Secretary of State reasonably suspects has taken place or is in progress or contemplation, and which they reasonably suspect has given rise to or may give rise to a risk to national security.

47 Subsection (1) provides for the test which much be met for the Secretary of State to issue a call-in notice.

48 Subsection (2) specifies that, for the purposes of the Act, the effect of section 13(1) must be disregarded when considering whether a trigger event has taken place or will take place.

49 Subsection (4) details the persons who must be given copies of the call-in notice. These include the acquirer and, if the acquisition relates to an entity, the entity itself. In addition, the Secretary of State may consider it appropriate to give a call-in notice to, for example, the seller or sellers, a significantly affected third party, or a relevant regulator.

50 Subsections (6) to (8) provide that the Secretary of State must publish and have regard to the statement provided for by section 3 before exercising the call-in power, but this power is not limited by anything contained in the statement.

### Section 2: Further provision about call-in notices

51 Section 2 concerns matters relating to the limits on the exercise of the call-in power. The power may only be exercised once per trigger event. Where the call-in notice is given in relation to a trigger event that has already taken place, it may only be exercised up to 5 years after the trigger event has taken place and up to 6 months after the Secretary of State has become aware of the trigger event, unless the Secretary of State has been given false or misleading information (see section 22). The 5-year limit does not apply to notifiable acquisitions which have been completed without the approval of the Secretary of State (see section 13).

52 Call-in notices may be served in relation to trigger events which take place from the day after the date of introduction of the Act. Section 2(4) sets out the time periods within which the Secretary of State may serve a call-in notice in relation to trigger events that take place between 12 November and the commencement of section 2.

### Section 3: Statement about exercise of call-in power

53 Section 3 concerns the statement which sets out how the Secretary of State expects to exercise the call-in power. While the Secretary of State is not obliged to publish a statement, the Secretary of State must do so before being able to exercise the call-in power, as stated in section 1(6).

### Section 4: Consultation and parliamentary procedure

54 Section 4 sets out the procedure that must be followed before the Secretary of State is able to publish the statement about the exercise of the call-in power. Before the statement may be published, the Secretary of State must carry out such consultation as the Secretary of State thinks appropriate in relation to a draft of the statement, make any changes to the draft that appear to the Secretary of State to be necessary in view of the responses to the consultation, and lay the statement before Parliament, where it is subject to annulment by either House within a period of 40 sitting days.

55 Subsections (2) to (4) provide that either House of Parliament may annul a statement before the expiry of the 40 sitting day limit. The consequence of the annulment is that the statement must be withdrawn. The annulment of a statement does not affect the validity of any call-in notice given prior to its withdrawal, nor does it affect the publication of a new statement.

## Chapter 2: Interpretation

### Trigger events in relation to qualifying entities and qualifying assets

56 Sections 5-12 provide the criteria for the acquisitions of control over entities or assets that qualify for assessment by the Secretary of State under the national security regime. These acquisitions in scope of the call-in power (section 1) are described as "trigger events".

57 Section 6 describes those acquisitions which are "notifiable acquisitions". A notifiable acquisition takes place when a person acquires certain shares or voting rights in a qualifying entity specified in regulations by the Secretary of State. Notifiable acquisitions must be approved by the Secretary of State before completing, lest they be legally void.

### Section 5: Meaning of "trigger event" and "acquirer"

58 Section 5 provides that a "trigger event" occurs when a person gains control of either a qualifying entity or a qualifying asset. Subsection (2) provides for the definition of "acquirer".

### Section 6: Notifiable acquisitions

59 Section 6 describes those acquisitions which are "notifiable acquisitions". A notifiable acquisition takes place when a person acquires control of a qualifying entity specified in regulations by the Secretary of State in any of the circumstances described in subsections (2), (5) or (6) of section 8. The Secretary of State may by regulations amend the acquisitions which are to be notifiable, or exempt acquisitions on the basis of the characteristics of the acquirer.

60 Section 63 provides for the parliamentary procedures to be used for regulations under the Act. Regulations under section 6 must be laid in draft before Parliament and approved by both Houses of Parliament before they may be made.

### Section 7: Qualifying entities and assets

61 Section 7 defines a "qualifying entity" as any entity that is not an individual.

62 However, an entity which is formed or recognised under the law of a country or territory outside the United Kingdom is only a "qualifying entity" if it carries on activities in, or supplies goods or services to, the United Kingdom.

63 Subsection (4) defines a "qualifying asset".

64 Subsection (5) provides examples of assets included in the category of "ideas, information or techniques which have industrial, commercial or other economic value" under subsection (4)(c).

65 Subsection (6) limits the definition of a "qualifying asset" in respect of land or moveable property situated outside the United Kingdom or the territorial sea adjacent to the United Kingdom, or assets within subsection (4)(c), to assets with a nexus to the United Kingdom.

## Section 8: Control of entities

66 Section 8 defines the circumstances in which a person gains control of a qualifying entity for the purposes of the Act. This constitutes a "trigger event" and may be subject to assessment under the national security regime if the call-in test is met. This section also makes clear when the additional acquisition of shareholdings or rights in an entity will constitute a "trigger event".

67 There are four cases in which a person gains control of a qualifying entity, which are summarised below:

a. a person increasing the percentage of shares that they hold in the entity by a specified proportion (section 8(2));

b. a person increasing the voting rights that they hold in the entity by a specified proportion (section 8(5));

c. a person acquiring voting rights in the entity which give powers to secure or prevent the passage of any resolution governing the affairs of that entity (section 8(6)), for instance in the case of an entity that does not conform to the thresholds for passing or blocking resolutions in Schedule 1A to the Companies Act 2006; or,

d. a person acquiring a right or interest in, or relation to, the entity which enables them to materially influence the policy of that entity (section 8(8)).

## Section 9: Control of assets

68 Section 9 defines the circumstances in which a person gains control of a qualifying asset for the purposes of the Act. This constitutes a "trigger event" and may be subject to assessment under the national security regime if the call-in test is met. A person gains control of a qualifying asset where they acquire a right or interest in, or in relation to, the asset and, as a result, are able either to:

a. use the asset, or use it to a greater extent than prior to the acquisition, or,

b. direct or control how the asset is used, or direct or control how the asset is used to a greater extent than prior to the acquisition.

69 Any right or interest in a qualifying asset, including a part-share in the asset or outright ownership, would be captured if they provide the ability to use, or direct or control how the asset is used. References to the use of an asset include references to its exploitation, alteration, manipulation, disposal or destruction.

## Section 10: Holding and acquiring interests and rights: supplementary and Schedule 1: Trigger events: holding of interests and rights

70 Section 10 introduces Schedule 1 which provides for particular cases in which a person is to be treated as holding an interest or a right for the purposes of the Act. Subsection (2) provides for the occurrence of circumstances set out in Schedule 1 to be treated as acquisitions for the purposes of the Act.

71 Schedule 1 sets out further details as to how interests and rights are deemed to be held and therefore provides further explanation of the mechanisms through which control of entities and assets may be acquired.

72 Paragraph 2 of Schedule 1 provides that parties acting through joint arrangements are treated as holding the collective interests and rights that each party of that arrangement holds individually.

73 Paragraph 3 provides for interests or rights held indirectly to be in scope of the regime. This means that a person holding an interest or right in a parent entity of an entity or a chain of entities is, depending on the circumstances in sub-paragraph (2)(a) or (2)(b) being satisfied, treated as holding the interest or right in the entity at the bottom of the chain. If an entity is part of a chain of entities, a person will exercise the right indirectly if each entity in the chain has a majority stake in the entity immediately below it in the chain, and the last entity in the chain has the right in question (sub-paragraph (2)(b)). Sub-paragraph (3) defines "majority stake" by reference to a majority of voting rights, dominant influence or control, and the right to appoint or remove a majority of the board of directors.

### Example A: Indirect holdings

Party A acquires 100% of votes and shares of Company B.

Company B owns 51% of votes and shares of a subsidiary, Company C.

As Company B holds a majority stake in Company C, Party A has acquired indirect control over Company C through the acquisition of Company B.

74 Paragraph 5 provides that a person who controls a right, as established in paragraph 5(2), is deemed to hold that right. This means that the controller of the right - and not the holder unless they are also the controller - will be considered to hold the right. Paragraph 5(2) sets out that control can be held through an arrangement between a person and others. The definition of an arrangement in paragraph 12 provides that there needs to be a degree of stability about it.

75 Paragraphs 6 and 7 provide for rights that are exercisable only in certain circumstances and rights attached to shares held by way of security respectively and replicate corresponding provisions in Schedule 1A to the Companies Act 2006.

76 Paragraphs 8-10 provide for the circumstances in which two or more persons are deemed to be connected persons by virtue of their relationship to one another. Each connected person is deemed to be holding the combined interests or rights of both or all of the connected persons.

77 Paragraph 11 provides for the circumstances in which two or more persons are deemed to be acting with common purpose and are therefore each deemed to be holding the collective interests and rights that each person holds individually.

### Example B: Common purpose

Party A owns 20% of votes and shares of Company D.

Party B owns 20% of votes and shares of Company D.

Party C acquires 20% of votes and shares of Company D.

Parties A, B and C co-ordinate the use of their votes, in practice meaning that they collectively use their votes to attempt to achieve a shared aim. In such circumstances, Party C's acquisition would be a trigger event through which Parties A, B and C would be deemed to have each acquired 60% of the votes and shares in Company D.

### Section 11: Exceptions relating to control of assets

78 Section 11 provides for exceptions from the definition of a "trigger event" in relation to assets. Subsection (1) provides that a person is not to be regarded as gaining control of a qualifying asset by reason of an acquisition made by an individual for purposes that are wholly or mainly outside the individual's trade, business or craft. Such acquisitions are therefore not within scope of the call-in power.

79 Subsection (2) provides that these exceptions do not apply where the acquired asset is land or falls within specified export control provisions.

80 Subsection (3) provides that the Secretary of State may by regulations amend the list of assets in subsection (2).

### Section 12: Trigger events: supplementary

81 Section 12 contains supplementary provisions in relation to determining when a trigger event that takes place over more than one day is to be treated as taking place (subsection (1)), and determining whether a trigger event is in progress or contemplation in circumstances where a person has entered into an agreement or arrangement which enables them to do something in the future that would result in a trigger event taking place (subsection (2)).

## Chapter 3: Approval of notifiable acquisition

82 Chapter 3 of Part 1 provides for the consequences of a notifiable acquisition completing without the approval of the Secretary of State.

### Section 13: Approval of notifiable acquisition

83 Section 13 provides that notifiable acquisitions which are completed without the approval of the Secretary of State are void. Subsection (2) sets out the ways in which the Secretary of State may approve a notifiable acquisition. Subsection (3) provides that a notifiable acquisition is void where it has been completed in a manner which is different to the stipulations of a final order (see section 26) made by the Secretary of State.

## Chapter 4: Procedure

84 Chapter 4 of Part 1 provides for two routes for persons to notify acquisitions to the Secretary of State in order to receive a call-in decision. Section 14 is a mandatory notification route which applies to notifiable acquisitions (as defined in section 6). Section 18 is a voluntary notification route for trigger events which fall outside the mandatory notification regime. Sections 15, 16 and 17 provide for retrospective validation of notifiable acquisitions which have completed without the approval of the Secretary of State (see section 13).

85 Chapter 4 of Part 1 also provides for two mechanisms by which the Secretary of State may obtain information to assist him or her in carrying out his or her functions under the Act. Section 19 allows the Secretary of State to issue an information notice requiring specified information to be provided. Section 20 permits the Secretary of State to issue an attendance notice requiring a person to attend at a specified time and place and to give evidence to the Secretary of State. These powers may be used before or after a trigger event has been called in. Section 22 provides that the Secretary of State may reconsider a decision made under this Act, and affirm, vary or revoke it, if the decision is materially affected by false or misleading information.

## Section 14: Mandatory notification procedure

86 Section 14 requires notifiable acquisitions (see section 6) to be notified to the Secretary of State and describes the procedure for doing so. Pursuant to subsection (1) a person who is to make a notifiable acquisition must give a mandatory notice to the Secretary of State prior to the acquisition taking place.

87 Subsection (4) provides that the Secretary of State may by regulations prescribe the form and content of a mandatory notice.

88 Subsection (5) provides that, as soon as reasonably practicable after receiving a mandatory notice, the Secretary of State must decide whether to reject or accept the notice.

89 Subsection (6) sets out the grounds on which the Secretary of State may reject a mandatory notice. Subsection (7) provides that, if a mandatory notice is rejected, the Secretary of State must, as soon as practicable, provide reasons in writing for that decision to the person who gave the notice.

90 Subsection (8) provides that, if a mandatory notice is accepted, the Secretary of State must, as soon as practicable, notify each relevant person, and, before the end of the review period (see the next paragraph), either give a call-in notice in relation to the proposed notifiable acquisition (see section 1), or notify each relevant person that no further action will be taken under the Act in relation to the acquisition. Subsection (10) defines "relevant person" as the person who gave the mandatory notice and such other persons as the Secretary of State considers appropriate.

91 Subsection (9) provides that the review period lasts 30 working days beginning with the day on which the Secretary of State notifies the person who gave the mandatory notice that it has been accepted.

## Section 15: Requirement to consider retrospective validation without application

92 Section 15 applies to notifiable acquisitions which were not approved by the Secretary of State before they were completed, and which are consequently void. Where the Secretary of State becomes aware of a void notifiable acquisition, subsection (2) requires the Secretary of State to either give a call-in notice (see section 1) or a validation notice in relation to the acquisition, within 6 months.

93 Pursuant to subsection (3) the effect of a validation notice is that the notifiable acquisition in question is to be treated as having been completed with the approval of the Secretary of State, and it is therefore not void. A validation notice must be given to the person who was required to give a mandatory notice to the Secretary of State in relation to the notification (see section 14) and such other persons as the Secretary of State considers appropriate. The Secretary of State must also notify those persons that no further action is to be taken under the Act in relation to the acquisition.

## Section 16: Application for retrospective validation of notifiable acquisition

94 Section 16 provides for validation applications: any person who has been materially affected by the voiding of a notifiable acquisition may apply to the Secretary of State for a validation notice (see section 15) in relation to the acquisition. Pursuant to subsection (3) the Secretary of State may by regulations prescribe the form and content of a validation application.

95 Subsection (4) provides that, as soon as reasonably practicable after receiving a validation application, the Secretary of State must decide whether to reject or accept the application (but, pursuant to subsection (8), he or she is not required to consider an application if, in his or her opinion, there has been no material change in circumstances since a previous application was made).

96 Subsection (5) sets out the grounds on which the Secretary of State may reject a validation application. Subsection (6) provides that, if a validation application is rejected, the Secretary of State must, as soon as practicable, provide reasons in writing for that decision to the person who made the application.

97 Subsection (8) provides that, if a validation application is accepted, the Secretary of State must, as soon as practicable, notify each relevant person, and, before the end of the review period (see the next paragraph), either give a call-in notice (see section 1) or a validation notice (see section 16) in relation to the acquisition. A validation notice must be given to each relevant person, who must also be notified that no further action will be taken under the Act in relation to the acquisition. Subsection (9) defines "relevant person" as the person who made the validation application and such other persons as the Secretary of State considers appropriate.

98 Subsection (9) provides that the review period lasts 30 working days beginning with the day on which the Secretary of State notifies the person who made the validation application that it has been accepted.

## Section 17: Retrospective validation of notifiable acquisition following call-in

99 Section 17 applies where the Secretary of State has given a call-in notice in relation to a void notifiable acquisition (see Sections 15 and 16). Subsection (2) provides that, where a final notification is given in relation to the call-in notice (see section 26), the Secretary must also give a validation notice (see section 15) in relation to the acquisition. Subsection (3) specifies the persons to whom the validation notice must be given. Subsection (5) provides that, where a final order is made in relation to the call-in notice (see section 26), so much of the acquisition as is compatible with the final order is to be treated as having been completed with the approval of the Secretary of State and is not therefore void.

## Section 18: Voluntary notification procedure

100 In circumstances where there is no requirement to notify, section 18 provides a mechanism by which parties may voluntarily notify the Secretary of State of a trigger event in order to receive a call-in decision.

101 Subsection (2) provide that a seller, acquirer or any qualifying entity concerned may give the Secretary of State a voluntary notice stating that a trigger event has taken place or that a trigger event is in progress or contemplation.

102 Pursuant to subsection (4) the Secretary of State may by regulations prescribe the form and content of a voluntary notice.

103 Subsections (5) to (8) provide for the process the Secretary of State must follow upon receiving a voluntary notice. In particular, the provisions set out the grounds on which the Secretary of State may reject a voluntary notice and the procedure which the Secretary of State must follow in responding to the relevant parties.

104 Subsection (9) provides that the Secretary of State has 30 working days to review a voluntary notice once it has been accepted. Before the end of this period, the Secretary of State must decide whether to call in the trigger event or whether to take no further action under the Act and notify relevant parties accordingly.

### Section 19: Power to require information

105 Section 19 provides for investigatory powers which enable the Secretary of State to obtain information either before or after the call-in power is exercised. The information must relate to the exercise of the Secretary of State's functions under the Act. Information may be required, for example, in order to determine whether a call-in notice should be given or whether remedies should be imposed.

106 Subsection (2) provides a proportionality test for use of this power.

107 Subsection (4) provides that the Secretary of State may specify in the notice the manner in which information is to be provided and the time limit for providing it. The time limit for providing information may depend on the type of information and the amount of time required to obtain it. Subsection (4)(c) enables the Secretary of State to require the person to provide any information within their possession or power which would enable the Secretary of State to find the information required by the notice.

### Section 20: Attendance of witnesses

108 Section 20 gives the Secretary of State the power to require the attendance of witnesses to assist them to carry out their functions under the Act.

### Section 21: Information notices and attendance notices: persons outside the UK

109 Section 21 makes provision in respect of the persons on whom the Secretary of State may serve an information notice or attendance notice outside the UK.

110 Subsection (2) provides that an information notice or attendance notice may be given to any person outside the UK who is: (a) a UK national; (b) an individual ordinarily resident in the UK; (c) a body incorporated or constituted under the law of any part of the UK; or (d) carrying on business in the UK.

111 Subsections (3) and (4) also provide the Secretary of State with the power to issue an information notice or attendance notice to persons outside the UK who have acquired, or who are in the process of acquiring, qualifying UK entities or assets that are either located in the UK or otherwise connected to the UK.

### Section 22: False or misleading information

112 Section 22 gives the Secretary of State the power to reconsider a decision they have made under the Act if it is materially affected by false or misleading information that has been provided to them. Offences in relation to providing false or misleading information are set out in section 34.

## Part 2: Remedies

113 Part 2 of the Act is concerned with the remedies available to the Secretary of State to address risks to national security and the period in which such remedies are available.

## Section 23: Meaning of "assessment period"

114 Section 23 provides for the time limits for the assessment of a trigger event after it has been called in. It provides that the Secretary of State has a period of 30 working days after a trigger event has been called-in to determine whether to issue a final order imposing remedies or a final notification confirming no further action is to be taken ("the initial period").

115 This period may be extended by the Secretary of State for a further 45 working days if they reasonably believe that a national security risk has arisen or would arise from the trigger event, and reasonably consider the extension is required to assess the trigger event further ("the additional period").

116 Extensions beyond 75 working days (the initial 30 day period plus the additional period of 45 working days) may be agreed between the acquirer and the Secretary of State if the Secretary of State is satisfied a national security risk has arisen or would arise from the trigger event, and reasonably considers a further period is required to consider whether to make a final order (see section 26) or what it should contain ("a voluntary period").

## Section 24: Effect of information notice and attendance notice

117 Section 24 provides that, when calculating the assessment period under section 23, any period of time between the Secretary of State notifying the recipients of the call-in notice (see section 1) that an information notice (see section 19) or attendance notice (see section 20) has been issued, and the Secretary of State notifying those persons that either the requirements of the notice have been complied with or that the time allowed for compliance has passed, is to be discounted.

## Section 25: Interim orders

118 Section 25 enables the Secretary of State, whilst a national security assessment is ongoing, to make an interim order for the purpose of preventing or reversing pre-emptive action or mitigating its effects. "Pre-emptive action" is defined as action which might prejudice the exercise of the Secretary of State's functions under the Act in relation to call-in notices (see section 1), i.e., in relation to national security assessments. This would include for example actions which might prejudice the imposition of appropriate remedies as part of a final order under section 26. The Secretary of State may only make an interim order if they reasonably consider that the provisions of the order are necessary and proportionate for the permitted purposes.

119 Subsection (4) provides that an interim order may amongst other things include provision requiring persons to do, or not to do, particular things. An interim order may, for example, prohibit the parties to a trigger event in progress from completing the acquisition, or require that any existing integration is reversed.

120 Subsection (5) sets out the permitted extra-territorial application of interim orders. An interim order may only apply to a person's conduct outside the UK or the territorial sea adjacent to the UK if they are: (a) a UK national; (b) an individual ordinarily resident in the UK; (c) a body incorporated or constituted under the law of any part of the UK; or (d) carrying on business in the UK.

## Section 26: Final orders and final notifications

121 Section 26 provides for the Secretary of State's final decision following a national security assessment. Before the end of the assessment period (see section 23), the Secretary of State must either notify the recipients of the call-in notice (see section 1) that no further action will be taken on the assessment under the Act, or, where he or she is satisfied that a trigger event has taken place or is in progress or contemplation, and that it has given rise to or would give

rise to a national security risk, make a final order for the purpose of preventing, remedying or mitigating that risk. The Secretary of State may only make a final order if he or she reasonably considers that the provisions of the order are necessary and proportionate for the permitted purposes. Subsection (4) requires the Secretary of State to consider any representations made to him or her before making a final order.

122 Subsection (5) provides that a final order may amongst other things include provision requiring persons to do or not do particular things. A final order will be in force for the period specified in or under it, or until it is revoked (subsections (7) and (8)).

123 Subsection (6) sets out the permitted extra-territorial application of final orders. A final order may only apply to a person's conduct outside the UK or the territorial sea adjacent to the UK if they are: (a) a UK national; (b) an individual ordinarily resident in the UK; (c) a body incorporated or constituted under the law of any part of the UK; or (d) carrying on business in the UK.

## Section 27: Review, variation and revocation of orders

124 Section 27 requires the Secretary of State to keep interim orders and final orders under review, and to consider requests to vary or revoke them.

## Section 28: Orders: supplementary

125 Section 28 makes provision for serving interim orders and final orders, and for serving notices that such an order has been varied or revoked. Orders, and varied orders, must be served on anyone who must comply with the order, the recipients of the call-in notice, and any other person the Secretary of State considers appropriate (for example, a regulator). The same persons must be given notice of the revocation of an order. In addition, notice that an order has been varied must be given to any person who was previously required to comply with the order but is no longer required to do so.

126 Subsection (4) prescribes the required contents of orders or accompanying explanatory material.

## Section 29: Publication of notice of final order

127 Section 29 requires that, when the Secretary of State makes, varies or revokes a final order, he or she must publish notice of that fact. Subsection (2) prescribes the required contents of such notices.

## Section 30: Financial assistance

128 Section 30 provides that the Secretary of State may, with the consent of the Treasury, give financial assistance to or in respect of an entity, through a loan, guarantee or indemnity or any other form of financial assistance. The financial assistance must be given as a consequence of him or her making a final order (see section 26).

129 If during any financial year the amount given under this section totals £100 million or more, the Secretary of State must lay a report of the amount before the House of Commons. Where during any financial year in which such a report has been laid the Secretary of State provides any further financial assistance under this section, he or she must lay a further report of the amount.

## Section 31: Interaction with CMA functions under Part 3 of Enterprise Act 2002

130 Section 31 provides for situations where a trigger event considered under this Act for national security reasons is also subject to consideration by the CMA under the merger control regime in Part 3 of the Enterprise Act 2002. It gives the Secretary of State the power, if a final order is in force or a final notification has been given under this Act (see section 26), to direct the CMA

to do, or not to do, anything under the merger control regime in relation to the trigger event. This power will allow the Secretary of State to ensure that, when a risk to national security has been addressed via a final order under the Act, the CMA does not inadvertently undermine this through any action it takes. The Secretary of State will also be able to use this power to ensure that a person is not subject to contradictory remedies under the two regimes.

131 Subsections (2) to (4) impose requirements for the use of this power, namely that the Secretary of State must reasonably consider that the direction is necessary and proportionate for the purpose of preventing, remedying or mitigating a risk to national security, that the CMA and such other persons as the Secretary of State considers appropriate must first be consulted, and that the Secretary of State's direction must be published.

# Part 3: Enforcement and appeals

## Sections 32-36: Offences

132 The table below summarises the offences set out in Sections 32-35.

| Offence | Penalty |
|---|---|
| Section 32: Completing, without reasonable excuse, a notifiable acquisition without approval | **Criminal Penalty**<br>On summary conviction in England and Wales: imprisonment for a term not exceeding 12 months, or a fine (or both).<br>On summary conviction in Scotland: imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum (or both).<br>On summary conviction in Northern Ireland: imprisonment for a term not exceeding 6 months, or a fine not exceeding the statutory maximum (or both).<br>On conviction on indictment: imprisonment for a term not exceeding 5 years, or a fine (or both).<br>**Civil Penalty**<br>The amount of the penalty is to be such amount as the Secretary of State considers appropriate, not exceeding the permitted maximum as per section 41.<br>The penalty must be a fixed amount only. |
| Section 33: Failing, without reasonable excuse, to comply with an order | **Criminal Penalty**<br>On summary conviction in England and Wales: imprisonment for a term not exceeding 12 months, or a fine (or both).<br>On summary conviction in Scotland: imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum (or both).<br>On summary conviction in Northern Ireland: imprisonment for a term not exceeding 6 months, or a fine not exceeding the statutory maximum (or both).<br>On conviction on indictment: imprisonment for a term not exceeding 5 years, or a fine (or both).<br>**Civil Penalty**<br>The amount of the penalty is to be such amount as the Secretary of State considers appropriate, not exceeding the permitted maximum as per section 41.<br>The penalty may be a fixed amount, a daily rate penalty or a combination of a fixed penalty and a daily rate penalty. |

| Offence | Penalty |
|---|---|
| Section 34(1)(a):<br><br>Failing, without reasonable excuse, to comply with an information notice or attendance notice. | **Criminal Penalty**<br><br>On summary conviction in England and Wales: imprisonment for a term not exceeding 12 months, or a fine (or both).<br><br>On summary conviction in Scotland: imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum (or both).<br><br>On summary conviction in Northern Ireland: imprisonment for a term not exceeding 6 months, or a fine not exceeding the statutory maximum (or both).<br><br>On conviction on indictment: imprisonment for a term not exceeding 2 years, or a fine (or both).<br><br>**Civil Penalty**<br><br>The amount of the penalty is to be such amount as the Secretary of State considers appropriate, not exceeding the permitted maximum as per section 41.<br><br>The penalty may be a fixed amount, a daily rate penalty or a combination of a fixed penalty and a daily rate penalty. |
| Section 34(1)(b):<br><br>Intentionally or recklessly altering, suppressing or destroying any information required by an information notice, or causing or permitting its alteration, suppression or destruction. | **Criminal Penalty**<br><br>On summary conviction in England and Wales: imprisonment for a term not exceeding 12 months, or a fine (or both).<br><br>On summary conviction in Scotland: imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum (or both).<br><br>On summary conviction in Northern Ireland: imprisonment for a term not exceeding 6 months, or a fine not exceeding the statutory maximum (or both).<br><br>On conviction on indictment: imprisonment for a term not exceeding 2 years, or a fine (or both).<br><br>**Civil Penalty**<br><br>The amount of the penalty is to be such amount as the Secretary of State considers appropriate, not exceeding the permitted maximum as per section 41.<br><br>The penalty must be a fixed amount only. |

| Offence | Penalty |
|---|---|
| Section 34(2):<br><br>Intentionally obstructing or delaying the making of a copy of information provided in response to an information notice. | **Criminal Penalty**<br><br>On summary conviction in England and Wales: imprisonment for a term not exceeding 12 months, or a fine (or both).<br><br>On summary conviction in Scotland: imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum (or both).<br><br>On summary conviction in Northern Ireland: imprisonment for a term not exceeding 6 months, or a fine not exceeding the statutory maximum (or both).<br><br>On conviction on indictment: imprisonment for a term not exceeding 2 years, or a fine (or both).<br><br>**Civil Penalty**<br><br>The amount of the penalty is to be such amount as the Secretary of State considers appropriate, not exceeding the permitted maximum as per section 41.<br><br>The penalty must be a fixed amount only. |
| Section 34(3) and (4):<br><br>Supplying information that is false or misleading in a material respect to the Secretary of State (or to another person, knowing that the information is be used for the purpose of supplying information to the Secretary of State) in connection with any of the functions of the Secretary of State under the Act, that the person knows to be false or misleading in a material respect or is reckless as to whether this is the case. | **Criminal Penalty**<br><br>On summary conviction in England and Wales: imprisonment for a term not exceeding 12 months, or a fine (or both).<br><br>On summary conviction in Scotland: imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum (or both).<br><br>On summary conviction in Northern Ireland: imprisonment for a term not exceeding 6 months, or a fine not exceeding the statutory maximum (or both).<br><br>On conviction on indictment: imprisonment for a term not exceeding 2 years, or a fine (or both).<br><br>**Civil Penalty**<br><br>The amount of the penalty is to be such amount as the Secretary of State considers appropriate, not exceeding the permitted maximum as per section 41.<br><br>The penalty must be a fixed amount only. |
| Section 35: Unauthorised use or disclosure of information.<br><br>It is a defence for a person charged with an offence under Section 35 to prove that they reasonably believed that the use or disclosure was lawful, or that the information had already and lawfully been made available to the public. | **Criminal Penalty**<br><br>On summary conviction in England and Wales: imprisonment for a term not exceeding 12 months, or a fine (or both).<br><br>On summary conviction in Scotland: imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum (or both).<br><br>On summary conviction in Northern Ireland: imprisonment for a term not exceeding 6 months, or a fine not exceeding the statutory maximum (or both).<br><br>On conviction on indictment: imprisonment for a term not exceeding 2 years, or a fine (or both). |

133 The maximum sentence of imprisonment on summary conviction will be 6 months in England and Wales until paragraph 24(2) of Schedule 22 to the Sentencing Act 2020 is brought into force.

134 Section 55(2) provides that section 19 of the Commissioners for Revenue and Customs Act 2005 (offence of wrongful disclosure) applies to the unauthorised disclosure of personal information from Her Majesty's Revenue and Customs.

## Section 36: Offences by bodies corporate etc

135 Section 36 provides that, where a body (for instance, a body corporate such as a company) commits an offence under this Act, an officer of the body will also be guilty of the offence if it is attributable to their consent or connivance, or to their neglect.

136 Subsection (5) provides that the Secretary of State may by regulations provide for the modification of this section in its application to a body corporate or unincorporated association formed or recognised under the law of a country or territory outside the United Kingdom.

## Section 37: Prosecution

137 Section 37 provides for which enforcement agencies are responsible for prosecuting offences under this Act. It provides that in England and Wales prosecutions must be brought by the Director of Public Prosecutions, and in Northern Ireland, the Director of Public Prosecutions for Northern Ireland. In Scotland, the Procurator Fiscal handles all prosecutions in the public interest and there is therefore no need for the kind of provision made in this section in Scotland.

## Section 38: Proceedings against partnerships etc

138 Section 38 makes provision about, and in connection with, bringing proceedings for offences under this Act against partnerships or other unincorporated associations.

## Section 39: Offences: penalties

139 Section 39 sets out the available penalties on conviction for persons who commit offences under this Act. These are set out in the table after paragraph 135 above.

140 Subsection (3) provides that, in relation to offences committed before paragraph 24(2) of Schedule 22 to the Sentencing Act 2020 is brought into force, the maximum term of imprisonment which may be imposed on summary conviction in England and Wales is 6 months.

## Section 40: Power to impose monetary penalties

141 Section 40 enables the Secretary of State to impose a monetary penalty on a person where they are satisfied beyond reasonable doubt that the person has committed an offence under Sections 32, 33 or 34. Subsection (6) provides that the amount of the penalty must be such amount as the Secretary of State considers appropriate, but it may not exceed the maximum penalty for the offence as set out in section 41. Subsection (7) requires the Secretary of State to have regard to various factors when determining the amount of a monetary penalty, including the seriousness of the offence and the ability of the penalised person to pay the penalty. Further information on the monetary penalties is set out in the table after paragraph 135 above.

## Section 41: Permitted maximum penalties

142 Subsections (1) to (7) of section 41 set out the maximum monetary penalties that the Secretary of State may impose for different offences under the Act. They specify the maximum fixed penalty and, if applicable, the maximum daily rate penalty. In relation to the offences of completing a notifiable acquisition without approval and failing to comply with an order, there are different maximum penalties for businesses and non-businesses. In relation to businesses, the maximum penalties are, depending on the offence, either a specified amount or a percentage of the worldwide turnover of the business and of any businesses it owns or controls.

143 Pursuant to subsections (8) and (9) the Secretary of State may by regulations specify how to calculate the maximum penalty applicable in any case (for example, how to determine the turnover of a business), or amend any of the maximum penalty amounts or percentage rates specified in subsections (1) to (7).

144 Section 63 provides for the parliamentary procedure to be used for regulations under the Act. Regulations under section 41 must be laid in draft before Parliament and approved by both Houses of Parliament before they may be made.

## Sections 42-47: Monetary penalties and cost recovery

145 Sections 42 and 46 require the Secretary of State to keep under review a monetary penalty and a requirement to pay costs respectively.

146 Section 43 ensures that a person may not be subject to both a monetary penalty and a criminal sanction for the same offence.

147 Sections 44 and 45 deal with monetary penalties and cost recovery respectively. They set out the procedure for recovering unpaid penalties and costs and provide for interest to be incurred on the unpaid balance.

148 Section 47 enables the Secretary of State to issue a notice requiring a person issued with a monetary penalty to also pay the Secretary of State's costs incurred in imposing the penalty.

## Section 48: Enforcement through civil proceedings

149 Section 48 provides that the duty of a person to comply with a requirement under or by virtue of an information notice, an attendance notice, an interim order or a final order is enforceable through civil proceedings by the Secretary of State for an injunction, or for specific performance of a statutory duty under section 45 of the Court of Session Act 1988, or for any other appropriate relief or remedy. This applies whether or not the person is in the UK.

## Section 49: Procedure for judicial review of certain decisions

150 Section 49 provides that claims for judicial review of certain decisions under this Act must be brought within 28 days beginning with the day after the day on which the grounds to make the claim first arose, unless the court considers that exceptional circumstances apply.

## Section 50: Appeals against monetary penalties

151 Section 50 enables any person on whom a monetary penalty or variation in penalty is imposed to appeal against the penalty or variation.

## Section 51: Appeals against costs

152 Section 51 enables any person on whom costs are imposed, or on whom a variation in costs is imposed, to appeal against the costs or variation.

### Section 52: Extra-territorial application and jurisdiction to try offences

153 Section 52(1) provides that the offences set out in Sections 32, 33, 34 and 35 may be committed by conduct that occurs inside or outside the UK irrespective of the offender's nationality or, if a body, country of formation or recognition.

154 Subsection (2) provides that, where an offence under the Act is committed outside the UK, proceedings for the offence may be taken at any place in the UK and may be treated for all incidental purposes as having been committed at any such place.

155 Subsection (3) specifies that in the application of subsection (2) to Scotland, any such proceedings may be taken in any sheriff court district in which the person is apprehended or in custody, or in such sheriff court district as the Lord Advocate may determine.

156 Subsection (4) defines "sheriff court district" by reference to the definition in section 307(1) of the Criminal Procedure (Scotland) Act 1995.

## Part 4: Miscellaneous

### Section 53: Procedure for service, etc

157 Section 53 enables the Secretary of State to make regulations prescribing the procedure for service of documents under this Act.

158 The regulations may in particular specify the manner in which a notice must be given, or an order served, the address to which a document must be sent, and whether a document may be sent electronically. They may also specify the date and time a notice or order is to be regarded as having been given or served (this may be important, for example, where a time limit begins to run from that date). The regulations may also make provision for cases where a recipient or sender is not an individual (for example, in the case of a company) or is outside the United Kingdom.

## Information gateways

159 Sections 54 and 55 provide the Secretary of State with the power to disclose information in specified circumstances to public authorities, and vice-versa.

### Section 54: Disclosure of information

160 Section 54 specifies the circumstances in which information may be disclosed.

161 Subsection (1) provides an information gateway for public authorities to disclose information to the Secretary of State for the purpose of facilitating the exercise of his or her functions under the Act.

162 Subsection (2) permits the Secretary of State to disclose information received under this Act to any UK or overseas public authority for specified purposes. Subsection (3) in addition permits disclosure of information to overseas public authorities for the purpose of the exercise of corresponding functions of overseas public authorities.

163 Subsection (4) specifies that any person who receives information under subsection (2) or (3) of this section may not use it for any purpose other than the purpose for which it was disclosed, or further disclose it, without the Secretary of State's consent. This subsection does not apply to information received from HMRC. In accordance with section 55(1), any person seeking to use information disclosed by HMRC under section 54 for a purpose other than facilitating the exercise by the Secretary of State of his or her functions under the Act, or seeking to further disclose such information, will be required to obtain HMRC consent.

164 Subsections (6) and (7) set out considerations the Secretary of State must take into account when deciding whether to disclose information under this section.

165 As the information disclosed under this Section may include information to which a duty of confidence would attach, subsection (8) overrides any obligation of confidence owed by a person disclosing information under this section, or any other restriction that would apply to the disclosure of that information (except as provided by section 57).

166 Subsection (9) defines "overseas public authority" and "public authority".

## Section 55: Disclosure of information held by HMRC

167 Section 55(1) provides that a person (which includes the Secretary of State, another public authority or an overseas public authority) who receives information which has been disclosed under section 54 by HMRC, may not use the information for any purpose other than facilitating the exercise by the Secretary of State of his or her functions under the Act or disclose the information, without the permission of HMRC. Subsection (2) applies the criminal offence under section 19 of the Commissioners for Revenue and Customs Act 2005 (offence of wrongful disclosure) to the unauthorised disclosure of personal information from HMRC.

168 As the information disclosed under this section may include information to which a duty of confidence would attach, subsection (3) overrides any obligation of confidence owed by a person disclosing information under this section, or any other restriction that would apply to the disclosure of that information (except as provided by section 57).

## Section 56: Duty of the CMA to provide information and assistance

169 Section 56 requires the CMA to give information and assistance to the Secretary of State to enable him to carry out his or her functions under this Act. This section largely replicates an existing duty in section 105(5) and (6) of the Enterprise Act 2002.

## Section 57: Data protection

170 Section 57 provides that information may only be used or disclosed for the purposes of this Act if this does not contravene the data protection legislation or Parts 1 to 7 of, or Chapter 1 of Part 9 of, the Investigatory Powers Act 2016.

## Section 58 and Schedule 2: Minor and consequential amendments and revocations

171 Section 58 and Schedule 2 make amendments to remove the existing national security screening measures from the Enterprise Act 2002.

## Section 59: Overseas information disclosure

172 Section 59 amends the overseas disclosure gateway in section 243 of the Enterprise Act 2002, removing the restriction on UK public authorities disclosing information that comes to them in connection with a merger investigation under that gateway.

## Section 60: Defamation

173 Section 60 protects the Secretary of State and the CMA against actions for defamation as a result of the exercise of functions under or by virtue of the Act.

## Section 61: Annual report

174 Section 61 requires, after the end of each financial year, the Secretary of State to prepare an annual report including the information set out at subsection (2), and to lay a copy of the report before each House of Parliament.

# Part 5: Final Provisions

## Section 62: Transitional and saving provision in relation to the Enterprise Act 2002

175 Section 62 is a transitional provision concerning trigger events which take place after the introduction of this Act but before commencement. It provides for the Secretary of State's powers of intervention under sections 42, 59 and 67 of the Enterprise Act 2002 to continue to apply to these trigger events after commencement. However, these powers do not continue to apply to a trigger event if any action is taken in relation to it under this Act.

## Section 63: Regulations under this Act

176 Section 63 makes provision in relation to the regulations that may be made by the Secretary of State under the Act.

## Section 64: Financial provision

177 Section 64 deals with the further financial provision necessary as a result of the Act.

## Section 65: Interpretation

178 Section 65 sets out definitions for terms used in the Act.

## Section 66: Short title, commencement and extent

179 Section 66 provides for the short title, commencement and extent of the Act.

180 Subsection (2) provides for certain specified provisions of the Act to come into force on the day the Act is passed.

181 Subsection (3) provides that the other provisions of the Act are to come into force on such day as the Secretary of State may by regulations appoint.

182 Subsection (4) provides that regulations under subsection (3) may appoint different days for different purposes, or make transitional, transitory or saving provision.

183 Subsection (5) provides that any amendment or repeal made by the Act has the same extent as the enactment to which it relates and that, subject to that, the provisions of the Act will extend throughout the United Kingdom.

# Commencement

184 Section 66 makes provision for certain powers enabling the making of regulations to come into force on the day of Royal Assent. The remaining provisions of this Act will come into force on days appointed by the Secretary of State by commencement regulations.

# Related documents

185 The following documents are relevant to the Act and can be read at the stated locations:

- The Enterprise Act 2002, https://www.legislation.gov.uk/ukpga/2002/40/contents
- The Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018, http://www.legislation.gov.uk/uksi/2018/593/contents/made
- The Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018, http://www.legislation.gov.uk/uksi/2018/578/contents/made
- The Enterprise Act 2002 (Turnover Test) (Amendment) Order 2020, https://www.legislation.gov.uk/uksi/2020/763/contents/made
- The Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2020, https://www.legislation.gov.uk/ukdsi/2020/9780348208795/introduction
- Mergers: Guidance on the CMA's jurisdiction and procedure, https://www.gov.uk/government/publications/mergers-guidance-on-the-cmas-jurisdiction-and-procedure
- National security and infrastructure investment review (Green Paper), https://www.gov.uk/government/consultations/national-security-and-infrastructure-investment-review
- National security and investment: proposed legislative reforms (White Paper), https://www.gov.uk/government/consultations/national-security-and-investment-proposed-reforms
- The Queen's Speech December 2019, https://www.gov.uk/government/speeches/queens-speech-december-2019
- The Queen's Speech December 2019 Background Briefing Notes, https://www.gov.uk/government/publications/queens-speech-2019-background-briefing-notes
- Press release on the Integrated Review of foreign policy (Press release), https://www.gov.uk/government/news/pm-outlines-new-review-to-define-britains-place-in-the-world

# Annex – Hansard References

186 The following table sets out the dates and Hansard references for each stage of the Act's passage through Parliament.

| Stage | Date | Hansard Reference |
|---|---|---|
| *House of Commons* | | |
| Introduction | 11 November 2020 | Vol. 683 Col. 924 |
| Second Reading | 17 November 2020 | Vol. 684 Col. 205 |
| Public Bill Committee | 24 November 2020<br>24 November 2020<br>26 November 2020<br>26 November 2020<br>1 December 2020<br>1 December 2020<br>3 December 2020<br>3 December 2020<br>8 December 2020<br>8 December 2020<br>11 December 2020<br>11 December 2020 | 1st sitting<br>2nd sitting<br>3rd sitting<br>4th sitting<br>5th sitting<br>6th sitting<br>7th sitting<br>8th sitting<br>9th sitting<br>10th sitting<br>11th sitting<br>12th sitting |
| Report and Third Reading | 20 January 2021 | Vol. 687 Col. 988 |
| *House of Lords* | | |
| Introduction | 20 January 2021 | Vol. 809 Col. 1258 |
| Second Reading | 4 February 2021 | Vol. 809 Col. 2332 |
| Grand Committee | 2 March 2021<br>9 March 2021<br>16 March 2021 | Vol. 810 Col. GC 311<br>Vol. 810 Col. GC 585<br>Vol. 811 Col. 194 |
| Report | 15 April 2021 | Vol. 811 Col. 1452 |
| Third Reading | 22 April 2021 | Vol. 811 Col. 1968 |
| Commons Consideration of Lords Amendments | 26 April 2021 | Vol. 693 Col. 150 |
| Lords Consideration of Commons Amendments | 28 April 2021 | Vol. 811 Col. 2252 |
| Commons Consideration of Lords Amendments | 28 April 2021 | Vol. 693 Col. 445 |
| Lords Consideration of Commons Amendments | 28 April 2021 | Vol. 811 Col. 2375 |
| Royal Assent | 29 April 2021<br>29 April 2021 | House of Commons Vol. 693 Col. 520<br>House of Lords Vol. 811 Col. 2413 |

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