

# UK Government Prohibits Acquisition of UK Supplier of Military Aircraft Components

September 22, 2020

On 5 September 2020, the UK Government [accepted](#) undertakings from Gardner Aerospace Holdings Limited not to proceed with its proposed acquisition of Impcross Limited, a UK-based manufacturer of components for the aerospace industry (including for military aircraft). Gardner is owned by Shenzhen-listed Ligeance Aerospace Technology Co., Ltd (“LAT”). Specifically, the Government identified concerns relating to:

- The “*protection of the UK’s aerospace capability and the safeguarding of sensitive information, skills and manufacturing capability within Impcross;*” and
- The “*protection of the UK’s operational advantage.*”

This is a rare case of the UK Government effectively prohibiting a transaction on national security grounds. Government intervention in defence-sector transactions, even where the Ministry of Defence identifies possible national security concerns, has not typically prevented transactions from proceeding. In most cases, transactions have been cleared subject to undertakings that seek to address two main concerns: (a) the maintenance in the UK of strategic capabilities to carry out defence-related work for the Ministry of Defence; and (b) the protection of classified technology and information.

In the present case, the Government sought formal undertakings despite being told by Gardner in April 2020 that it had abandoned the transaction after the Competition and Markets Authority (“CMA”) issued a phase 1 report to the Secretary of State identifying national security concerns. The prohibition on acquiring any shares in Impcross (without the consent of the UK Government) applies for a year from the commencement of the undertakings (*i.e.*, until September 2021). Gardner is also required to notify the

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Government of any discussions with Impcross that take place during the following year (*i.e.*, until September 2022). The Government’s intervention was more far-reaching than in similar recent cases – by way of example, Government intervention into the proposed acquisition of Mettis Aerospace by Aerostar (a Chinese entity that controls LAT) was [closed](#) without formal undertakings when the transaction was abandoned shortly after the intervention notice was issued – and it is unclear whether the approach adopted in the Gardner case represents a new policy or one that was specific to that case.

The decision is consistent with a more interventionist approach that has been signalled by the UK Government over the last three years. In particular, the Government has [proposed](#) a new national security and investment regime under which a far larger number of transactions could be subject to Government review and intervention, including transactions that do not qualify as “mergers” or meet existing thresholds. The Government has also recently [introduced](#) new grounds for public interest intervention under the current regime (to combat public health emergencies) as well as lowering the jurisdictional thresholds for review of transactions in several particularly sensitive sectors (in [2018](#), for military or dual-use products, computer hardware, and quantum technology, and in [2020](#), for artificial intelligence, cryptographic authentication technology, and advanced materials). The UK Parliament’s Committee on Foreign Affairs is also conducting an [inquiry](#) into the Foreign Office’s “*role in blocking foreign asset stripping in the UK.*”

## Current Regime

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 merger (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 generally limited and, in most cases, decisions are taken on technical competition grounds by the CMA.

The Secretary of State can, however, intervene in qualifying mergers where they raise one or more “public interest considerations” specified in the legislation.<sup>1</sup> These “public interest considerations” are national security, plurality of the media, the stability of the UK financial system and – since [June 2020](#) – the ability to combat public health emergencies.

Once the Secretary of State has issued a public interest intervention notice, the CMA must report to the Secretary of State on jurisdiction and competition issues, together with a summary of the representations it has received on public interest matters – typically, in the case of defence-sector transactions, from the Ministry of Defence. After reviewing the CMA’s report, the Secretary of State will either refer the case for a more detailed Phase 2 investigation or clear the transaction, either unconditionally or subject to undertakings.

If the transaction is referred to Phase 2, the CMA must prepare a report for the Secretary of State within 24 weeks of the reference to Phase 2 (extendable by 8 weeks if there are “special reasons”). The report must include a decision on jurisdiction, and recommendations on whether the Secretary of State or others should take action to remedy, mitigate or prevent any adverse effect on the public interest. Within 30 days of receipt of the CMA’s Phase 2 report, the Secretary of State must decide whether to clear the transaction, require remedies or prohibit the transaction altogether.

## Gardner/Impcross

Gardner is a manufacturer of parts for the aerospace industry. Most of its sales are made directly to Airbus or other suppliers whose products are subsequently fitted on to Airbus aircraft. It is ultimately owned by LAT, which is listed on the Shenzhen Stock Exchange. Impcross is a UK-based manufacturer of aerospace parts, including for military aircraft. The Transaction concerned the

<sup>1</sup> Certain mergers that do not meet the UK thresholds may also 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.

anticipated acquisition by Gardner of the entire shareholding in Impcross.

### Public Interest Intervention Notice

On 5 December 2019, the Secretary of State for Business, Energy & Industrial Strategy issued a public interest intervention [notice](#). At the same time, the Secretary of State issued an [order](#) preventing any step being taken to integrate Impcross's business with Gardner's business, including the transfer of information, know-how and documents. The order also prevented Gardner from taking ownership or control of Impcross's business pending the outcome of the public interest intervention. This was the first time that the Secretary of State (rather than the CMA) had issued an order under Schedule 7 of the Enterprise Act 2002 to prevent pre-emptive action in a transaction giving rise to public interest considerations.<sup>2</sup> The second such [order](#) was made two weeks later in respect of the proposed acquisition of Mettis Aerospace by Aerostar.

The CMA issued its [report](#) to the Secretary of State on 2 March 2020, covering jurisdiction, competition issues, and national security issues.

### Jurisdiction

The CMA's assessment of jurisdiction is heavily redacted, but the principal question was whether, given the early stage of negotiations between Gardner and Impcross, the Transaction was "*in contemplation*" within the meaning of Section 26 of the Enterprise Act 2020. The CMA found that the Transaction was "*in contemplation*," referring in particular to:

- "*Evidence of genuine consideration given on the part of the acquirer in relation to entering into the Transaction;*"<sup>3</sup>
- "*Evidence of the Parties' mutual contemplation of and interest in the Transaction;*"<sup>4</sup>
- Gardner's "*capacity to bring about the Transaction;*"<sup>5</sup>

<sup>2</sup> See paragraph 18 of the [2<sup>nd</sup> Report of Session 2019- 2021 of the House of Lords Secondary Legislation Scrutiny Committee](#).

<sup>3</sup> Gardner/Impcross, [CMA Report](#) of March 2, 2020, para. 4.8.

- At the time of the CMA's report, "*neither Party submitted that they no longer had an interest in the Transaction [nor] that they had decided to abandon the Transaction (and there has been no public announcement to that effect).*"<sup>6</sup>

Since Impcross's annual UK revenues were around £9 million (and the alternative share-based test would not have been met), the Transaction was only subject to UK jurisdiction as a result of the lowering in 2018 of revenue thresholds from £70 million to £1 million for transactions concerning military and dual-use products that are subject to export control.

### Competition Assessment

The CMA dismissed the possibility of competition concerns. It noted that in the aerospace sector each component typically performs a distinct and vital function, so different components are not substitutable. Third parties confirmed that the Parties did not product the same specific components – with Impcross focused on avionics and equipment, and Gardner focused on aerostructures – and customers had not approached the Parties to produce the same products.

### National Security Assessment

The CMA Report summarised the views of the Ministry of Defence on the national security implications of the Transaction.

The CMA's Report explains that the Ministry of Defence issued various information requests to the Parties and selected third parties, conducted site visits to Impcross, and commissioned analysis from defence and security subject matter experts. It concluded that the Transaction would give rise to national security concerns relating to "*the protection of the UK's aerospace capability and the safeguarding of sensitive information, skills and manufacturing capabilities within Impcross*" and "*the UK's operational advantage.*"<sup>7</sup> The Report noted that the Ministry of Defence had been considering possible remedies to address those risks and would advise the Secretary of State directly. The

<sup>4</sup> *Idem*, para. 4.9.

<sup>5</sup> *Idem*, para. 4.10.

<sup>6</sup> *Idem*, para. 4.11.

<sup>7</sup> *Idem*, para. 10.6-7.

CMA also reported (in terms mostly redacted in the report) on concerns identified by other third parties.

### Termination of the Transaction

On 16 March 2020, in light of the CMA Report and further written advice from the Secretary of State for Defence, the Secretary of State informed Gardner and Impcross that he was inclined to refer the Transaction for a Phase 2 inquiry. Gardner indicated that it intended to abandon the pursuit of the Transaction and offered undertakings confirming the same. These undertakings were formally accepted by the Secretary of State on 5 September 2020.

### Proposed New Regime

The Government carried out a consultation in 2017 about the UK's national security investment regime. Following the initial consultation, the Government published a detailed [proposal](#) in 2018, 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*.”
- 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*.”

The Government confirmed in the [Queen's Speech of December 2019](#) that it would propose a National Security and Investment Bill. The timing of the draft Bill and the details of the regime it will propose remain uncertain.

### Conclusion

The Government's decision to block *Gardner/Impcross* illustrates its increasingly interventionist approach to transactions that give rise to public interest issues.

Between 2004 and 2018, the Government intervened 13 times on public interest grounds: eight times in respect of national security, four times on media plurality (three times relating to Sky), and once in respect of the stability of the UK financial market.<sup>8</sup> In 2019 alone, the Government intervened five times: four times on national security grounds and once in respect of media plurality.

Though not all of the 13 transactions in which the Government intervened between 2004 and 2018 proceeded to completion, none was prevented from closing on public interest grounds. In 2019-2020, as noted above, the Government effectively prohibited two transactions (*Gardner/Impcross* and *Aerostar/Mettis*). Though both of these cases concerned products with military use, the Government has signalled that it could adopt a similar approach to other sensitive sectors.

The decision to block the transaction rather than address concerns with remedies replicates under the public interest regime a trend that has become increasingly apparent in the CMA's review on competition grounds. In [2019](#), six out of the ten mergers subjected to Phase 2 review were prohibited (or abandoned following provisional prohibitions) compared with two out of eight transactions in 2018.

As well as more rigorous enforcement of existing powers, the Government has taken short-term measures to strengthen its ability to intervene on public interest grounds (reducing the threshold for

<sup>8</sup> The ground relating to financial stability was introduced in 2008 to allow the Government to force

through the transaction between Lloyds TSB and HBOS in spite of competition concerns.

jurisdiction in certain sensitive areas, as explained above, and introducing a new ground for intervention to protect the ability to combat public emergencies). It has also proposed a new national security and investment regime under which a far larger number of transactions could be subject to Government review and intervention, including transactions that do not qualify as “mergers” or meet existing thresholds.

This increasingly interventionist approach to public interest mergers in the UK is consistent with a broader political interest around the world in merger control, as demonstrated by the introduction of many new foreign direct investment regimes, the strengthening of existing regimes, and a greater willingness on the part of politicians to comment on mergers. The UK Government’s reaction may also reflect increased foreign investment in UK companies.

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