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National Security and Investment: sectors in scope of the mandatory regime

To whom it may concern,

The UK Petroleum Industry Association (UKPIA) represents the eight main oil refining and marketing companies operating in the UK responsible for supplying 84% of fuel demand in the UK and branding the majority of the UK's 8,000 petrol filling stations.[1,2] UKPIA member companies own and operate a number of sites designated as Critical National Infrastructure and a high proportion of their downstream assets will likely be captured under the requirements of the National Security and Investment Bill.

UKPIA previously responded to the both the Green Paper (2017) and White Paper (2018) consultations and note that some of the concerns raised in those responses have seen positive progress, such as with the clearer definitions in this new consultation and the Bill itself as well as offering greater certainty on Judicial Review processes and decision making. However, while the focus of this new consultation is on the mandatory notification definitions (see response in annex), UKPIA wishes also to reiterate and build upon our previously raised concerns regarding the nexus test, timelines for assessment and the proposed fines regime, which we believe still may act as disincentive to foreign direct investment in future.

<u>Nexus Test</u>
As flagged in our 2018 response, UKPIA views the Nexus to UK test as potentially wide ranging despite assurances in the Government Response that "Government will also legislate for a tighter nexus test for mandatory transactions." Despite the

[1] Digest of UK Energy Statistics, BEIS, 2020
[2] Energy Institute Retail Marketing Survey 2020

reassurance we cannot find reference in the Bill to the Nexus test so concerns will remain. It remains unclear how HMG will know if a trigger has occurred overseas.

The Nexus to UK test could also include indirect supply to the UK e.g. trigger events occurring within an overseas Joint Venture supplying goods to the UK, again making both tracking and enforcement difficult and potentially against the UK's security of supply interests (where such arrangements are already supplying important goods / services to the UK).

Ultimately, UKPIA and members retain the view that the concept of the Nexus to UK test is conceptually flawed and should be removed completely, however, further consultation specifically on a nexus test would be welcomed if Government retains the view that the concept is required. The consultation could consider better clarity of scope, when government would use its call in powers.

An alternative option may be to define the specific assets, IP and entity types that HMG views are of particular risk or concern by including them in the definitions – the example of sub-sea cables implies that this option is possible and already happening within BEIS and could remove a great deal of the ambiguity and open-ended risk in current drafting.

Process Timelines
The process as set out in the Bill has the potential to be unduly long – up to 105 days (30 days to call in, 30 days scrutiny with ability to extend by 45 days and potentially longer given the introduction of the 'voluntary period' which is at least subject to agreement with the acquirer). While the initial 30 days assessment may be assumed to be the main deadline for most acquisitions that will not require greater scrutiny, 105 days or more is a considerable amount of time and may make a purchase considerably less attractive to acquires and a sale more difficult for the incumbent. It would be helpful to clarify if this proposal is for periods of working days or not.

5 year call-in notice
Unwinding a trigger event is potentially very difficult and the ability in the Bill for the Secretary of State to issue a call in notice up to 6 months after they were made aware of the trigger event could be very problematic to practically unwind. An organisation in a merger or purchase, for example, may have placed one or more of the entities into liquidation and workforce may have been either redeployed or made redundant and found alternative employment. To unwind in such cases may also have a significant effect on UK infrastructure and could once again affect UK resilience with the clauses. To an extent the inclusion of powers relating to financial assistance may assist with some of the issues raised above, however, the risks are considerably greater than financial only and the complexity is likely to be the biggest inhibition.

Additionally, the ability in the Bill for the Secretary of State to issue a call in notice up to 5 years after the trigger event took place gives a very long time for a risk to be

hanging over a transaction even if the original decision not to notify the Secretary of State was one that was fair by the company(ies) involved.

Fines

Section 41 shows potential fines to be "the higher of 5% of the total value of the turnover of the business (both in and outside of the United Kingdom and including any business owned or controlled by the business) and £10 million." While recognising that these fines have been reduced since the White Paper in 2018 (from 10% of an organisation's global turnover), UKPIA views that the fines remain excessive and should only be applicable to UK investment. We would also note that the UK chose to remove the consideration of global turnover in its application of the Security of Network & Information Systems Regulations (NIS Regulations), limiting the fines at £17m.

While we are not aware of precedent, there may be value in considering upper limits on fines with regard to the deal value – this would have the benefit of making any fine specific to the acquisition being considered and avoiding the disproportionate impacts of the global turnover measure.

Overall

The potential impact of this legislation, as drafted, is ultimately that UK critical national infrastructure becomes a less attractive place to invest in and that the UK economy could therefore contract as a direct result of lower investment, with other countries being considered more attractive to investors.

Yours sincerely,

Jamie Baker
Director of External Relations

UKPIA

Consultation Questions Response

1. Are the sector definitions sufficiently clear to enable investors and businesses to self-assess whether they must notify and receive approval for relevant transactions? If not, how can the definitions be improved?

UKPIA believes that the relevant definitions to the downstream oil sector that we represent are sufficiently clear in the most part.

There are two areas that may need further clarity:

1. *Under the Energy definition 1.b could be clarified so that it does not confuse gas and petroleum infrastructure definitions (1.b appears only to need to refer to gas infrastructure as petroleum infrastructure is addressed in 1.a, however, definition is included in 1 a on "petroleum", "petroleum production project", "terminal", and "upstream petroleum pipeline" and "tonne of oil equivalent" which might all be better placed in 1.a).*

2. *Aggregation of assets may confuse some companies' understanding as to whether a group of assets is captured under the mandatory regime. For example, the definition under the Energy section (g) includes a measure for companies that handle 500,000 Tonnes per annum, which could apply to large petrol forecourt operators that have 200 sites that sell 2.5million litres throughput per annum. This particular metric may also be problematic if volumes handled change significantly (e.g. due to COVID-19) or if a company's assets are close to the limit (as is quite possible for larger forecourt owners in the above example).*

   Given the potential for confusion or for companies potentially frequently moving above or below the above threshold, UKPIA views that, as is already the case with CNI, companies be informed whether they are expected to notify or not (perhaps once a year). Given the fines in the Bill are significant it would seem fair to inform companies of this requirement.

2. To what extent are technical and scientific terms correct and sufficiently clear and commonly understood for the purposes of determining relevant activities?

Technical and scientific terms are correct for the downstream oil sector although as per the answer to question 1, we believe that the definitions of petroleum (and related terms) would be better separated out, noting that oils are covered by 1a and 1g exclusively.

The drafting of (g) i-iii which includes "intermediates, components and finished fuels" could potentially be interpreted to include petrochemicals, lubricants and other products which seems too broad given the earlier definition in (g) "The supply of petroleum-based road, aviation or heating fuels (including LPG)" which implies the intent is only to capture products used for energy. Given the drafting in (g) is

clear, we would suggest the that ‘intermediates’ language is moved to that section rather than to the sub-clauses to make it clearer for the reader. An alternative may be to clarify (g)i-ii and link back to the supply of petroleum based products or refining/blending processes as per (g)(iii).

3. To what extent do these definitions include the areas of the economy where foreign investment has the greatest potential to cause national security risks?

It is UKPIA’s view that the definitions go beyond what is necessary and at serious risk to national security as the market has proven its ability to respond to short term issues and long-term closures alike. We agree that the sector does have numerous assets of critical importance due principally to the scale and economic reliance on the products our members supply, however, view that the minimum criteria for notification are too low.

The criteria and thresholds do not consider market share, geographic spread or alternative facilities and suppliers. It is very difficult to use the same threshold for the South East where a higher threshold might be needed, as the Highlands and Islands where the suggested threshold may be more appropriate.

The risk of such conservatism is that the ability for assets to change ownership as a going concern is reduced with potential FDI put off from bidding for such assets and reducing the bargaining power of the seller. In extremis this might result in complete loss of bidders and an asset closing as opposed to continuing as a going concern – such a situation risks reducing national security to at least the same degree as under ownership by a hostile actor as the overall resilience in the fuel supply chain is lost forever.

4. How else, aside from mandatory notification under the NSI regime, can the Government ensure relevant transactions receive appropriate screening while minimising the impact on business?

UKPIA is not aware of any other mechanisms that are relevant for this purpose.

5. Do these definitions strike the right balance between safeguarding national security and minimising the burdens placed on businesses and investors? Is it possible to narrow the scope of the definitions without compromising national security?

See response to Q3.