Are you a "saviour" or "bandit"?

A practical guide to navigating UK Government intervention in deals

Executive summary

Over the last two years, an important – if quiet – revolution has taken place. Expressed both through the adjustments made to the Enterprise Act 2002 and in the passage of the National Security and Investment Bill (now an Act), the UK Government has overhauled its apparatus for scrutinising and intervening in deals on public interest grounds.

At the same time, the Competitions and Markets Authority ("CMA") has taken a more aggressive approach to enforcement post-Brexit and demonstrated an increasing aversion to entertaining remedial solutions. The net result has been to make the task of getting some deals approved significantly more complex and challenging than before.

In this article, we explore how the process of completing a transaction has become more politicised, and we outline the best practices that are emerging to navigate this new landscape. We argue:

- Deal-making now requires a holistic approach that fuses together legal expertise and established regulatory affairs practices with an integrated communications campaign mind-set. While it remains essential to manage the legal process effectively, it is equally important to understand and shape the political environment surrounding a transaction.
- Meaningful economic commitments at the outset of a deal campaign can be essential to ensure a potentially contentious deal lands well – with investors and stakeholders alike. They are not, however, sufficient for getting a transaction done. Negotiating headroom should be left to help an acquirer weather a long and often contested clearance process.
- An acquirer's reputation going into a deal can act as an asset or a liability. A compelling investment case is no longer enough to push a transaction through: strong customer, investor, supplier and employee relationships, and those stakeholders' willingness to advocate on an acquirer's behalf, can make an important difference in expanding or narrowing criticism of the deal which in turn influences government's political calculus on intervention.

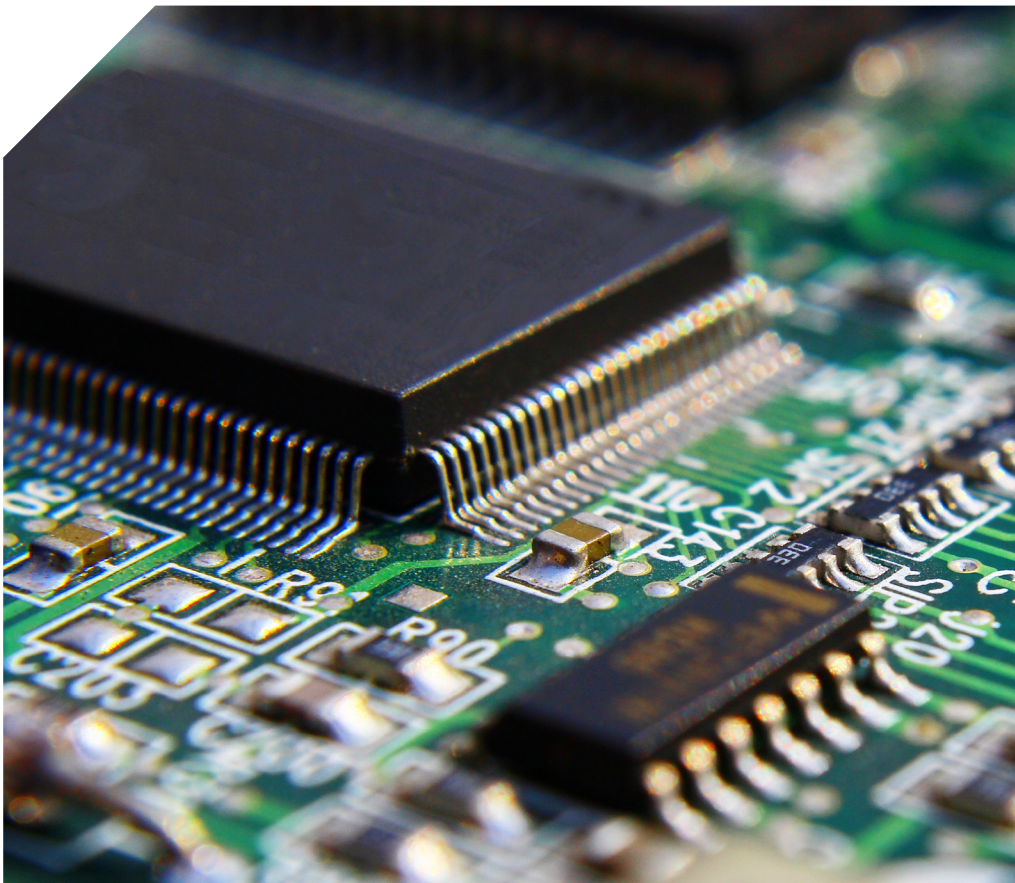
The sources of intervention

Free trade and globalisation have raised one billion people out of poverty. But that's over – we're moving to a mercantilist era where each international grouping plays to its own advantage

Reasons for the politicisation of deal-making are varied, but one can make a compelling case that the veil of public interest, particularly national security, is being rewoven to cover economic interests – particularly the protection of domestic businesses.

Indeed, laws that some may have thought intended to curb Russian or Chinese security threats to critical national infrastructure are now being used to explore (and in some cases contest) acquisitions by companies based in "allied" countries. The government has been clear that any foreign investment is susceptible to intervention and the veracity of this is particularly evidenced by the issue of Public Interest Intervention Notices (PIINs) in the NVIDIA/Arm and Parker-Hannifin/Meggitt deals.

Even where national security has not been an issue, we have seen increasing government encroachment on transactions to secure economic commitments from an acquirer. In the UK, notwithstanding the government has no legal basis to demand such commitments, ministers and officials have seemingly come to expect acquirers to make economic commitments in large mergers, and government is not embarrassed to ask for binding pledges on headcount, R&D spend, HQ, tax etc. More often than not, at the root of Government's desire to secure economic commitments is nebulous political pressure to extract a 'good deal for the UK'. We believe this pressure is manageable with the right strategy.



On other occasions, the government has clear legal means to intervene formally. In the UK, this comes via a PIIN under the Enterprise Act 2002, or new powers under the National Security and Investment Act **("NSIA")**, which comes into force on 4th January 2022 (and has retrospective effect). The UK government is currently reviewing four mergers under the Enterprise Act, all on national security grounds, having only intervened in 18 cases up to 2020 (12 on national security, 7 on media plurality and once on financial stability).

The increased rate of intervention is symbolic of a significant shift in philosophy and priorities in the UK. Even those politicians whose instincts are that the free flow of ideas, capital and people are inherently good things appear to accept that the political weather has changed.

One British legislator of impeccable neo-liberal credentials remarked: **"Free trade and globalisation have raised one billion people out of poverty. But that's over – we're moving to a mercantilist era where each international grouping plays to its own advantage."** A government voice, meanwhile, made a similar point in more colourful terms:

"The question is whether a buyer is the saviour of a sector, or a bandit."

The shift in philosophy and priorities has clear implications for the positioning of a sensitive transaction. Every deal must appear to be on the side of the angels to avoid condemnation from stakeholders.

Government (decision-makers) and legislators (decision-influencers) are vital stakeholders, of course. The bulk of an acquirer's efforts should go on persuading and reassuring those who make the decision and those who might influence it. Yet merging parties should not lose sight of the stakeholders who matter most to government and politicians: employees, pensioners, customers, suppliers, trades union and the media.

The value and focus of stakeholder engagement

The aim of stakeholder engagement around a challenging merger is to help secure clearance for the client in the right timeframe and for the minimum cost in terms of economic commitments and remedies.

It is additive to the legal work – managing the surround sound by building support for a transaction, providing reassurance to decision-makers and decision-influencers, and neutralising opposition where possible. Engagement needs to be properly targeted and strike the right balance of give and take, and of knowing when to engage and when to withdraw.

Finding such balance requires good judgment, a deep understanding of the political environment, careful planning and close collaboration between the client, lawyers, financial advisors and the communications advisors. There are at least four broad areas where that collaboration is required.

1. Economic commitments – an often necessary but insufficient part of the route to clearance in complex cases

A fashionable view among some communications and government relations advisers is that merging companies need to provide extensive economic commitments upon announcement – in addition to any formal competition or public interest remedies – in multiple territories to smooth the progress of a complex deal.

We see it in a more nuanced way: when it comes to investment screening, economic commitments (such as R&D, technical headcount, and net zero) are important but insufficient to allay public interest concerns. Economic commitments are separate to national security / public interest considerations, and, if offered a suite of commitments, government are incentivised to ask for (and get) more. We know from our own experience that where Government is offered considerable commitments upfront, they are requesting more creative additional commitments to show they've driven a hard bargain and won for UK plc.

A balance is therefore required so that any economic commitments given on announcement can help a deal to land and weather a long and often contested clearance process, but without surrendering the necessary flexibility for future negotiation with government.

And, of course, in complex situations where multiple FDI clearances are required, one must be alive to the fact that a political commitment in one territory may disturb the process in another.

2. Building a broader story that resonates with politicians, media, suppliers and trades union, and amplifying it

Simply put, a strong investment story (including a compelling narrative about economic benefit to UK plc) and track record will reassure policymakers and play well in the media, thereby adding political credibility to an acquirer and the deal rationale. The role of parliamentary select committees and backbench MPs is an important factor to consider: select committee chairs, opposition and constituency MPs are well-aware of the platform they have to challenge a deal to either extract a good settlement for their constituents or put the government under pressure to intervene. Their opposition may not prove material, but it can constrain the real decision-makers' freedom of manoeuvre.

A genuinely strong investment story and track record are often accompanied by good customer and supplier relationships and positive labour relations. These stakeholders, plus suppliers and trade unions can be powerful allies (and dangerous opponents) with their own networks across government, legislatures and the media. Better to have them onside than not – particularly if it helps avoid the risky strategy of seeking to put public pressure on officials and regulators. There are times when it is expedient to make noise publicly; but, more often than not, it is better to bring support to bear quietly.

One of the benefits of an acquirer inserting themselves into relevant business or policy debates outside the transaction review process is that it can support relationship building with government and enhance reputation

3. Balance sheet health and the role of investor relations

Media and politicians are increasingly interested in the leverage profile of acquirers. Their concern appears to be potential taxpayer exposure if a highly leveraged company collapses or is forced to restructure or dispose of assets with a negative impact on jobs, especially high-skilled jobs, and the wider economic recovery.

Investor voices and industry analysts can, therefore, be helpful to provide reassurance on that score – or, in contested situations, throw shade on a highly leveraged competitor.

4. Building relationships, enhancing reputation and partnering with government

A question asked by local politicians and media, for example, of US acquirers with a limited presence in Europe is: who are you and why should I care? A company cannot build support for a deal without answering those questions.

A commitment to ongoing corporate communications and government relations – in parallel to the specialised engagement on the transaction – can help to provide an answer. One of the benefits of an acquirer inserting themselves into relevant business or policy debates outside the transaction review process is that it can support relationship building with government and enhance reputation, thereby helping to sustain the march to clearance.

It can also help to address public policy challenges and fill deficits of expertise among policymakers. Governments the world over are battling to recover from the enormous administrative and fiscal strains caused by the pandemic. The weight of challenging issues – be it the future of work, the education of the next generation, the future of retirement, or even simply national security today – is creating a widespread bandwidth problem across government.

Partnering with government – or learned societies, universities and so on – to help solve some of these challenges not only helps to build relationships and enhance reputation, it might also help to expand bandwidth, clear ministerial in-trays and even lead to faster decisions about clearance.

That's worthwhile action because, ultimately, clearance is the thing that matters most.

Competition

In transactions which involve genuine competition issues, obtaining clearance from the CMA is becoming more challenging. It is important to remember that the CMA is essentially independent in its case decision making. Further, the most complex cases that undergo a phase two enquiry are decided by a panel of former senior figures from industry, academia and professional services chosen for each case. The CMA usually exhibits a strongly allergic reaction to political or media lobbying in case decision making. However, its recent aggressive approach to enforcement, both in terms of jurisdiction and its apparent lack of willingness to entertain remedial solutions, particularly behavioural ones, has attracted considerable criticism in some political and economic circles. Given the implications of Brexit for the economy and the desire of the Government to show that the UK is open for business, it is inevitable that some are questioning whether the CMA's approach is appropriate. As a result, the forthcoming appointments of a new Chairman, and a new CEO, will attract a lot of political, business and media attention.

The international perspective

For many international deals, the UK Government and the CMA are just two of the several (or possibly many) regulatory stakeholders that will need to be negotiated with care. Indeed, in a complex matter that raises both FDI and competition issues (for example, acquisitions raising questions of access to important technologies) it is crucial to appreciate that failure to obtain a single approval will almost certainly kill the deal ('one strike and you are out').

The need for multiple competition approvals is nothing new but the advent of many new or strengthened FDI regimes globally, a trend that was turbo charged by the pandemic, has made it substantially more difficult to navigate to good outcomes globally.

In particular, one important difference between FDI and competition processes is that whereas in the latter, parties will usually need to make sure that their argument is consistent on competition issues throughout the world, in the former it may well be necessary to satisfy quite different and competing national interests. For example, satisfying the needs of the Chinese Government may not sit well with the US Government and vice versa. The same may even apply in Europe between the increasingly competing interests of the UK and the EU, post Brexit.

The Future

There are many unknowns in how the new NSIA regime will operate. Will the investment screening process run smoothly within the promised timeframes? Will the Act's retrospective powers be used? How liberally will the Secretary of State interpret his powers to intervene, and under what circumstances? But what is certain is that the old approach to deal-making – one that focused on the legal process and deployed communications only at key, discrete moments – is no longer suitable for the new legislative and regulatory landscape. Managing this successfully requires expertise and experience in law, finance, politics and media, and ultimately good judgement to calibrate the right approach to each stakeholder. Experts in politics and media must work in lockstep with lawyers and financial advisors to position acquirers as saviours rather than bandits in a much more hostile, and more sceptical, environment than we have seen before.

This report has been drafted by Brunswick's London Competition and Public Interest Team.

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