

UK Government widens its powers to intervene in acquisitions

Companies deemed critical to combating COVID-19 and future public health emergencies gain protection as additional sectors are brought within the scope of national security reviews

The UK Government has strengthened its ability to intervene in acquisitions of UK businesses ahead of a new, more wide-ranging national security screening regime expected to be published shortly:

- **Building UK resilience in public health crises:** the Government will now be able to intervene in certain deals involving businesses critical to the UK's ability to combat, and to mitigate the effects of, public health emergencies such as the COVID-19 pandemic – including those that may have become more susceptible to hostile foreign takeovers. The new powers came into force on 23 June 2020 (see further below). They are in addition to the Government's existing powers to intervene in transactions on national security (including public security); media plurality; and financial stability (added in response to the 2008 financial crisis) grounds.
- **Widening the scope of national security interventions to address new risks:** the Government has also extended its ability to intervene in deals on national security grounds by adding 3 new categories of target businesses caught by the lower thresholds introduced in June 2018 (see our [briefing](#)): **artificial intelligence; advanced materials; and cryptographic authentication technology.** These join military and dual-use goods, quantum technology and computing hardware as sectors where the Government can intervene if the purchaser is acquiring material influence over a target earning at least £1 million of UK turnover (rather than £70 million under the usual rules). This expansion of categories will need to be debated and approved by Parliament before it can come into effect.

Deals involving companies critical to the UK's ability to combat and mitigate the effects of public health emergencies

Key points to note:

- **Sectors impacted:** the new rules apply to investments in, and joint ventures with, businesses that are critical to the UK's ability to combat, and to mitigate the effects of, a public health emergency. This potentially wide class of businesses:
 - includes targets that are directly involved in a pandemic response, such as pharmaceutical companies and research bodies involved in vaccine research, as well as companies involved in the manufacture of personal protective equipment (**PPE**) and other essential medical supplies;
 - but it is clear that the new public interest consideration is also wide enough to encapsulate companies that may play a crucial role in mitigating the effects of a pandemic, such as companies active in the food supply chain, logistics companies that play an essential role in keeping supply chains moving in exceptional circumstances or private healthcare companies that may offer resources to relieve burdens on the NHS in times of crisis.

The wide scope of the legislation is likely to ensure that, if the Government maintains that a company is vital to the UK's ability to deal with a health crisis, such a decision will be difficult to challenge in court. It is highly unlikely that a court would seek to overturn the Government's exercise of its discretion in determining which companies are critical to maintaining the UK's capability to respond to public health emergencies.

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- **Deals caught:** the Government may intervene where each of the following tests are met:
 - **Acquisitions of minority or controlling stakes** - any investments which enable the acquirer to materially influence the policy of the target. The UK regime's lowest level of control – 'material influence' - can occur at shareholdings as low as 10-15%, and exceptionally lower, as the Competition and Markets Authority (**CMA**) has wide discretion to take a range of factors into account (including the size of other shareholdings, board representation, material commercial agreements and the investor's industry expertise). **Joint ventures** and acquisitions of **further stakes** (which enable the investor to move from a position of material influence to control) may also be caught.
 - **The target is an 'enterprise'** – it must comprise an activity or assets capable of generating revenue. An enterprise usually includes assets, contracts and employees necessary to carry on a business, but assets alone will sometimes suffice where they enable a business activity to be carried on (e.g. a site or facility, or (rarely) intellectual property rights alone, where it is possible to identify turnover directly related to those assets).
 - **The 'turnover' or 'share of supply' tests are satisfied:**
 - Either target's UK turnover exceeds **£70 million**;
 - Or the acquisition creates or enhances a share of supply of goods or services in the UK of at least **25%** (a test that the CMA interprets increasingly widely).
- **The Government's powers:** the Government may intervene by issuing an intervention notice any time before the CMA refers the deal to a phase 2 investigation on competition grounds, and within 4 months after the deal has completed (or material facts are made public if later). If the Government intervenes:
 - The CMA will review the jurisdictional and competition issues of the deal (as usual), but will also seek views from government departments, sector regulators, industry associations and consumer bodies on the relevant public interest issue. The CMA will then report its findings to the relevant Secretary of State.
 - The Government will then decide the outcome of the case in light of the CMA's report. If the Government concludes that public interest issues arise it may:
 - Either refer the deal for a detailed phase 2 investigation, following which, if the CMA finds that the deal may operate against the public interest, the Government may prohibit or clear the deal or impose remedies;
 - Or accept remedies that address the public interest concern without the need for an in-depth investigation.
- **Experience so far:** since the current regime came into force in 2003, the Government has intervened in 20 cases - 12 times on national security grounds, 7 times on media plurality grounds and only once on financial stability grounds. No deal has yet been blocked as a result of public interest concerns (although a number of deals have been abandoned following an intervention), but strict conditions are frequently imposed as conditions to clearance. These typically involve:
 - ring-fencing of sensitive information and/or technology;
 - requirements to maintain strategic capabilities/ security of supply in the UK; or
 - commitments to maintain a UK head-quarters or presence and to protect employees and local R&D capabilities.

It is notable that, of the 12 national security interventions since 2003, 6 interventions have taken place since 2017, and 4 of these have involved investors from China. The 2 most recent Government national security interventions in deals involving Chinese acquirers (both related to Chinese investments in UK aerospace component manufacturers) resulted in abandonment of the transactions.
- **A more interventionist approach ahead:** the new powers have been introduced ahead of the long-awaited National Security and Investment Bill, which is due to be published shortly. This major legislation is expected to create a new national security screening mechanism which will be separate from the merger regime and will capture a wide class of acquisitions of UK entities and assets (including intellectual property), regardless of their turnover or market share. While it was originally expected that the new regime would be based on the Government's 2018

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White Paper (see our [briefing](#)), which favoured a voluntary notification regime, recent speculation suggests it could be significantly wider in scope and possibly require mandatory notification of deals.

- **The cross-party Foreign Affairs Select Committee** is also conducting an inquiry into the role of the Foreign and Commonwealth Office (**FCO**) in blocking foreign asset stripping of UK companies. The Committee is accepting evidence (up to 30 June) on what safeguards are required in the Bill to ensure the FCO has a full role in decisions to intervene.
- **The UK Government's steps are in-line with other major jurisdictions**, including the EU, where the European Commission recently issued guidance encouraging member states to use all tools available to them to avoid a loss of critical assets and technology to foreign ownership (see our [blog](#) and [recent report](#)). These developments are part of an increasingly protectionist wave taking place against the backdrop of COVID-19, protracted trade negotiations and increasing political tensions: as more barriers are raised, interventions are likely to become more political and will require careful management if merging parties are to secure acceptable commercial solutions.

Implications for investors

The new rules significantly widen the scope for Government intervention in acquisitions of UK businesses, ahead of more wide-ranging reforms.

Investors seeking to acquire stakes in companies should:

- Assess upfront the risk of intervention and implications for deal timing and execution risk.
- If the target business could fall within scope, engage with the relevant Government departments and other key stakeholders at the earliest opportunity.
- Consider how public interest concerns could be addressed in remedies or undertakings and engage proactively in discussions in order to mitigate the risk of a lengthy review. Experience has shown that solutions may be found in the majority of cases if parties are prepared to engage upfront with the Government and authorities.
- Bear in mind that, although there has been significant focus in recent times on the risks of Chinese investment (which has only been exacerbated by the fall-out from the COVID-19 pandemic), the majority of remedies required following national security interventions in the UK to date have involved investments from countries traditionally regarded as 'friendly', including the US and Canada. It is very clear that the Government's national security concerns are not limited to Chinese investment. Moreover, given the new public health emergency intervention ground is designed to maintain the UK's resilience to deal with public health emergencies such as COVID-19, any foreign entity investing in such companies is likely to face close scrutiny.

Given the Government's desire to protect UK companies from what it may see as opportunistic or exploitative approaches from foreign investors, it is very likely that critical UK companies will be able to rely on the Government's support in fending off unwanted takeover bids.

This is a rapidly developing area, with further legislative reforms expected shortly.

Please get in touch if further information would be helpful. For additional reading, visit our [Global antitrust in 2020: 10 key themes report](#) and our [Coronavirus Alert Hub](#).

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