



UK - FDI and public interest

A recently strengthened regime and proposed changes
– a different environment for foreign investors

June 2019

Current strengthened regime – an overview

- Merger control – competition review by EC or UK CMA depending on turnover thresholds.
- If EC thresholds are met, UK can still review mergers to protect “**legitimate interests**” as per Article 21(4) EUMR:

“Member States may take appropriate measures to protect legitimate interests [...] Public security, plurality of the media and prudential rules shall be regarded as legitimate interests.”

- EC has the **final word** on what qualifies as “legitimate interest” in accordance with EU law.
- E.g. UK reviewed Fox/Sky over media plurality concerns.
- UK can also protect “**essential security interests**” under Article 346 TFEU (i.e. arms, munitions and war material).
- Mergers and investments remain subject to **relevant sectoral and licensing regimes** (including water, financial services, energy, commodities etc.).



Current strengthened regime – an overview

UK cases (EC thresholds not met)

- Public interest cases:
 - National and public security (e.g. Melrose acquisition of GKN, 2018)
 - Media plurality and broadcasting standards
 - Stability of UK financial system (e.g. Lloyds acquisition of HBOS, 2008)
- Special public interest cases – certain media, government contractors, defence information.
- From June 2018 – mergers involving (1) military or dual-use goods, (2) computing hardware and (3) quantum technology sectors are subject to low thresholds for intervention (e.g. Gardner Aerospace acquisition of Northern Aerospace, 2018)
- Sectoral regulations and licencing regimes (see previous slide).

Current strengthened regime – an overview

Other relevant factors



UK Industry Act 1975 allows Government to prohibit changes of control over an “important manufacturing undertaking where that the change of control would be contrary to the interests of the UK” - this power has never been used however.



Public bids under the Takeover Code. A statement of intent is required and a legally-binding “post-offer undertakings” are possible (e.g. Comcast acquisition of Sky, 2017)



Golden shares – needs EC law compatibility (e.g. Hinkley Point 2016).

New proposed regime – a major change of approach

- National Security and Investment Consultation Paper published in July 2018.
- Far reaching changes proposed – could apply to **any sector** with a **significant expansion** of the government's power to intervene and review investment.
- The proposed new regime does not distinguish between domestic or foreign investors but hostile states or parties are clear focus.
- Huge potential increase in reviews. 200 notifications? Of which 100 will be subject to detailed reviews and of which 50 will result in remedies?
- Status currently unclear. What will be the views of the new government? Timing remains uncertain.



A voluntary but exhaustive regime

- **Notification remains voluntary, but investors are “encouraged” to notify** the Government in advance of any transactions which may raise national security issues.
- The Consultation Paper proposes a set of **“trigger events”** (see next slide) leading to a review of a deal relating to resulting influence or control over an entity (**not just full control**).
- The Government will be **able to intervene via by “calling-in” powers**, either before a transaction is completed or up to 6 months after deal completion, **increasing and prolonging deal execution uncertainty**.
- **No turnover or market share thresholds!**

A voluntary but exhaustive regime

- Very broad potential scope designed to catch national security concerns in any sector. Beyond listed “core” areas which include energy, communications, transport and nuclear sectors – the Consultation Paper makes clear that that national security concerns could potentially arise in **any sector of the economy**.
- Proposals include screening for acquisition of “assets”, including real estate property/land, intellectual property.
- A draft statement of policy intent highlights the following risk areas (trigger events):
 - **target risk**: particularly businesses involved in national infrastructure, advanced technologies, critical direct suppliers to the UK Government and emergency services, military and dual-use technologies and suppliers to those sectors; and
 - **acquirer risk**: investments by parties who may seek to use their acquisition to undermine the UK’s national security (‘hostile parties’) – which may be foreign or UK-based and are assessed on a case-by-case basis.
- “Senior ministers” would be able to approve, **impose conditions on, block or unwind already completed deals**.
- Proposals provide strong incentives for investors for **early Government engagement** if transaction review is likely.
- Potential for chilling investments?

The proposed procedure

