

UK merger control: Public health emergencies and foreign takeover scrutiny

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New measures, announced on 21 June 2020, will allow the UK Government to intervene in relation to transactions involving businesses with "critical capabilities" to help combat public health emergencies, such as coronavirus.

Additional planned measures include expanding the list of sectors to which significantly lower merger control thresholds apply (artificial intelligence, cryptographic authentication technology and advanced materials). This step comes after similar powers were introduced in 2018 in relation to military, dual-use and advanced technology sectors (see our previous [briefing note](#)).

Both developments form part of a trend towards greater involvement by Government in merger control cases, and come ahead of the publication of the planned National Security and Investment Bill.

Key changes

Although the Competition and Markets Authority (CMA) is the primary merger control enforcement agency in the UK, in very limited circumstances involving specified public interest considerations, the Government can intervene and assume the role of the final decision maker.

The new measures expand the scope for intervention by the Government:

- From 23 June 2020, the grounds upon which the Government can make a public interest intervention under the Enterprise Act 2002 (EA02) include "*the need to maintain in the United Kingdom the capability to combat, and to mitigate the effects of, public health emergencies*". This is now an additional ground alongside the existing grounds of national security, media plurality and stability of the financial system. The last time that this list was expanded was in 2008 when, in response to the financial crisis, the then Government introduced the stability of the financial system as a public interest ground.
- The Government also intends to expand the scope for scrutiny of transactions in three sectors considered key to national security: artificial intelligence, cryptographic authentication technology and advanced materials. The relevant merger control thresholds will be lowered, which will enable the CMA to scrutinize more deals and, importantly, give the Secretary of State greater scope to intervene on national security grounds. These changes require parliamentary approval, but are expected to come into effect shortly.

Public health emergencies

The COVID-19 pandemic has brought into sharp focus the need for a secure and stable supply chain to help combat public health emergencies. This includes both the direct and indirect effects of such emergencies.

Section 42 of the EA02 currently permits the Secretary of State to intervene and investigate transactions where certain public interest considerations arise but, to date, these had been limited to grounds of national security, media plurality and financial stability. The Government now has the power the ability to intervene in transactions on the public interest ground of "*the need to maintain in the United Kingdom the capability to combat, and to mitigate the effects of, public health emergencies*". Effective from 23 June 2020, this new ground was introduced by The Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2020).

In announcing the change, the Government cited the example of a business directly involved in a pandemic response such as a vaccine research company or personal protective equipment (PPE) manufacturer. However, the new public interest ground is intended to go significantly further than goods and services directly related to public health. The Government has made it clear that it is more expansive in scope, and includes goods and services necessary to mitigate the impact of a public health emergency, giving continuity of food supply and internet usage as specific examples.

The scope for intervention is not unlimited. In order for the Secretary of State to intervene in transactions on grounds of "*public health emergencies*", the relevant transaction would still need to satisfy the existing UK merger control thresholds: either the target's UK turnover must exceed £70 million or, post-transaction, the merged entity will result in the creation or enhancement of a 25% share of supply or purchases of goods or services of any description in the UK. But even in relation to the existing thresholds, recent cases show that the CMA is increasingly willing to approach the share of supply test in a broad and flexible manner, which can be expected to continue.

Lower thresholds for certain technology sectors

The Government has also set out proposed changes to the merger control thresholds in relation to transactions in the sectors of artificial intelligence, cryptographic authentication technology and advanced materials. This follows similar changes in 2018 in relation to military, dual-use and advanced technology sectors (see our previous [briefing note](#)).

For transactions in these three sectors, the CMA will have the ability to intervene where either of the following reduced tests is met:

- the target's turnover exceeds £1 million (reduced from £70 million); and/or
- the target alone has a share of supply or purchase of at least 25% of any goods or services in the defined sectors (dispensing with the need for an increment to the share of supply).

Further detail is expected, but the draft legislation put before Parliament sets out some detail on what will be included in each sector:

- Artificial intelligence – technology enabling the programming or training of a device or software to use or process external data (independent of any further input or programming) to carry out or undertake (with a view to achieving complex, specific tasks) automated data analysis or automated decision making or analogous processing and use of data or information.

- Cryptographic authentication technology – including (i) the method of verifying the identity of a person, user, process or device; or (ii) the origin or content of a message, data or information, by means of electronic communication, where the method of verification has been encrypted.
- Advanced materials – including (i) materials that are capable of modifying (including in real time) the appearance, detectability, traceability or identification of any object to a human or to sensors within certain ranges; (ii) alloys that are formed by chemical or electrochemical reduction of feedstocks in the solid state; (iii) manufacturing processes that are involved in the solid state formation of alloys; and (iv) certain "metamaterials".

It is important to note that, where there are national security issues in play, the Secretary of State already has limited powers to intervene regardless of whether the merger control thresholds set out above are met. However, the revised thresholds will give the CMA greater scope to review the competitive impact of smaller transactions in these sectors.

What's next?

These changes come at a time of increased scrutiny of foreign takeovers by governments across the globe, as protectionism continues to rise. The changes also come at a time of a great economic uncertainty. The long term response to the coronavirus pandemic is still cautiously unfolding, and the outcome of the Brexit transition talks remains uncertain.

As with the amendments introduced in 2018, these reforms are a 'stop-gap' to plug holes in the Government's ability to tackle the risk of takeovers by actors perceived to be hostile to the UK's interests, particularly in the tech sector. Indeed, in announcing these new measures, the Government acknowledged that "[t]hese latest changes to the Enterprise Act are intended to mitigate risks in the short term ahead of more comprehensive powers in the forthcoming National Security and Investment (NS&I) Bill".

Although the Government's longer term plan is to introduce a foreign direct investment regime through the National Security and Investment Bill, it is unclear whether that Bill will reflect the White Paper published in 2018. The timing of the Bill is also unclear, and whether it will be presented before Parliament this year remains to be seen given the on-going, and more pressing, issues facing the Government at present.

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