

UK Government Introduces New Powers to Intervene in Mergers on Public Interest Grounds

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On 22 June 2020, the UK Government introduced new measures allowing it to intervene in merger transactions “to maintain in the United Kingdom the capability to combat, and to mitigate the effects of, public health emergencies.”¹ The Government will be able to intervene on these grounds in any transaction that meets UK merger thresholds, including those that also meet EU thresholds. These measures, which are effective as of 23 June 2020, have been introduced in direct response to the COVID-19 pandemic, and will apply, among others, to businesses involved in the development and distribution of vaccines and other pharmaceuticals for treatment of the virus and to those manufacturing of PPE and healthcare equipment.

The UK Government’s measures pattern those taken in numerous other countries to strengthen foreign investment rules during the COVID-19 pandemic in the healthcare sector.² The French, German and Italian Governments, among others, have strengthened their respective foreign investment regimes, and, in March 2020, the European Commission published a communication urging EU Member States to screen foreign investments into critical healthcare infrastructure.³

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¹ The Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2020, available at <http://www.legislation.gov.uk/ukxi/2020/627/contents/made>.

² See <https://www.clearytradewatch.com/2020/04/evolving-european-foreign-direct-investment-review-during-the-covid-19-pandemic/>.

³ See <https://www.clearygottlieb.com/news-and-insights/publication-listing/european-commission-urges-member-states-to-protect-suppliers>.



The UK Government has also proposed legislation to reduce the thresholds for reviewing acquisitions of companies involved in the artificial intelligence, cryptographic authentication technology or advanced materials sectors.⁴ The Government will be able to intervene where a target's UK turnover exceeds £1 million (substantially lower than the £70 million threshold that applies to most other sectors) or the target or parties combined have a UK share of supply of at least 25% (even where that share will not increase following the merger). These lower thresholds have applied since June 2018 to firms that develop or produce items for military use, computer hardware, or quantum technology. The proposed changes will come into law once approved by Parliament.

Background

There are currently no specific controls on foreign investment in the UK. The Government can intervene on public interest grounds only if a transaction qualifies as a "relevant merger situation" (by which two businesses "*cease to be distinct*" and, in most cases, the transaction meets a UK turnover or share of supply test). Political involvement in merger control is limited. In most cases, decisions are taken on technical competition grounds by the Competition and Markets Authority. The Government can intervene directly in only three situations.

- **Public interest cases.** The Secretary of State can intervene in mergers that meet the UK thresholds and also raise one or more "*public interest considerations*" specified in the legislation. Until the most recent amendment, these were: national security, plurality of the media, or the stability of the UK financial system.⁵ As noted above, the thresholds are lower in respect of transactions involving firms that develop or produce items for military use, computer hardware, or quantum technology.

- **Special public interest cases.** Some mergers that do not meet the UK thresholds may still be investigated on public interest (but not competition) grounds. They are currently limited to mergers involving "*government contractors*" holding confidential information relating to defence and certain mergers in the newspaper and broadcasting sectors.
- **EU Mergers.** Certain mergers that fall within the scope of the EU Merger Regulation can also be reviewed on public interest grounds at national level. Under the EU Merger Regulation, Member States may take "*appropriate measures*" to protect public security, the plurality of the media, and prudential rules. Any other public interests must be approved by the European Commission on a case-by-case basis. Following the UK's departure from the EU on 31 January 2020, the UK entered a transition period due to end on 31 December 2020. EU competition law continues to apply in the UK until the transition period ends (and to mergers notified to the European Commission before the end of that period), meaning that the European Commission continues to have exclusive jurisdiction over transactions with an EU dimension, including those affecting UK markets.

The New Measures

Public Health Emergencies

The Government has added a fourth "public interest consideration" allowing intervention in mergers meeting UK thresholds: "the need to maintain in the United Kingdom the capability to combat, and to mitigate the effects of, public health emergencies." The procedure applied if the Government issues an intervention notice will be the same as under the current regime in respect of other public interest considerations. Following intervention on this basis, the Secretary of State will be able to make enforcement orders for the same purpose. The

⁴ The Enterprise Act 2002 (Share of Supply) (Amendment) Order 2020, available at <http://www.legislation.gov.uk/ukdsi/2020/9780348208795>.

⁵ The stability of the UK financial system was introduced as a new public interest consideration by the Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008, SI 2008/2645, in the context of *Lloyds TSB plc/HBOS plc*.

Government will be able to take equivalent steps in respect of transactions that would otherwise be subject to the exclusive jurisdiction of the European Commission.

These changes took effect from 23 June 2020, although they could in principle be withdrawn if they are not approved following subsequent scrutiny by Parliament prior to 19 July 2020.

Artificial Intelligence, Cryptography, and Advanced Materials

The Government has laid a Statutory Instrument before Parliament that, if passed, will lower the thresholds for Government intervention in mergers in the artificial intelligence, cryptographic authentication technology and advanced materials sectors. Under the new rules, mergers in the prescribed sectors will qualify for review on competition and public interest grounds if:

- The target’s UK turnover exceeds £1 million; or
- The target or parties combined have a UK share of supply of at least 25% (regardless of whether that share of supply would increase as a result of the merger).

The Statutory Instrument defines the relevant sectors as follows:⁶

1. **Artificial intelligence** means technology enabling the programming or training of a device or software to use or process external data to carry out automated analysis or decision making, or analogous processing of information.
2. **Cryptographic authentication** means the method of verifying a person, user, process or device, or verifying the origin or content of encrypted electronic communications.
3. **Advanced materials** means (a) materials which are capable of modifying the appearance, detectability, traceability or identification of any

object within a certain range, (b) any alloys that are formed by chemical or electrochemical reduction of feedstocks in the solid state, (c) manufacturing processes that are involved in the solid state formation of alloys in or into crude or semi-fabricated forms, or powders for additive manufacturing, or (d) metamaterials (excluding fibre-reinforced plastics with a random dispersion of filler or packaged device components designed for civil application).

In 2018, the Government lowered merger thresholds in the same manner for mergers relating to firms that develop or produce items for military use, computer hardware or quantum technology.⁷ Under the new rules, a merger involving one of these sectors could in principle be reviewed on purely competition grounds or for any relevant public interest consideration. The UK Competition and Markets Authority (“CMA”) has nevertheless indicated that it does not expect transactions meeting only the new lower thresholds to be reviewed unless they raise national security considerations. The CMA has also published Guidance on how the reduced thresholds will be applied in practice, suggesting that transactions meeting only the lower thresholds are unlikely to give rise to competition law concerns.⁸

Longer-Term Reforms

The Government carried out a consultation in 2017 about the UK’s national security investment regime, which included a number of longer term reforms. Following the initial consultation, the Government published a detailed proposal in 2018,⁹ the principal features of which included the following:

- A national security review separate from review by the CMA that would go beyond merger control, applying to a wide range of “*trigger events*.”

⁶ See Section 3(4) of the Enterprise Act 2002 (Share of Supply) (Amendment) Order 2020 for more detailed definitions.

⁷ See <https://www.clearygottlieb.com/-/media/files/alert-memos-2018/uk-introduces-new-thresholds-for-national-security-mergers-pdf.pdf>

⁸ See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/715167/guidance_on_changes_to_the_jurisdictional_thresholds_for_uk_merger_control.pdf.

⁹ See <https://www.clearygottlieb.com/-/media/files/alert-memos-2018/uk-government-proposes-national-security-and-investment-regime.pdf>.

- The Government’s ability to intervene would not be limited to specific sectors, although certain sectors are identified as being “*more likely to raise national security concerns.*”
- If “called in” by the Government for detailed review (whether having been notified voluntarily for an initial “*screening*” or not), transactions could not close prior to securing approval. Completed transactions could be called in within six months.
- In-depth review would take up to 30 working days, but the Government could “*stop the clock*” while parties respond to information requests. The review period could be extended by 45 working days if a national security risk is identified and further scrutiny and consideration of remedies is required.
- Decisions would be made by a “*Senior Minister*” (Secretaries of State, the Chancellor, or the Prime Minister), with powers to impose “*such remedies as [are] necessary and proportionate.*”

Further details about these proposals are available [here](#).

Comment

The Government has been under pressure, in light of the COVID-19 pandemic, to follow other countries that have introduced measures enabling the protection of critical healthcare infrastructure.¹⁰ Instead of introducing a broader foreign direct investment regime, the Government has introduced short-term measures that can be implemented quickly. These measures echo the addition of the “stability of the UK financial system” as a public interest consideration in 2008 to address the financial crisis generally and, more specifically, to enable the Government to clear a transaction (Lloyds/HBOS) that would otherwise have required more detailed scrutiny under competition law.

In addition to the usual assessment whether to notify a transaction to the CMA for review on competition

grounds, firms contemplating a transaction in the healthcare sector will need to assess the risk that a transaction might be called in for review on public interest grounds. Since such review can be suspensory, parties will need to consider the effect that such review might have on transaction timing.

Although there is no precedent for the type of remedies that might be required to mitigate any concerns relating to public health emergencies, parties can look to precedent in defence sectors transactions. In such cases, any concerns have typically been resolved with commitments that seek to address two main concerns: (i) the maintenance in the UK of strategic capabilities to carry out defence-related work for the Ministry of Defence; and (ii) the protection of classified technology and information.

The longer-term reforms to the UK’s national security and investment regimes are likely to have a more significant impact than these changes, and a much larger number of transactions could be subject to review and intervention as a result, including transactions that do not qualify as “mergers” or meet existing thresholds.

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¹⁰ For further information on changes introduced recently in the EU, see <https://www.clearygottlieb.com/-/media/files/alert-memos-2020/european-commission-urges-member-states-to-protect-suppliers-pdf.pdf>, [\[the-german-foreign-direct-investment-control-regime-take-shape-amid-the-covid-19-crisis/\]\(https://www.clearygottlieb.com/news-and-insights/publication-listing/french-foreign-investment-control-new-rules-applicable-as-from-april-1st-2020\), and <https://www.clearygottlieb.com/news-and-insights/publication-listing/french-foreign-investment-control-new-rules-applicable-as-from-april-1st-2020>.](https://www.clearytradewatch.com/2020/06/changes-to-</p>
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