

Insights

NEW UK GOVERNMENT POWERS TO SCRUTINISE M&A DEALS ON PUBLIC HEALTH AND NATIONAL SECURITY GROUNDS

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On 21 June 2020, the UK Government announced that it is introducing emergency legislation that will bolster its powers to scrutinise, and potentially block, foreign takeovers on new public interest grounds, namely:

- to maintain domestic capability to combat and mitigate the effects of the COVID-19 pandemic and future public health emergencies; and
- to broaden the scope of transactions reviewable on national security grounds to those touching artificial intelligence (**AI**), cryptographic authentication technology and advanced materials.

Amendments to the Enterprise Act 2002 (**EA02**) come into force today, 23 June 2020, to enable the Department for Business, Energy and Industrial Strategy (**BEIS**) to intervene if a business directly involved in the pandemic response (such as a vaccine research company or PPE manufacturer) becomes the target of a takeover, and would otherwise have been subject only to competition review. This change is implemented by an extension of the list of public interest considerations on the basis of which Government may intervene (national security, media plurality and financial stability) specified under the EA02, to public health emergencies.

In addition, the Government proposes to legislate in the short term to enable it to review mergers involving three sectors considered to be central to national security (AI, cryptographic authentication technology and advanced materials), even in the absence of significant target turnover or overlap between the parties' activities (and which is currently a pre-condition for intervention).

2018 NATIONAL SECURITY REFORMS TO THE ENTERPRISE ACT 2002

The proposed national security reforms broaden the scope for intervention against foreign investment in the AI, cryptographic authentication and advanced materials sectors. The reforms build directly on the EA02 reforms introduced in June 2018, which lowered the thresholds for UK Government intervention on national security grounds in deals in the military or dual-use, computing

hardware and quantum technology sectors. Currently under the EA02, the Government can review deals in these sectors where:

- the turnover in the UK of the entity being acquired is £1 million or more (a significant lowering compared to the £70 million target turnover threshold for other sectors); and/or
- the target has an existing share of supply of 25% or more of the relevant goods and services (unlike for other sectors, this does not require an overlap in the parties' activities).

The Government continues to have the right to intervene on national security or other public interest grounds (media plurality, financial stability and, from today, maintaining domestic capability to combat public health emergencies) in deals in any other sector that meet the UK merger thresholds that apply to the broader economy.

THE BROADER FOREIGN INVESTMENT REGIME

Historically the UK has been one of the most laissez-faire of the major developed economies when it came to foreign ownership of strategic assets and companies, in many respects making it one of the most attractive jurisdictions for foreign direct investment. Nevertheless, the UK has begun to reconsider its approach significantly in response to concerns about national resilience and security.

The Government's latest reforms appear to be a direct response to the perceived threat posed to the UK and UK companies by COVID-19 and to increased direct and indirect foreign investment in advanced technologies. The Government considers that it has lacked the legal tools to safeguard the UK's national interests effectively and is extending the reach of the merger control regime in the short term ahead of the much more fundamental changes due under the National Security and Investment Bill (**NSI Bill**).

UK'S NSI BILL

The draft NSI Bill, which is yet to be published, is intended to further strengthen the UK Government's powers "*to scrutinise investments and consider the risks that can arise from hostile parties acquiring ownership of, or control over, businesses or other entities.*" It would enable the Government to call in for review a wide range of transactions on national security grounds, irrespective of deal size, structure or sector, provided the Government has a reasonable suspicion that the transaction may give rise to a risk to UK national security due to the identity of the acquirer, the nature of the activities of the entity, or the nature of the asset, to which the transaction relates.

Whilst the timing for adoption of the NSI Bill is unclear, last month the Prime Minister indicated that the draft NSI Bill would be published in the coming weeks. Indeed, it is likely that the COVID-19 crisis and the resulting concern that foreign investors may be able to more easily acquire critical UK businesses financially weakened by the pandemic has pushed national security to the top of the UK Government's legislative agenda.

THE PROTECTIONIST TREND

The UK is not alone in tightening up efforts to screen foreign investments by bringing forward legislative reforms to protect national interests during the pandemic. Many jurisdictions globally have accelerated the introduction or strengthening of their FDI regimes intended to protect national strategic assets and technology in light of the economic impact of the pandemic, and a perceived threat from foreign, often State-backed, investment. Indeed, even before the EU's new FDI Regulation, expressly aimed at security and public order intervention, takes effect in October 2020, the European Commission's White Paper last week proposed sweeping new intervention powers to protect the "level playing field" of the EU single market from the actions of State-subsidised non-EU entities.

CONCLUSIONS

Strengthening the UK's ability to protect its national security interests has been part of the political agenda for some time, with plans to strengthen national security review of M&A activity first announced by then Prime Minister, Theresa May. The economic and geo-political challenges presented by the COVID-19 pandemic have brought the issue firmly into focus. Foreign investment approval and the "national interest", writ large, now needs to be a framing consideration in all transactions with a cross-border element in the UK and elsewhere.

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