

COVID-19 crisis inspires global tightening of Foreign Investment Screening

United Kingdom

The UK currently has no standalone FDI screening regime, although the Competition and Markets Authority (CMA) has jurisdiction to review national security aspects of “relevant merger situations” subject to antitrust review. Short-term reforms implemented in June 2018 made it easier for deals to qualify for national security review in three areas: (i) military and dual-use items; (ii) certain aspects of computing hardware; and (iii) quantum technology. In June 2020, the UK Government announced the extension of those short-term reforms to cover three additional areas also deemed particularly important for national security: (i) artificial intelligence; (ii) cryptographic authentication technology; and (iii) advanced materials. At the same time new powers were introduced to intervene in mergers that threaten the UK’s ability to combat public health emergencies, such as COVID-19.

The current crisis has therefore given further impetus to proposals to give the Government stronger powers to intervene on non-competition grounds, as originally proposed in September 2016. Further longer-term reforms will likely take the form of a proposed National Security and Investment Bill (as outlined in the briefing notes accompanying the Queen’s Speech which took place in December 2019).

Key points to note about the proposed Bill are:

- The Government intends that the new long-term regime will provide businesses with certainty and transparency.
- The new regime will not only capture acquisitions of businesses but also acquisitions of other entities and assets, such as intellectual property, with national security implications.
- There will be a notification system for businesses to flag transactions raising potential security concerns for approval separate from the CMA merger control process. It had seemed likely notification would be voluntary, with the Government also able to call in relevant transactions for review if not voluntarily notified. However, recent reports in the business press suggest the impact of COVID-19 may have prompted a re-think and that notifications could in fact be mandatory.
- Notified transactions will be subject to “quick, efficient screening,” according to the briefing notes. The 2018 proposals envisaged an initial review period of 15 working days, with a full assessment lasting up to 105 working days.
- Problematic transactions may be subject to conditions, or blocked as a last resort, but with parties having the right to appeal. There will also be sanctions for non-compliance with the new regime.

There have been 12 interventions on national security grounds since 2002 – raising the question whether significant reforms are actually needed, especially given there is already much flexibility in the current merger review rules, which can capture relatively small deals (especially in the sectors mentioned above) and minority investments. However, much of the benefit of the proposed new national security regime may rest in the greater deterrent effect of a more prominent, standalone regime – plus the ability to scrutinize acquisitions of assets/entities falling short of a business (which the current regime does not allow).

Recent amendments to the Enterprise Act 2002 laid before Parliament on June 22, 2020 reflect more urgent changes deemed necessary now. The current COVID-19 pandemic and depressed share prices put businesses at greater risk of foreign takeovers and the Government has a concern that its ability to deal with a

public health emergency may be undermined if businesses with critical capabilities become subject to foreign control. Effective from June 23, 2020, an additional public interest consideration has therefore been added to the UK merger control regime, enabling mergers to be reviewed and possibly remedied or even blocked if there are serious concerns that the deal threatens the UK's ability to combat or mitigate a public health emergency. Potentially a broad range of businesses could be caught given the examples provided of vaccine research companies, personal protective equipment manufacturers, internet service providers and food supply chain companies.

In addition, changes that became effective on July 21, 2020 make it easier for mergers involving parties active in artificial intelligence, cryptographic authentication technology and advanced materials to qualify for a national security review by lowering the relevant thresholds for review, replicating changes

implemented in 2018 regarding military and dual-use items, computing hardware and quantum technology. A national security review is possible if the target is active in the relevant sector and has UK turnover exceeding £1 million or a UK "share of supply" of at least 25 per cent. These thresholds are considerably lower than the thresholds that generally apply (£70 million UK turnover or a 25 per cent share of supply with an increment), putting many more potential transactions at greater risk of a review. However, there has not been the expected slew of national security cases in the three sectors for which the same change was implemented in 2018 – reflecting that deterrence may be the main aim.

Both these reforms announced in June 2020 are intended to be stop-gap measures prior to the more comprehensive long-term changes expected to come with the National Security and Investment Bill.

By **Caroline Thomas**