HOUSE OF COMMONS

Foreign Affairs Committee

Oral evidence: The FCDO's role in blocking foreign asset stripping in the UK, HC 296

Tuesday 24 November 2020

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Watch the meeting

Members present: Tom Tugendhat (Chair); Royston Smith; Bob Seely; Henry Smith, Graham Stringer.

Questions 227 - 260

Witnesses

I: Roger Barker, Director of Policy and Corporate Governance, Institute of Directors; and Andy Sellars, Strategic Development Director, Compound Semiconductor Applications Catapult.

II: Veronica Roberts, Partner, Herbert Smith Freehills; and Roger Barron, Partner, Paul Hastings.

Examination of witnesses

Witnesses: Roger Barker and Andy Sellars.

Q227 **Chair:** Welcome to this afternoon's session of the Foreign Affairs Committee. It is a huge pleasure to have you with us. I will ask our two witnesses very briefly to introduce themselves in one or two sentences.

Roger Barker: I am director of policy and corporate governance at the Institute of Directors, which represents individual company directors from all sorts of enterprises across the UK.

Andy Sellars: I am the strategy development director for the Compound Semiconductor Applications Catapult. We are a non-profit research and technology organisation helping UK companies to develop electric vehicles, quantum technologies and advanced telecom products such as 5G.

Q228 **Chair:** Thank you very much, both of you. With a focus on national security and investment, which is what we are looking at this afternoon, both of you have areas of expertise, albeit, I am glad to say, not entirely overlapping. If there is a question that you feel you can answer, please do so. If you do not feel that you have anything to add to the other person's comments, please do not feel the need to do so.

Does the new National Security and Investment Bill strike the right balance between national security and the UK's economic interests? Will it have a significant impact on investment?

Roger Barker: Thank you for the invitation.

It is too early to tell whether it strikes the right balance. There is no doubt that we have to find a balance between two things: national security, and maintaining an open and welcoming environment for foreign investment. Both are absolutely crucial in their own way. If we get this wrong, it could have very negative implications for the economy, particularly at this crucial moment coming out of the EU transition process during Covid with huge company balance sheet problems with respect to our companies and our Government. We have to find the right balance. Whether we do so will depend a lot on how this Bill is implemented. Are the right resources and the right processes in place so that it can work efficiently?

Secondly, can it be implemented in a way that is non-politicised? If this gets dragged into public lobbying debates around industrial strategy and concerns from stakeholders over a range of issues beyond national security, the process could be very negative for UK plc, but if it can be prescribed within consistently defined and transparent parameters that are efficiently applied, it could be a source of competitive advantage and a very useful process that we add to our armoury. We still do not know which of those two ways this Bill will go.

Andy Sellars: The Bill brings the UK in line with the major economic competitors that we are dealing with at the moment. There is similar legislation in the States and countries in Europe. It broadly brings the UK in line with those. Any extra scrutiny in the short term is likely to add as a potential drag on investment, but, ultimately, investors will start to factor that in.

I agree with Roger's point. The important thing is the process to make it transparent and non-bureaucratic so that companies can move ahead and attract the investment, especially at the early stages, that they need.

Q229 **Henry Smith:** How do you believe the Government should determine which sectors are strategically important to the UK?

Roger Barker: That is difficult to determine within the context of this Bill. If you are talking about importance in an industrial policy sense, that needs to be done entirely separately from this Bill. If you want to prioritise particular sectors and to intervene to nurture and take them forward, that is fine. It would be a mistake within the context of this Bill to see national security in those terms. National security is not really so much a sectoral thing. It is to do with different types of technology, use of data, and how they are applied in different contexts. That is not the route I would choose to define national security in this Bill.

Andy Sellars: In some ways, the Bill is approaching this from looking to address a group of technologies rather than an end outcome. We need a clear definition of what we mean by security. I have heard other commentators make similar comments. For example, can the technology be used as a weapon? That is a pretty obvious one. Can the technology be a potential cyber threat? Can the technology be used to intercept and manipulate data or financial transactions? Is the technology essential for maintaining critical infrastructure such as health, finance, transport or communications? Could the technology be withheld under geopolitical tensions?

Some of these questions start to frame and define what we mean by security. Does the transaction of a company—a merger and acquisition—involve a critical material in the supply chain for which we require security of infrastructure? We need clarity around the definition of security to make sure it is focused on security and does not have a broader remit.

Roger Barker: I would agree with that.

Q230 **Henry Smith:** Who should be involved in assessing what sectors may be strategically important?

Andy Sellars: A number of agencies spring to mind like the National Cyber Security Centre and the Centre for the Protection of National Infrastructure. Another great agency, DSTL, would have a large view on the acquisitions that could be sensitive. Some trade associations, Government advisory groups and non-governmental groups like the

Photonics Leadership Group would have a very strong view on which acquisitions would have a security element to them.

Quite a lot of companies that we deal with do innovative projects that are funded through agencies like the UK's innovation agency, Innovate UK, or through the research councils such as the EPSRC. One potential way of screening them is in their application process to assess whether the technology could have a security implication when they apply to a fund to do a project.

Roger Barker: A slightly worrying feature of the Bill in its current form is that the final arbiter is the Secretary of State. There is a concern that the decision becomes politicised in a particular situation. We have seen that in the past when Melrose took over GKN and during the abortive bid of Pfizer for AstraZeneca. This became a political football despite the efforts initially of people to look at the transactions along very technical grounds.

For that reason, it is very important that independent experts are brought into the process at a relevant stage. There are models for that oversight process. The Takeover Panel, for example, is not just officials or politicians overseeing those transactions; non-conflicted expert practitioners are also involved. That is important.

The fact that a transaction could go to judicial review will not be a huge source of oversight because you can only challenge transactions on the grounds of faulty processes and procedures.

Having appropriate independent oversight in the way Dr Sellars has mentioned, and possibly other ways as well, will be key.

Q231 **Chair:** You raised an element about politicisation that I find very interesting. How can you avoid politicisation in a Bill like this?

Roger Barker: The first way in which you can do it is—this goes back to what Dr Sellars said—that you need to create a very specific and transparent definition of national security. One has to state clearly in this Bill that there should not be any remedies available for any reason other than a national security concern. That should be made very explicit in the Bill to start with. Then there should be a very clear definition of national security that can be interpreted and understood in a very transparent way that is applied consistently by independent experts.

There should be a degree of predictability in this process so that, if one voluntarily notifies a transaction to the UK Government, one can almost predict pretty well in advance what the outcome will be through the application of transparent processes.

Q232 **Chair:** May I politely challenge that? If I had said to you at this time last year that PPE for medical staff was a national security issue, we would both have thought I was being silly. By March, that was no longer the case. We have certainly seen—I think I am right in saying—food security being defined as a national security issue for many European countries.

We have recently seen President Trump using national security as a reason for intervening in the car industry. I do not want to be difficult, but is that not a very difficult thing to define in any way predictably into the future, or am I not being ambitious enough?

Roger Barker: It is very difficult, but, if we do not try to define it, our reputation as a predictable and open venue for inward investment will be destroyed and undermined, people will invest in other countries and our companies will move to more investor-friendly locations. I am not saying that the process should be entirely rigid and without the scope for, in extremis, some discretion, but, as much as possible, it needs to be a de-politicised technical process.

Q233 **Chair:** Dr Sellars, do you agree?

Andy Sellars: Yes. On the question of politicisation, I agree with Dr Barker. The way to mitigate the process of politicisation is to have a good technical definition of security.

There is a sliding scale of security. On the one hand, there is defence and warfare and, on the other, there are much softer levels of security like security of water and security of electricity supply. PPE comes into that. There is a very broad spectrum of what we could mean by security. Without attempting to define it, that very process of defining is the best method to remove politicisation.

Q234 **Chair:** Are there other ways of getting around this and trying to introduce predictability? One perhaps is to establish a committee or a board of some description so that you know the kinds of appointments you are putting on such as your retired military, your retired diplomats, your retired businessmen or even active ones of each. You create effectively a pattern that may not be identical over the years, but it is certainly less prone to variability than a single individual.

Roger Barker: I agree. It would be helpful for there to be transparency about how the procedure is working, the result and the rationale of decisions that are made in respect of notifications on particular transactions. If people start to see those decisions and understand the logic behind them and the process, that will give people much greater confidence in the whole process and a much greater willingness to see this as a very technical, standard part of investing in the UK rather than some new major obstacle that will completely transform their view of the attractiveness of the UK.

Q235 **Chair:** Effectively, you are creating a precedence in a similar way to a court.

Roger Barker: Yes, indeed.

Q236 **Royston Smith:** I do not want to labour the politicisation point—I understand it completely, although businesses want there to be no politics in decisions until they want a different decision, and then they

lobby us to change the decision. Good luck with that, if I may say so. I understand the point you are making. It would be much simpler if we did not have politicisation of these things, but I fear there probably will be.

You talked about that and about the definition of security. That is really important, and it has come up a few times now. Notwithstanding those two challenges and risks, what will be the long-term impact of the Bill on UK businesses and investors?

Roger Barker: It could be profound, either in a positive or a negative direction. From a positive point of view, it could be a competitive advantage—a slick, efficient process that is very transparent and predictable. It could be seen as part of the smooth operation of investing in the UK, and that could be to our benefit. I do not think anyone disputes the need to bring our national security screening processes in line with those of other major countries. That is a perfectly laudable and reasonable objective.

On the other hand, if we do not implement it right—we have not spoken so much about the logistics of making this work—it could become a bureaucratic nightmare for companies.

When this Bill was first proposed, it was thought that there were going to be about 200 notifications of transactions a year to Government. Now, the estimate is that it could be 1,000 or more per year. That could be an underestimate, because any wise board of directors would think it only prudent to notify Government of a transaction simply to manage their risks. Who wants to be in an exposed situation five years after a transaction, potentially to face a huge fine or major sanctions as a director? We are talking now about screening of transactions on an industrial scale.

I wonder whether BEIS as a Government Department is up to this. Does it have the people and the processes in place that can give a decision within 30 days, for example, as they are arguing? We have spoken to them. They have emphasised that they have put in place the right resources and the right level of seniority in terms of oversight. It is reasonable to be somewhat sceptical about the capacity of Government to manage this sort of thing because it is a complete transformation from the current situation under the Enterprise Act where, in the space of 15 years, only about 12 transactions were examined by Government. We are now going from 12 over 15 years to 1,000-plus per year. We need to make sure that we have the right resources and the right processes in place.

Q237 **Royston Smith:** You are probably talking about the lawyer's natural caution, not wanting to take a risk and notifying everything. But I assume that much of what will be notified will be dealt with speedily and probably not even in the 30 days, although some of the others will probably take far longer, and the worry will be what impact that will have on investment. What about businesses' ability to scale up and attract

investment and capital? Do you think that will be affected by what is perceived as an additional risk and additional bureaucracy?

Andy Sellars: The UK has the second highest number of start-ups outside the US and attracts the second highest level of venture capital outside the US. There is a lot of evidence that a lot of these companies come out of universities. They attract VC, they scale up, they de-risk over a short period, and they then sell out. One of my ambitions for this sort of Bill would be for investors to have a longer-term view of an investment, and hopefully that would support scale-up.

There is some evidence that investors in the States tend to be more tech savvy and to take a longer-term perspective on their investments. If we can encourage that in the UK, the benefits of this Bill could be to realise more value from companies scaling up in the UK rather than selling out early and potentially that value being realised overseas.

Roger Barker: On the other hand, if we get it wrong, we will be removing a potential source of buyer for these companies, and ruling out, at least at the margin, some significant investment into these companies, which will depress their valuations and reduce the incentives to build up that sort of company. It could be positive or negative depending on how it is implemented.

Q238 **Royston Smith:** Are there any type of investments that we should encourage or discourage in the UK companies, and what does the right type of investment look like?

Roger Barker: That is a very difficult thing, especially for Government, to identify. The right sort of investment is investment that builds the productive capacity of the UK, creates jobs and improves our utilisation of technology. All of those things are great. It is often quite difficult to identify what will be a good or a bad investment in advance. That is the nature of our economic system. There are good investment decisions and there are bad investment decisions, and the market whittles them out ultimately. Government should not be picking winners or sitting in judgment in most cases. They should allow investments to play out and the successful companies to emerge. But of course there are investments that will have a negative impact on national security as we choose to define it. It is reasonable for Government to intervene in that case.

It may indeed be reasonable for Government to develop an industrial strategy for the UK if they want to prioritise particular sectors and focus interventions on those strategic sectors. The IOD is not necessarily opposed to that. Our only point is that that process of developing an industrial strategy should take place in another box. It should not be implemented through this Bill by stealth or in a hidden way.

Andy Sellars: I broadly agree. When you are attracting investors at an early stage, you quite often do not know. Your technology can go in multiple different directions so you want to encourage as much

competition to invest in your product as you can at the very early stage. Hermann Hauser has identified that the next few decades will be characterised by having a sovereign capability in technologies. I would like to think that it would encourage more tech savvy investors into the investment space to look at a more longer-term investment.

Q239 **Chair:** I go back to a point you made about the Enterprise Act. You mentioned 12 cases in 15 years. Do you think that is because the Act is worded in a certain way? Do you think it is because the Government did not intervene as much as they should have done, or do you think it could be because the world has changed in the nature of state-owned enterprises—I am thinking predominantly about countries like China—and has changed the way in which the investment environment has been seen?

Roger Barker: I do think the world has changed. Certainly, there were some technical aspects of that. For example, the monetary threshold for intervening is currently £70 million. This proposed Act will reduce that very significantly. That is part of the reason.

I do think we are living in a different world now. In the decade after the introduction of that Act, there was the feeling that we were in a benign period of globalisation where we could be open to foreign direct investment and foreign transactions with open arms and without too much scrutiny, but now the world has changed somewhat.

It is right that we upgrade our regulatory framework in response to that. The key thing is making sure that we do not throw the baby out with the bathwater, and we do not go from being seen as a country that is very open for investment and very welcoming to the world to one that is seen as the opposite and is closing in on itself. That is really not what we need at the current juncture, leaving the EU with huge corporate and public indebtedness. We need foreign investment in this country.

Q240 **Chair:** When you say 1,000-plus under the new Act—I am not trying to be difficult—why 1,000 and not 10,000 or more? Would it not be in the advantage of any lawyer at any transaction moment to declare for fear that the situation could change in a year or two down the road and then be caught by the five-year reach-back?

Andy Sellars: That is my understanding. I have spoken with a number of companies—a number of start-ups and large companies—and their real fear is having a five-year retrospective action hanging over them. That would be the biggest risk to the boards of these companies. They would be much more likely to make a voluntary notification so that they could put themselves under a spotlight to remove that five-year risk. That is an incentive for companies to make a voluntary notification.

Q241 **Chair:** Dr Barker, do you see the world similarly?

Roger Barker: Yes. It has been emphasised that many aspects of this are a voluntary regime. One wonders how voluntary it really is. Although

you do not have to notify your transaction to the UK Government, there will be a strong incentive to do so. Although the Government are committed to turning round inquiries within 30 days, they could, if required, make a request to the company to enter into a time-unlimited investigation period. It is a voluntary matter whether the company accepts that or not, but in most cases the company will. One cannot imagine that they would have much incentive not to do so. Although this may appear to be a very voluntary type of framework, it is a relatively stringent one in practice.

Andy Sellars: For some of the smaller companies that are seeking continual funding rounds and investment, anything longer than a couple of months is a disincentive. They might raise one round of investment. They might then look for a secondary round of investment a year or 18 months later. Anything that is of the order of two or three months of uncertainty will be a real hangover for those companies to try to get that second round of investment, especially into early-stage companies.

Q242 **Chair:** Will you both think about the Bill specifically? If you were in our position as a Member of this House, what would you look to change in it? Very specifically, are there amendments that you can think of? What are the main strengths of the Bill, what could be strengthened further and what weaknesses could be corrected?

Roger Barker: It should be stated within the Bill that there should be no remedies imposed for reasons other than national security. Secondly, despite the difficulties, there should be an attempt to define the parameters of national security to make that as transparent and applicable as possible. People will have different ideas about what national security means, and this will be one definition. Despite that, it is important to define it; otherwise, it will become all things to all people that all people will try to exploit for different reasons.

The third thing will be transparency around the decision-making processes. There should be transparency around decisions made in respect of particular transactions.

Andy Sellars: I have nothing much to add to that. I agree with Dr Barker.

Chair: May I say an enormous thank you to both of you? You have been extremely generous with your insights and your time. I am hugely grateful for the support you have given not just in this session but in helping to prepare for it and helping to think through some of the aspects that led us to question it. Thank you very much indeed.

Examination of witnesses

Witnesses: Veronica Roberts and Roger Barron.

Q243 **Chair:** I ask you both to introduce yourselves very briefly.

Veronica Roberts: I am a competition regulatory partner at Herbert Smith Freehills and I also head up our global foreign investment regulatory group.

Roger Barron: I am a partner at Paul Hastings, an international law firm. Before that, I was at a UK headquartered international law firm for 27 years. I am an M&A lawyer. I advise companies on all the aspects of buying and selling companies, in particular on general corporate aspects, working closely usually with somebody like Veronica.

Q244 **Chair:** Thank you very much indeed for joining us this afternoon. I repeat the apology that I gave earlier for keeping you late. Sadly, remote working during Covid has rather messed us around, as I am sure it has messed around many others.

As lawyers, do you think that the National Security and Investment Bill provides sufficient clarity for business and investors?

Veronica Roberts: There are certainly aspects in which the Bill can be improved. We have talked already about mandatory notification being necessary in the 17 specified sectors. I appreciate that the Government are currently consulting on the detail of those sectors, but some of them are way too broad for companies to be able to make clear decisions about whether they need to notify transactions under this legislation.

One example that I would call out is the communications sector. At the moment, it is stated that that sector will cover all private and public electronic communications networks and services. That is going to cover a vast array of investments, some of which will be very small but nevertheless caught by the mandatory notification obligation.

There is the five-year call-in period that the Government can use to come back and review transactions. There is mention of a six-month period. If a transaction is given sufficient publicity or is brought to the Government's attention, they will only be able to intervene for a period of six months after that publicity. That will need to be made much clearer in the Bill to give companies more certainty about when the Government will be able to intervene if they fall outside the mandatory notification sectors and go ahead and decide to complete the transaction without making the voluntary notification. Those would be my two starting points.

Chair: Mr Barron, is there anything you would add?

Roger Barron: As an M&A lawyer first and foremost, I am keen to give advice to our clients on what is likely to happen—if a deal is doable, what they need to bear in mind along the way and what sort of things they need to do.

The Bill is to be welcomed in the sense that we have had a long period of uncertainty in policy and where it is going to go. It is good to have it brought together in one place and quite a lot of structure around the sort of things that the Secretary of State will be wanting to look at.

There are quite a lot of gaps to be filled. We look forward to regulations, we look forward to the final Bill and we look forward to the statement before the Commons. There is quite a lot of information still to come on how this will work in practice. I am sure we will come on to that.

I have a number of areas where there is uncertainty, and that could happen in a practical way in terms of types of transactions. There are distinctions to be drawn between the bilateral transaction and auction that is covered in the consultation response. In public M&A, when the Takeover Code and Takeover Panel are involved, they have been consulted, too. There is a lot of detail that I could go into.

Q245 **Chair:** My next question was about the main areas of ambiguity. You have begun to touch on it. Maybe you would like to carry on.

Roger Barron: One thing that I would immediately seek to change if I could is the position right now. We are having very live conversations with lots of people who could be entering into transactions now and find themselves in trouble—there might be some informal guidance available from the team—without proper guidance on what the law looks like, what the regulations say and what the Secretary of State is going to be concerned about. We can have a guess, but we are in a slightly "Alice in Wonderland" moment where the words will mean what someone wants them to mean at some point. It is quite hard to know exactly if you are advising companies now. As one of the earlier panellists said, there is going to be arguably an abundance of caution now.

One of the concerns is that there will be a number of people rushing to do deals between now and when the law is enacted and the regulations come into force. I really do not see that. It is not like a forthcoming tax change where people will do something quite quickly. M&A is a little different from that. I do not anticipate a whole raft of things. It is not as if we do not have some protections in the Enterprise Act for arguably the most egregious things.

Chair: What do you think, Ms Roberts?

Veronica Roberts: The Enterprise Act is a tool that the Government can still use until this new Bill comes into force. As we heard in the earlier session, the thresholds were reduced very significantly in 2018 in three sectors, and then earlier this year in the summer in three further sectors. They have taken the turnover threshold for the target down very significantly to £1 million. But, more importantly, there is a very flexible share of supply test that enables the Government to intervene to review a transaction on national security grounds if the assets have a 25% share of supply or more. We know that that is not a proper economic market definition. That is just a share of supply.

It would be possible for the Government to have a very narrow intellectual property use or asset use and say that that share of supply test is satisfied and step in to review that transaction in six of the 17

sectors. We have not seen those lower thresholds being used, certainly not the ones that were introduced this summer. They have not been used yet by the Government. That would be a perfectly acceptable and valid tool to enable the Government to step in until this Act can be brought into force. Like Mr Barron, we are getting lots of queries from clients already, about very small transactions in some cases; simply because they are covered in the 17 specified sectors, they are concerned that this call-in power will exist.

Q246 **Chair:** You have both highlighted some of the problems of ambiguity. Perhaps I can turn it around and ask where the Bill is lacking in the flexibility that it would require to intervene on national security grounds. Are there areas where you feel it should have more flexibility or perhaps even more ambiguity?

Veronica Roberts: I work with my M&A specialist, and my job at the outset of a transaction is to give our clients clear and predictable advice about where they need to make their filings. In cross-border acquisitions, those filings will be merger control filings, foreign investment filings and sometimes sector-specific filings. I prefer to see certainty in legislation so I know when I am going to be able to say to a client that a filing is needed or it is not needed and we can tick it off the list.

Ambiguity from my perspective is not helpful, and it will not be helpful for clients generally, either. One thing that would be very helpful to talk about is the Government's signposting of the white list in the Bill. Very little is said about that at this stage.

The paperwork says that the Government are keen to specify characteristics of a particular type of investor, and that once those investors have made perhaps one or two notifications under the new regime they will be exempt from making future notifications. That is of critical importance because we have discussed already the prevalence of foreign investment into the UK and the desirability of that.

At the same time as the Bill was introduced, I know the Office for Investment was set up saying that the Government clearly want to increase foreign investment into the UK. There is a range of pension investors, other investors and sovereign wealth funds with a huge range of investment in the UK who want to carry on investing in the UK and will really benefit from a white list like that and the certainty that it will bring them.

Roger Barron: Contrary to popular belief, lawyers do not really like ambiguity at all, so certainty would be a good thing. The mandatory/voluntary split is helpful in that regard, depending on what words and policy back that up. If it is mandatory, you know you are in the circle, and if you are voluntary you will look at mandatory to get a bit of a clue and a bit of guidance on how close you are to the kind of issues that the Secretary of State might be interested in. That is helpful.

The earlier panel touched on the political input. As a lawyer—it may surprise people—I do not mind at all. Defence and national security are political decisions in many ways. Far be it for an M&A lawyer to decide what national security should be about. Trying to get a good, clear understanding about the issues that the Secretary of State and his advisers are going to be concerned about would be helpful, too. I do not see necessarily that there is a whole area where we want to increase flexibility or ambiguity.

People are consulting separately on the sectors. I am probably not the right person to decide whether a particular type of activity should be within one sector or another. With the increased definitions around the various different sectors, more focus would be on the other side of the equation—what is it that the Secretary of State would like to be interested in from a security point of view as opposed to the actual sectors? If you start with that as the question—if this piece of technology, this company or this asset in someone's hand is going to be the sort of thing that the Secretary of State will want to be involved in—the chances are that, with 17 sectors broadly defined and similar things around the edges, you might well find yourself able to find a way into that. The flexibility is there. From my point of view and that of people like Veronica Roberts, it is a question of finding out how that is going to be interpreted.

Chair: Both of you have touched on areas of national security. I know Bob Seely has asked in the past about whether the national security clauses could be best defined.

Q247 **Bob Seely:** I am sorry to join this call late—apologies if I have missed things.

It would be interesting to have an opinion on national security because it seems to me that, to understand what national security is, you must attempt to define it. One does not need to over-define, but one needs to have a sense of when a national security argument kicks in: whether it is in industrial monopoly, whether it is in new technology in AI—artificial intelligence—and big data, whether it is in traditional defence industries, or whether it is ownership of critical national infrastructure. How important is some definition of national security rather than a slight suck-it-and-see approach, which is what we have had in the past sometimes?

Veronica Roberts: I would almost prefer to think about having a workable regime in practice. I would almost prefer to identify what is not national security. There has been a lot of debate about what this regime should cover, and it is very welcome that it has a firm focus on national security. We discussed in the earlier session the possibility for politicisation of this regime, and it would benefit clients if we had certainty. I would favour saying what national security is not—it is not about jobs; it is not about industrial policy—so that we have a very firm focus on national security.

When it comes to the definition itself, many other FDI regimes have not defined national security because it is a concept that will evolve with time. As long as we can explain to our clients that the focus very clearly will be on genuine national security concerns, that will be of great assistance.

Q248 **Bob Seely:** Eighteen months ago, if any one of our Committee had stood up in Parliament and said that our lack of supply of PPE would become a national security issue, everyone would have laughed at that individual, yet they would have proved incredibly farsighted. What constitutes national security evolves over time, which is why it seems to me that a workable and flexible definition of national security has to involve a process of when something hits a critical mass of importance or lack of being able to supply that in this country or potential for revolutionising warfare or technology in some way. It is very difficult to define. If it was just saying what it is not, that implies a certain rigidity.

Veronica Roberts: I completely understand the PPE example. Nobody could foresee how integral that was going to be to the UK. You could have some wording around that. Currently, the Bill talks about espionage and disruption to UK society. It is very important that it is focused on security concerns and not broader public interest concerns and protection of companies from competition, for example.

Q249 **Bob Seely:** You are completely right about protection of companies from competition. When you are talking about national security concerns, is ownership of a significant part of the UK's energy supply a national security issue? I would say it is. Is ownership of nuclear power plants in the UK part of a national security issue? I would say it is. Is Huawei's presence as a significant and potentially dominant supplier of 5G—it would have been before this new law—a national security issue because of the pressure it allows on the political classes? Those for me are national security issues because of the weight of potential influence on UK decision making, but it is clearly not a national security issue in terms of a traditional narrow approach.

Veronica Roberts: But all those examples that you have just given would be covered in the 17 specified sectors and therefore under the proposal would need to be the subject of a mandatory notification to the Government. That is another way of doing it provided that you ensure that that list is as short and as focused as possible. Communications, for example, covers any acquisition that meets the trigger threshold in private or public communications network suppliers—minute investments, which I do not think is top priority for the Government.

Q250 **Bob Seely:** You sum it up very well. It is that sense of what constitutes a trigger nowadays. Is it quantity or specialisation, or is it a traditional approach? We need some definition or guide undoubtedly; otherwise it can be whatever a Minister says it is or is not. We need to understand that potential trigger or that compound trigger nowadays and what it means in different industries.

Chair: Mr Barron, do you want to follow up on any of that?

Roger Barron: That was a really interesting and good discussion. In terms of getting guidance from the Government, the concept of critical infrastructure was a helpful one, which encapsulated some of the smaller deals—the key word being "critical", not financial value. I agree with a lot of what Veronica Roberts has said about making it very clear. If you can say what is not included, that is going to be helpful, too.

You have transactions, and we can talk about how this works in practice. You have buyers and sellers. Leaving aside public M&A and the Takeover Code, more often than not, if someone is looking to sell or trying to make an investment stake in a company, they will almost certainly run an auction process. It is as much in the interest of the seller to understand the certainty of execution on behalf of the various different buyers and what their own wishes will be as much as it is for the buyers to know that they can get a deal executed. All parties to transactions will try to weigh up myriad things at that stage, and it happens very quickly.

The consultation talked about how it anticipates that it is only when that final buyer is selected for a transaction that you expect to go through this process. But it does not really work like that. Quite often, people will be negotiating simultaneously with more than one potential buyer and going with one of those, literally in rooms next door to each other. Being able to make a judgment—these are examples—for UK companies and UK businesses having some certainty about who they can and cannot deal with is really important from an M&A point of view.

Q251 **Henry Smith:** Further to that, are there any other aspects of the Bill that could be circumvented by hostile actors seeking to undermine the UK's security?

Veronica Roberts: My sense is that the Government have given that a lot of thought already. For example, the mandatory notification applies where it is an acquisition of a corporate entity in the specified sectors. If the acquirer is instead buying assets or intellectual property, they do not have to do a mandatory notification, but the Government have given themselves the call-in power in those cases. This is where we are talking about that being a very broad call-in power to go back and review the transaction.

My understanding is that the five years is principally there for those transactions that never make the light of day that the Government may well be more interested in reviewing. They can go back and look at any acquisition of intellectual property or assets in those specified sectors in particular. That, for me, would have been the main technique, but it is already adequately covered.

I made the point before that it would be good if other transactions could be very clear about when the six-month time limit will start to run for that type of asset and intellectual property acquisition. There is a

suggestion in part of the paperwork that that six-month time limit will start to run from when the deal is published in a national newspaper, which is very similar to the merger control regime. I can see why that scope is there for Government, but it would be really good if all the other investors who have transactions that the Government will not be interested in could be clear about when their six-month timeframe starts to run.

Henry Smith: Mr Barron, is there any aspect you would like to add to that?

Roger Barron: It is a good question. Trying to work out if there are ways around it is the traditional lawyer's way. This is an Act or a Bill that has quite a lot of teeth. The descriptions of holdings and working through and a look through to various different groups, for example, will catch some of the things that people might have wanted to do in setting up structures to try to avoid this. It is not about foreign direct investment at all. Any investor, including UK investors, can be caught by this.

It is pretty broad in terms of the ability for Government to look at it. A mix between mandatory and voluntary also helps in that. Arguably, it is more the fact that there could be many people—perhaps out of caution but perhaps because that is how they see the rules at the moment—making notification and swamping the bureaucracy, even with a large support unit, in being able to find the areas that people should be really focused on. That can be the same in relation to lots of different new laws and regulations. We see that in other areas. When they have all settled down, people will say, "This is what it seems to me," and it is probably not as narrowly defined as people might think. I do not see any obvious flaws.

Q252 **Henry Smith:** Do you believe that the Bill provides Government with adequate means to identify hostile actors, and how susceptible are these decisions to legal challenge?

Veronica Roberts: In terms of adequate means to identify them, people have to fill in a relatively short notification form if they notify a transaction, which should flush out issues like that. If the transaction is not notified, we have talked already about the powers of the Government to step in. They have powers to request a vast range of information and compel witnesses to answer questions as well. That would be helpful to try to delve into ownership of the acquirer. So, yes, I think it does in that respect.

Q253 **Henry Smith:** Does the Bill leave any other areas of vulnerability for the UK from a security perspective?

Veronica Roberts: Not as far as I am aware. We have not seen the much lower thresholds that were introduced in the summer being used yet. I am not aware of transactions where the Government really need to intervene and have not been able to do so; other Government Departments may be.

There is a further area of what I regard as ambiguity where the Government might be better off using different powers, and that is the extraterritorial impact of the Bill. When you have to submit a mandatory notification, it is very clear that that is all about the acquisition of a UK-based company carrying out activities in the UK. When you step outside the mandatory notification sphere, you are in involuntary notification. That could be an acquisition of assets or IP, or it could be in any other sector. What the Bill currently says is that the Government will be able to step in and review that, or you can voluntarily notify even where the acquisition is of a company based in a different country but that company is bringing goods or services into the UK. That is very expensive. It is very unusual for a foreign investment regime to work in that way.

In France, Spain, and Germany, all the foreign investment regimes focus on the acquisition of an interest in a company registered or based in that country. That extraterritorial impact concerns me, certainly from the perspective of giving our clients certainty about where they might need to make a voluntary filing because it means that the Government have the power to step in and review, for example, the acquisition of a company based in France that happens to be importing certain goods into the UK. That is much better dealt with by export/import control and other national security licensing obligations that the Government will be able to impose on those goods and services, rather than trying to expand a national security investment regime in that way.

Henry Smith: Mr Barron, do you want to jump in on that?

Roger Barron: I fully agree with all that. The opportunity for BEIS to consult various other areas of expertise is a good thing from a national security point of view, but from a transactional point of view we could find ourselves with many people being aware of a potential M&A transaction. I know the Government are consulting the Takeover Panel. In the early stages of a potential public M&A bid, there is a so-called rule of six. You are only allowed to talk to six people—with good reason, because you could end up with insider trading and price-sensitive information floating around, and it may make people reluctant to try to do deals in this country at all if they are going to be flushed out in terms of the lack of secrecy and confidentiality. There is a balance, because you need to have the right information to be able to form a judgment.

Q254 **Bob Seely:** Apologies if you have already answered this. It is a bit of an issue for me and a concern that there is no reference to a public interest threshold. In the US and Australian processes, which may be the closest models, there is in the Aussie one a test of character and a public interest test. That public interest test includes things like tax evasion; there is a character test as well. It seems to me that somebody accused of egregious human rights abuses clearly would fail a character test if there were one. To not have that included in a public interest test, especially with the accusation of forced labour issues coming out of China—I agree that this may not be national security but it is an extremely important

part of our national interest—could undermine the credibility of this Bill, if there is no wider public interest test, no test of character and no human rights angle whatsoever.

I am not saying you make it fluffy and broad, but there should be at least something that gives a Minister some grounds to act and potentially with that a more transparent process of how decisions are made or at least a referral process to the Intelligence and Security Committee or a wider group of players. What are your thoughts?

Veronica Roberts: We have not covered that. I agree that those issues are important. In fact, the Australian FIRB regime has had a broader national interest test but is now consulting on trying to focus that more on national security.

At the outset, I said I am a merger control lawyer and I have been doing merger control filings in the UK for nearly 25 years. I remember when we had a merger control system that worked on a public interest test before the Enterprise Act was brought into force in 2002-03. It was a very broad public interest test. It covered all the things that you have been talking about and more, such as jobs and employment. It was very difficult, and it became increasingly difficult to advise clients on when the Government would intervene and review their transaction. That was why, with cross-party support, the Enterprise Act was brought into force, making it a more competition-focused merger control regime and to take the public interest out of the regime other than in very focused sectors: media plurality, which will remain after this Bill comes into force, and national security, which is what we have been focusing on and will be taking forward. That legislation is flexible.

The Government was able over the summer to add at very short notice a new public interest heading to combat public health emergency, for obvious reasons. It is much easier to give investors the certainty that they need if you take that type of public interest out of the process. I believe—although I am straying out of my practice area—that there would be other ways to deal with human rights and slavery issues in other forms of controls.

Q255 **Bob Seely:** That is a great answer, but what would those controls be?

Veronica Roberts: That is where I am straying out of my practice area into antislavery legislation and the ability of the Government to pick up other countries and other companies for human rights abuses. It is wrong to force those judgments to be made within the context of an investment regime, particularly when you think about the deterrence effect that that will have on all the investment that, at the same time, the Government are telling us they want to increase into the UK. It would have a very significant and disproportionate impact.

I am slightly avoiding your question on the other legislation that you would need to deal with those issues, because it is not my specialist area, but I am sure there will be other ways. Mr Barron may know more.

Roger Barron: If it is outside Veronica Roberts's area of expertise, it is even further out of mine as a simple M&A lawyer. I have been doing this for nearly 30 years now and remember looking at cases on media plurality and those kinds of things in the early days.

Public interest is, on the face of it, a very good thing. I would not necessarily have a problem with it if that is what the policy makers decide to put in there as long as there was some clarity around how and in what circumstances that would be the approach.

It is not for me to say whether a policy is a good idea or not. It is trying to understand what that policy means and in particular what it means in practice to our clients when advising on M&A.

Q256 **Bob Seely:** That is why you would then have a definition where you have an indication of what the trigger points are. You cannot have something that allows different Governments of different political stripes wide range to interpret. I understand the potential to scare investors off, and that would be bad, but to have no trigger points for somebody with human rights abuses, significant reputation, or a character test reputation or nothing about public interest, whatever the trigger point, just seems to be counter to a lot of what we are trying to do in this country by having a value system of value and use but one that we are keen for other people around the world to appreciate.

Effectively, what we are saying is that we talk about human rights an awful lot, but when it comes to this sort of stuff we are not terribly interested; we are open for business, no questions asked. We have had big problems with Chinese and specifically Russian investment and Russian influence over the last 10 years because of that. That lowest common denominator approach tends to backfire over time. Having something there will aid us to have a credible system that will be better for us in the long run.

Roger Barron: I fully understand the point. For these purposes, it is clearly something that the Government of the day could do if they wanted to. This Bill is focused on national security. I think that that would be extending it somewhat, and if that is what Parliament and Government want to do, then that is fine. As an M&A lawyer, I do not have a view.

Q257 **Royston Smith:** Do you agree with the Bill's assessment that state-owned entities and funds do not inherently pose more of a national security risk than other parties?

Veronica Roberts: The right approach has been taken on that. Some other foreign investment regimes have made state-owned enterprises subject to slightly stricter controls and regimes. It is clearly the case that we in the UK welcome with open arms an array of investment from state-owned entities, and the Government will have the ability to look into ownership when they want to. The right balance has been struck there.

Roger Barron: From my understanding, national security covers a broad spectrum. At one end of the spectrum, you have nations that from time to time are hostile actors to our country. It is perfectly right for our Government to look at it if the enterprise is simply a commercial arm of that state. It will be helpful if there is guidance. This is where we come into white lists and black lists. Knowing whether there are particular nations—and by extension state-owned enterprises—that pose a particular problem will be welcomed.

On a state-owned enterprise per se of a friendly nation, we talked about white lists a little bit. Until the end of this calendar year, everybody in the EU is our friend. Could you extend the white list to them next year? Are there other countries that would fall the other side of the equation for now? Rather than pretending there is a process that everyone can go through and at the end of it you are blocked is not in anyone's particular interest. There are extreme examples at both ends where it would be helpful to have clarity about whether a particular nation's investment is welcome or unwelcome if that is what the Government of the day want to do.

Q258 **Royston Smith:** Ms Roberts already alluded to my next question, which is about whether there is going to be an exempt list. I appreciate it may be straying outside your expertise, but we are trying to get an idea of what people think about the Bill and why some things are in and some things are out, and other things are not as clear as they perhaps ought to be. Why do you think the Government are not using a white list or an exempt list? Why do you think they are reluctant to do so?

Veronica Roberts: From the papers, the Government have said that they want to see the regime bed down in practice, but they have said that they would welcome applications from investors, and they may well be state-owned entities with a range of investment in the UK that do not present any issue whatsoever. They have said that, if they can go through a couple of notifications and they do not give rise to any issues, and the Government are clear what the ownership is and what their track record is of investment in the UK, they should be able to go on a white list. It looks like the Government want to see how this works for a few months.

Some of those organisations are companies that will be making notifications very frequently indeed given the broad remit of the 17 sectors. Provided they get through that process a couple of times with no problem at all, it is very reasonable and welcome that they go on a white list. I am sure that the Government would have the possibility to retract that if there was a material change in circumstances, but it would relieve the Government of a number of notifications to review and would give certainty to the really important investors that we want to encourage, not discourage.

Q259 **Royston Smith:** Do you think it is about allowing the new legislation to bed down? Is there no other motivation for not having anyone on or off a

list currently?

Veronica Roberts: That is certainly my sense when I read through the papers. The Government do not want to start off with a regime and already have people that are exempt from it. I would very much hope that the Government move very quickly to put that white list in place and identify the category of investor and, maybe sometimes directly with the company, identifying that they will effectively be exempt from those requirements until further notice.

Many of those companies will already be seeking informal guidance from the new BEIS unit about transactions. Let's face it, they may have signed transactions, when we saw the Bill on 11 November, that were complete before commencement date. They need more certainty about whether the Government will be interested in reviewing those transactions. I expect that there will be a lot of interaction between that type of investor and the Government even before commencement date. Hopefully, the Government will be ready to move very quickly once the Act is in force. That will be a very welcome development.

Royston Smith: Mr Barron, do you want to add anything to that?

Roger Barron: The idea of an exempt list is attractive. On the other hand, to your question on why they would not want to do it, I suppose, if someone is okay to buy one asset, they are not necessarily okay to buy another asset. They want to keep the flexibility to be able to say, "We do not mind you buying this type of software or this property," or whatever it might be, "but we might have concerns if you introduce things in a different way." You can always focus on the identity of individuals and leave the sectors to one side. That is the kind of discussion I suppose we are having—if someone is going to be clear at all.

Certainly from an M&A perspective, being clear that if you are going to an auction you can wave your card to the other party and say, "Look, I am able to do this deal," is very attractive. I wonder if it is the best use of everyone's time and resources to put people through their paces over a few transactions to see where they end up. You can almost do this outside the ticking clock and have certain regular investors educating those who need to make the decisions in advance outside a deal context so that, when a deal context comes along, those decisions can happen more speedily in everyone's interests.

Q260 **Chair:** I have a final question to you both on the Bill accounting for the risk of disguised takeovers—namely, the acquisition of a UK company by a friendly entity, who then goes on to sell it to a potentially hostile entity. Clearly, this links to the Imagination Technologies example that many of us are aware of. Do you see this Bill as helpful in that circumstance?

Veronica Roberts: This Bill does give opportunities for the Government to step in when assets are then onward sold. It gives the Government considerable flexibility to do that.

Roger Barron: I agree with that. I do not know whether your final question is indeed your final question. There is one other area I wish to raise, if I may.

Chair: Please raise it.

Roger Barron: There is one area that causes me a lot of concern. We have talked about things at the start of transactions and certainty and what can be done and all the rest of it. The other side of the transaction is the whole idea that transactions can be declared legally void if they should have been notified, approved and worked. I can understand the attraction of that, but I wonder whether the ramifications have been fully thought through and whether other tools of enforcement and sanctions could be sufficient to avoid some of those ramifications.

On the idea that a transaction that happened over a period of time ago is declared legally void, as if it never happened, there are all the things that—not just the transaction itself—flow from that transaction: the banks who lent money, and the employees who may have been hired off the back of that transaction or who received share awards and so on. The security of taking over property and assets and charges over the assets of a company register with Companies House and land registries gets unwound. You could find yourself a month or two later with somebody applying and saying, "I am materially prejudiced by this," and with the wave of a wand it all gets put back together again.

It is hardly for two lawyers to say that this is not a great thing because this is going to cause an awful lot of work for lawyers. That happens. I wonder whether there are better ways. Aside from the fact that criminal and civil sanctions are already available, there are other things that you could do. You could force people to hold the assets separately. You make sure they could not touch the relevant assets. You could put somebody into the business to oversee it to make sure that does not happen and so on and so forth.

There is a real risk that, if a transaction is declared void, it is not just going to be the offending party—or parties—who will be penalised. There will be an awful lot of fallout for a lot of very innocent people, including citizens of the United Kingdom.

Veronica Roberts: I will add that in the two longer-standing foreign investment regimes in the world, which are CFIUS in the States and FIRB in Australia, it is not the case that the transaction will be void. The authority can say that the transaction must be unwound. There is an ability to say that the transaction is voidable, but it is not an outright, "This transaction is void." As Mr Barron says, it gives rise to all sorts of practical difficulties and may not even be enforceable because this legislation will apply to a US company buying another US company that happens to have a UK subsidiary in one of the 17 specified sectors. That agreement will be subject to US law. It is an interesting point for lawyers,

but it does not work in practice. It would be much better to say that it is voidable and it would depend on the circumstances.

There is one other point on timing. Clearly, the Government have said that there will be an initial period of 30 working days to review notifications, and then if they give rise to national security concerns they can be pushed into a further review period, which will be a first stage of 30 days and then a further 45 days. Potentially, that is 105 working days. That is a very lengthy process, and we would very much welcome some speed being injected into that.

The earlier panel talked about this. It might be worth looking at the French foreign investment regime, which has a fast-track of 10 days to tell investors whether they want to investigate a transaction in more detail—a shorter time period simply to flag up whether there might be any issues and then do a more detailed review. It would be very welcome for investors to try to cut the initial 30-working-day period.

Chair: Thank you very much. You both know the Government are looking for ideas and amendments and have been very open about that, and this Committee is looking to suggest any. If you have future and further thoughts, we would be very happy to hear them. I am extremely grateful for your input today. You have been extremely generous with your time again, and I am particularly grateful for your insight.