Foreign Investment Review

Contributing editor
Oliver Borgers

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GETTING THE DEAL THROUGH

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Preface

Foreign Investment Review 2018

Seventh edition

Getting the Deal Through is delighted to publish the seventh edition of *Foreign Investment Review*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on France and Indonesia.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
January 2018

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United Kingdom

Timothy R W Cowen, David Allen Green, Madeleine Gaunt and Stephen Dnes
Preiskel & Co LLP

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Historically, the basic policy position of the UK has been to support and welcome investment from all sources, continuing a long tradition of the UK being a trading nation and a supporter of open markets. In many respects, this continues to be the case, and the basis of UK merger control is predominantly based on investment being allowed and mergers welcomed unless they pose competition problems in particular markets. The presumption is that absent a good market-relevant reason not to, such mergers should be permitted.

However, over the past few years, the idea of a broad public interest test going beyond the standard competition test (and whether it should apply to merger control) has been gaining traction in policy circles in the UK, and at the highest levels. The idea featured in Theresa May's campaign speeches for the Conservative Party Leadership, in the Conservative Manifesto, 2017 and in the Queen's Speech, 2017. At the time of writing, the government has published a Green Paper on the topic of such reform. Any move towards a new foreign investment-based test may complicate the current permissive approach, and has the potential to add uncertainty to the investment environment.

The current general position is set out below, followed by specific instances where exceptions have applied, and where thought needs to be given toward such broader public policy issues than arise in most mergers.

As a general rule, national level merger control in the UK sits alongside EU merger control. As a one-stop shop, the European Commission (the Commission) only has exclusive jurisdiction to decide whether to clear a transaction on competition grounds. Non-economic public interests are not currently included in the EU regime, but the legislation provides a process for member states to take 'appropriate measures' to protect other 'legitimate interests'.

At a national level, the UK's general approach is a voluntary notification regime, which is aimed at assessing competition issues. The bodies to be notified and for which there is an established process to review an investment in a UK entity are, generally, the CMA and the Commission. Foreign entities considering investing in a UK entity should be aware of the following:

- The government may formally intervene in a transaction on public interest grounds, relating to cases involving national or public security, the media or prudential controls within the financial system (and in any other cases that the secretary of state deems should be of 'public interest' for these purposes).
- Various UK public bodies and government departments are consulted in the course of UK merger review, such as sectoral regulators with competition powers, and their views may be relevant to the outcome. (For example, the CMA's initial findings in BT's acquisition of EE were heavily reliant on material from Ofcom, the UK telecommunications regulator.)
- There are rules requiring that any entity operating an airline within the European Economic Area (EEA) is majority owned and effectively controlled by EEA states or their nationals.
- Under the Industry Act 1975, the secretary of state is currently able to prevent control of an 'important manufacturing undertaking' passing to a non-UK resident where this would be contrary to the UK's interests. So far this power has not been used and would require approval by both Houses of Parliament.
- The UK government holds golden shares in a small number of UK companies active in the defence sector, which, depending on the rights attached thereto, it may use to prevent a foreign investor from acquiring more than a certain percentage shareholding in the company, or to veto any arrangement that results in unacceptable influence or control over the company. The use of golden shares is currently limited under EU law to where there are clear public security and public policy grounds. Such limitations might be relaxed subsequent to Brexit.

This chapter focuses on the public interest issues referred to in the first point above. Those considering the investment in an airline that operates in the UK should refer to *Getting the Deal Through – Air Transport 2018*. Persons considering investment in entities active in the UK defence and security sectors should also consider whether consent is required from the Ministry of Defence (the MoD) to assign or novate any contracts the target has with the MoD.

Where sectoral regulators have jurisdiction such as with relation to water, electricity, gas and energy generally as well as telecommunications they may have an important influence over the outcome of a merger review, particularly where they have concurrent powers that may be relevant to remedies. This is outside the scope of this chapter, but will need to be specifically investigated with relation to mergers or investments affecting that sector and the policy objectives established by the sectoral regulator.

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

In addition to the usual controls that apply to all public bodies under the UK's general administrative law, the laws specifically addressing intervention on public interest grounds are:

- the Enterprise Act 2002 (EA02) (as amended);
- the EU Merger Regulation (EUMR);
- article 346 of the Treaty on the Functioning of the European Union (TFEU); and
- the Takeover Code (in relation to certain public companies).

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The UK government can intervene in four categories of transaction on public interest grounds:

- public interest mergers – deals within the UK merger control regime that raise public interest considerations (section 42(1) and (2) EA02);
- special public interest mergers – deals within the UK merger control regime (though not necessarily meeting the same jurisdictional thresholds) and raise public interest considerations (section 59 EA02);

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- UK legitimate interest mergers – deals that qualify for notification to the Commission under the EUMR but affect a legitimate interest of the UK (article 21(4) EUMR mergers); and
- transactions that qualify for notification to the Commission under the EUMR but affect the essential interests of the UK's security (article 346 TFEU mergers).

A summary of the types of transaction caught in each case is provided below. Transactions relating to certain public companies may also be subject to the Takeover Code and any relevant public interest considerations. This Code is not covered in detail below but can be a consideration for investors.

UK public interest mergers (applicable where UK merger control thresholds are met)

The secretary of state can intervene in public interest mergers but must have reasonable grounds for suspecting that it is or may be the case that:

- the UK merger control regime is applicable;
- the jurisdictional thresholds are met; and
- one or more 'public interest considerations' are relevant and need to be considered with relation to the deal (section 42(1) and (2) EA02).

Public interest considerations (applicable where UK merger control thresholds are met)

Public interest considerations may be varied from time to time by the secretary of state by amending, removing or adding to the considerations listed by way of an order (section 58(2) EA02). At the time of writing the public interest considerations that have been identified include:

- defence: the interests of national security, including public security (section 58(1) and (2) EA02);
- accurate news and free expression: the need for accurate presentation of news and free expression of opinion in newspapers (section 58(2A) EA02);
- plurality of the media (defined as being where reasonable and practicable, for a sufficient plurality of views in newspapers in each market for newspapers in the UK or a part of the UK (section 58(2B) EA02): in relation to every different audience in the UK or in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience (section 58(2C)(a) EA02);
- broadcasting: for the availability throughout the UK of a wide range of broadcasting that (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests (section 58(2C)(b) EA02);
- media standards: for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003 (section 58(2C)(c) EA02); and
- prudential regulation in the interest of maintaining the stability of the UK financial system (section 58(2D) EA02).

UK special public interest mergers (applicable where jurisdictional thresholds are not met, but a defined public interest issue is raised)

Before the secretary of state intervenes in a UK special public interest merger, the transaction must fulfil the following conditions:

- the structure is of the type to which the UK merger control rules apply (section 59(1) EA02); and
- immediately before implementation, at least one of the enterprises concerned was carried on in the UK or by or under the control of a body corporate incorporated in the UK and a person carrying on one or more of the enterprises concerned was a relevant government contractor (ie, a person who has been notified by the secretary of state that he or she, or his or her employees, hold information relating to defence and of a confidential nature (section 59(3B) EA02)); or
- the person or persons by whom one of the enterprises was carried on supplied at least 25 per cent of all newspapers of any description, or all broadcasting of any description, in the UK, or a substantial part of the UK (section 59(3C) and (3D) EA02); and
- one or more public interest considerations is relevant to a consideration of the transaction (section 59(2)).

Unlike UK public interest mergers there is no requirement for the transaction to satisfy the jurisdictional thresholds for an investigation, though the transaction must otherwise fall within the UK merger regime. The public interest considerations are the same as for UK public interest mergers.

Legitimate interest mergers under article 21(4) EUMR

To intervene in this type of merger, section 67(1) and (2) EA02 provide that the transaction must satisfy the jurisdictional thresholds of both UK and EU merger control and the secretary of state must:

- have reasonable grounds for suspecting that it is or may be the case that: the transaction structure would fall within both UK and EU merger control;
- be considering whether to take appropriate measures in relation to the transaction to protect a legitimate interest of the UK under article 21(4) EUMR (section 67(1)(c) EA02); and
- believe that it is or may be the case that one or more public interest considerations are relevant to a consideration of the transaction (section 67(2) EA02).

Legitimate interests under article 21(4) EUMR include public security, plurality of the media and prudential rules.

Article 346 TFEU mergers (national security cases)

Article 346 TFEU provides that, in relation to transactions caught by the EUMR, the UK government may:

- instruct a company not to supply information to the Commission under the EUMR where it considers that disclosure of such information is contrary to the essential interests of the UK's security; and
- take measures it considers necessary for the protection of the essential interests of the UK's security that are concerned with the production of or trade in arms, munitions or war material.

4 How is a foreign investor or foreign investment defined in the applicable law?

Foreign investor or foreign investment is not defined in the EA02, the EUMR or article 346 TFEU; the rules do not distinguish between foreign and domestic investors.

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

There are no special rules, however, from time to time, 'back-door nationalisation' has been raised as a political issue where the state-owned entity is the acquirer.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

In the case of media mergers, the decision-maker is the secretary of state at the Department for Culture, Media and Sport. In all other cases, it is the Secretary of State for Business, Energy & Industrial Strategy. The CMA also plays a part in the review process (see question 9). Relevant sectoral regulators may also be involved in the process, where relevant.

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

As a basic element of the rule of law the government must have a legal basis for any intervention and a legal basis for any action that it takes. In principle, it cannot, therefore, intervene in transactions on national interest grounds except where it can demonstrate that it is operating within the laws set out above.

Three points are worth noting here, because they add an element of flexibility in more controversial cases, requiring careful management. First, the definition of what is or is not within the scope of the existing legal basis may be broad enough to cover intervention directly. Secondly, influence over the standard merger control process

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is possible and may be effected either by government department or through sectoral regulators in ways that may not explicitly be recorded as public interest interventions. Thirdly, new public interest grounds may be swiftly added to the list set out in section 58(1)-(2D) EA02 or any consideration may be removed or amended (section 58(3) EA02). This occurred at the height of the financial crisis to allow through the *Lloyds/HBOS* merger referred to in question 1, which raised potential competition concerns, but was allowed because of concerns for financial stability had the merger not proceeded.

The secretary of state may also intervene in transactions on the basis of a consideration that is not specified but which, in the opinion of the secretary of state, ought to be so specified. The secretary of state must then, as soon as practicable, take such action as is within his or her power to ensure that it is contained in an order laid before both Houses of Parliament and approved within 28 days from the day the order was made (sections 42(7), 42(8)(b) and 124(7) EA02). The UK government can also ask the Commission to recognise other legitimate interests not set out in article 21(4) EUMR. Such additional interests will be assessed against the general principles and other provisions of EU law.

Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

Jurisdictional thresholds for merger notification to the CMA are triggered when:

- as a result of the merger, the combined enterprise will supply or acquire 25 per cent or more of any goods or services in the UK or a substantial part of the UK, or an existing share of supply of 25 per cent or more will be enlarged (section 23 EA02); or
- the value of the turnover in the UK of the enterprise being taken over exceeds £70 million (the turnover test; (section 23 EA02).

The EU thresholds for turnover are crossed where the combined aggregate worldwide turnover of all undertakings concerned is more than €5 billion and the aggregate EU wide turnover of at least two of the undertakings is more than €100 million. An alternative threshold is where the combined aggregate worldwide turnover of all undertakings concerned is more than €2.5 billion and the aggregate EU-wide turnover of at least two of the undertakings is more than €250 million, and the combined aggregate turnover of all undertakings is at least €100 million in at least three member states and in at least three of these member states the aggregate turnover of each of at least two of the undertakings is more than €25 million.

Notification to the CMA of a transaction is not compulsory. Notification to the Commission is compulsory if the relevant thresholds are met.

For the secretary of state to intervene in UK public interest mergers or in special public interest mergers, they must have reasonable grounds to believe that the transaction satisfies the jurisdictional thresholds of the UK merger control regime (see question 3) and satisfies the relevant test for public interest or special public interest set out in the Enterprise Act 2002 (see question 3).

In article 21(4) interventions, the secretary of state must have reasonable grounds to believe that both the EU merger control regime jurisdictional thresholds and the UK jurisdictional thresholds are met. In such cases, there is mandatory EU notification but no mandatory notification to the UK.

In article 346 TFEU interventions, which are based on national security considerations, the secretary of state must have reasonable grounds to believe that the transaction fulfils the jurisdictional criteria set out in the TFEU. Any such transaction would meet EU merger control trigger thresholds and therefore require notification to the Commission subject to any restrictions that the secretary of state may impose on notification or the provision of information.

Following the publishing of the Panel Statement 2016/9 on 14 December 2016, which is the most recent relevant Statement, those public companies to which the Takeover Code is relevant, must submit a series of documents and forms, including a firm offer announcement, to the Takeover Panel.

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?

CMA investigations are conducted in Phases. Phase 1 is a shorter, less in-depth investigation. Only where concerns are identified does the matter proceed to Stage 2.

In both public interest and special public interest cases, the CMA will undertake investigations at Phase 1. The secretary of state is able to issue a public interest intervention notice or special intervention notice at the stage at which he or she has reasonable grounds to suspect that the respective public interest tests are fulfilled. The CMA will then report to the secretary of state on jurisdiction and market definition issues and then take the decision on clearance, clearance with undertakings or referral to Phase 2. The Phase 2 review is, similarly, undertaken first by the CMA and then considered by the secretary of state. The standard CMA fees will apply to public interest mergers. There is no fee for special public interest mergers.

In mergers with the relevant EU dimension, the secretary of state may issue a European intervention notice at the stage at which he or she has reasonable grounds to suspect that the relevant jurisdictional thresholds are met. This has the effect of the UK authorities assuming control of the merger investigation. At that stage, the CMA will investigate and report to the secretary of state on jurisdiction, and give a summary of representations from parties of a public interest nature and its views on whether the transaction will or is likely to operate contrary to the public interest. Other government organisations may be consulted, such as Ofcom in media mergers. If the test is met a referral to Phase 2 will be made. The CMA will then investigate and report to the secretary of state who will take a decision on whether to make a finding that the transaction would be adverse to the public interest.

In article 346 mergers, the Ministry of Defence should be consulted prior to filing to the Commission. The secretary of state will then provide instructions to the parties on whether it should be notified to the Commission and, if so, what material should be withheld. If there are aspects of the transaction that are not notified to the Commission, the CMA will investigate those aspects of the merger as a UK public interest investigation. There is no filing fee for article 346 mergers but CMA fees may apply for aspects of the investigation that require investigation by the CMA as a public interest matter.

10 Which party is responsible for securing approval?

There is no rule on who should secure approval in the UK but, in practice, the acquiring party tends to take the lead and this may be provided for in contractual agreement between the merging parties. The EU regime provides that certain parties to the transaction are responsible for notification of the transaction. In public bids, this is the bidder, in acquisitions, the acquirer, and in mergers, parties must file jointly on behalf of all parties.

Parties should also be aware that merger control in other jurisdictions where the acquirer or target have assets or do business might also apply. This usually does not apply to other EU jurisdictions, if the EU Merger Regulation pre-empts national jurisdiction. It should be noted that there is scope for a 'reference back' under article 9 of the Merger Regulation where impact on a distinct national market leads national authorities to petition the Commission to refer the case back to them.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

The usual CMA or EU timescales will or may apply to parts of the review. Both Phase 1 and Phase 2 reviews are subject to timetables (though extensions or suspensions are allowed in certain circumstances). The secretary of state's involvement in a UK or Commission review, however, can significantly extend the review process. The effect of the intervention on the timetable will depend on at which stage the secretary of state chooses to intervene (when he or she has reasonable grounds for doing so). Broadly speaking, intervention by thesecretary of state can significantly extend the review process as the secretary of state must consider the CMA's position before it can make final decisions.

The secretary of state has the power (as does the CMA in standard merger reviews) to expedite a Phase 1 review and proceed straight to a Phase 2 referral, provided the transacting parties agree and provided

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that it is likely that the criteria for Phase 2 referral will be met. This fast-track procedure requires parties to waive some of their procedural rights under the Phase 1 process.

Various other factors affect the timeline of a review, including: the complexity; the flow of information between the authorities and the parties in question; the number of 'interested' parties; and whether and at what stage undertakings or remedies are proposed.

In practice, it would be prudent for transacting parties to engage with the CMA, Commission and relevant UK government departments at the earliest stage possible (and in many cases, prior to notification). Early discussions, informal advice and well-considered and drafted undertakings or remedies may help expedite clearance.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Subject to any contractual arrangements between the parties to the contrary, transactions under review at a national level do not need to receive clearance before the transaction can close. However, parties should proceed with caution if the thresholds will (or are likely to) be met as the regulatory authorities have the power to intervene following closure of the transaction.

If the secretary of state were to intervene in a merger on public interest grounds, this would not be a bar to the transaction completing. However, the secretary of state and the CMA can impose separate obligations on the transacting parties to prevent integration of the parties or impose obligations to undo integration that has already occurred. There is relatively wide scope for them to do this and there is detailed guidance on what considerations the CMA or secretary of state must take into account when following such a course of action.

At the EU level, for most acquisitions, clearance must be obtained before the transaction is put into effect (article 7(1) EUMR). Breach of this provision carries heavy penalties; fines can be up to 10 per cent of group worldwide turnover (article 14(2) EUMR). There is an exception to this in the case of public bids that have been duly notified to the Commission – these can proceed, but only on the basis that the transaction is notified to the Commission without delay (article 7(2) EUMR).

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Both the CMA and the Commission welcome pre-notification discussions, but these are not mandatory. The CMA is able to offer informal advice and encourages pre-notification discussions, provided there is a realistic prospect that the transaction can or will go ahead. There are strict confidentiality requirements on any pre-notification discussions and any positions taken in such pre-notifications are not binding on the ultimate position of the CMA. Early discussions can assist in identifying any potential competition concerns and could assist transacting parties in the notification process as they may be able to provide information at the notification stage that deals with competition concerns raised in initial discussions. Furthermore, if competition concerns are identified, and early and detailed proposals for remedies made (which have already been discussed with the regulator), this can help speed up clearance.

In transactions likely to satisfy the public interest or special interest test or the article 21(3) test, it may be prudent for the parties to engage with the relevant UK authorities (or secretary of state) in the early stages. In article 346 TFEU cases, the secretary of state should be notified prior to notification to the Commission in any event.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

The employment of lobbying or other specialists is not common but specialists may be consulted case by case. Transacting parties may use external specialists to undertake reviews, reports or case studies that can be submitted to the reviewing authorities.

Early informal advice or discussions may expedite clearance and, in those cases where a Phase 2 referral is likely, early consideration of and discussions on undertakings are likely to be of value. Where undertakings may involve third parties (such as divestment undertakings), it can be valuable to include those in the discussions from an early stage. Both the Commission and the CMA (and the secretary of state) can delay a decision if the transacting parties (or in some cases relevant third parties) do not provide full and correct information during the course of their investigations.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

The Secretary of State may refer a UK public interest merger or an article 21(4) EUMR merger to the Phase 2 investigation up to four months after the transaction completes or the material facts are made public, whichever is the later. The secretary of state may also accept undertakings in lieu of a reference in the same time period.

At a national level, the CMA and the secretary of state are able to review, challenge, or even unwind integration if, on a case-by-case basis, they consider it necessary to do so.

In article 346 TEFU merger cases, the UK government can only intervene before the Commission makes its decision and there is therefore no retrospective intervention in such cases.

Furthermore, non-compliance with the Takeover Code may result in sanction by the Panel, the FCA, and any regulatory body to which the non-compliant organisation belongs.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

The substantive test for clearance depends on the basis for which there is intervention. For UK public interest mergers, the test for referral to Phase 2 is whether the secretary of state believes the transaction falls within the UK merger regime and that it operates or may be expected to operate against the public interest (section 45(2)-(5) EA02). Following the Phase 2 investigation, the test for a negative decision is whether the secretary of state believes the same test to have been met.

The secretary of state must, in his or her consideration, accept the CMA's findings on anticompetitive outcomes (whether negative or positive) but then must also consider whether the relevant public interest considerations outweigh any anticompetitive effect. There is limited guidance on how that decision must be taken.

For UK special public interest mergers, the test for referral to Phase 2 investigation is whether the secretary of state believes that the relevant criteria are (or may be) met and, taking into account only the relevant public interest considerations, the transaction operates or may be expected to operate against the public interest (section 62(2) and (3) EA02). Similarly, the substantive test for a negative decision following a Phase 2 reference is whether the secretary of state decides that this test is met (section 66(2) EA02).

For article 21(4) mergers, the test for referral to Phase 2 investigation is whether the secretary of state believes that the relevant criteria, set out under questions 3 and 8, are (or may be) met and, taking account only of the relevant public interest considerations, the transaction operates or may be expected to operate against the public interest (section 5(2) and (3) of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (PLIO)). The substantive test for a negative decision following a Phase 2 reference is whether the secretary of state decides that this test is met (section 12(2) PLIO).

Article 346 TFEU mergers (national security)

In article 346 TFEU mergers, any aspects of the transaction that are not notified to the Commission but that fulfil the criteria of a UK public interest merger or a UK special public interest merger will be assessed against the substantive tests outlined above for those types of transaction. Under article 346 TFEU, any measures taken by the secretary of state must be necessary for the protection of the essential interests of the UK's security and connected with the production of or trade in arms, munitions and war material. Any non-military aspects of the transaction that have been notified to the Commission will be subject to its usual merger control review.

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Update and trends

On 17 October 2017, the UK government published a Green Paper proposing updates to the merger regime to address national security concerns. The government proposes to amend the turnover threshold and share of supply tests for transactions in the military and dual-use sector, and the advanced technology sector. The proposal is to lower the turnover threshold to £1 million in order to address security concerns while leaving micro-businesses outside the scope of the Enterprise regime. The government also wishes to remove the current requirement for a qualifying merger or takeover to bring about an increase in the share of supply; an additional test would be added such that the share of supply threshold would be met in the relevant sectors if the target business has an existing share of supply of 25 per cent or more of the relevant goods or services.

The government has also indicated that it will make longer-term reforms, including expanding the government's power to scrutinise a broader range of transactions for national security concerns, and considering removing the requirement for there to be a relevant merger situation in existence in order for a transaction that raises national security concerns to come under scrutiny. It is also considering a mandatory notification regime for foreign investment into the provision of a focused set of 'essential functions' in key parts of the economy, such as the civil nuclear and defence sectors.

At an EU level, the European Commission has issued a proposal for a Regulation establishing a framework to review Foreign Direct Investment into the EU. The likelihood that this will be in place and have effect before the UK has left the EU is slim, but this remains a point to keep an eye on.

Clearly, at both EU and national level, this is an area to watch over the next few years.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

Formal and official guidance here is unavailable. From practical experience it is known that the competition authorities have many opportunities to discuss cases with each other in the course of their regular meetings. (See, for example, the ICN meetings among competition authorities.) Meetings also occur between the EU and US authorities pursuant to intergovernmental cooperation treaties. Cross-agency discussions can and do occur with relation to defence issues pursuant to intergovernmental cooperation treaties. It is advisable to ensure that the respective government departments are briefed with relation to the issues within their concern.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

Competitors, significant competitors, interested parties, industry working groups, economists and other experts may be consulted by the decision-making body.

The rules on standing are set out in the respective regulatory legislation or guidelines.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Ssecretary of state can prohibit a UK public interest, special public interest or article 21(4) merger if, following a Phase 2 CMA report, he or she has made an adverse public interest finding and considers that such action is reasonable and practicable to remedy, mitigate or prevent any of the adverse public interest effects that have resulted from, or may be expected to result from, the transaction (sections 55(2) and 66(6) and Schedule 8 EA02, and section 12(7) PLIO).

In a limited number of public interest cases, the Secretary of State has the power to make a reference to the CMA for a Phase 2 investigation, where the CMA has not done so. The secretary of state is bound by the CMA's Phase 1 findings on competition issues, but not on any views expressed about the public interest consideration.

If the secretary of state believes he or she may wish to use his or her powers under article 21(4) of the EU Merger Regulation to protect legitimate interests, he or she can issue a European intervention notice. This requests that a transaction that fulfils the EU threshold be nevertheless considered by the UK authorities. This obliges the CMA to make a report to the secretary of state, and enables the secretary of state to make a Phase 2 reference. The Secretary of State is also able to take enforcement action.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

The Secretary of State can accept undertakings to remedy public interest concerns or competition concerns identified by the CMA in public interest cases. Undertakings can be offered after an intervention notice has been issued, and, if they are agreed by the secretary of state and fulfil the relevant criteria, clearance can be gained despite the public interest grounds for intervention. Undertakings or remedies can also be offered at Phase 2 and can involve third parties.

In public interest cases, undertakings will be reviewed by both the secretary of state and the CMA for applicability to public interest concerns and to competition concerns respectively. They may also be reviewed by a relevant sector-specific regulator. The Secretary of State can also clear transactions that may otherwise cause competition concerns where it has been decided that the public interest outweighs such concerns.

21 Can a negative decision be challenged?

UK decisions taken by the CMA and the Secretary of State's decisions can be challenged in the Competition Appeal Tribunal (CAT). Subject to judicial permission, CAT decisions can be appealed before the Court of Appeal of England and Wales, the Court of Session in Scotland or the Court of Appeal in Northern Ireland, as applicable, or, in certain circumstances, the UK Supreme Court. An appeal can deal with the merits of the decision being challenged.

The secretary of state's decision may also be subject to judicial review by the High Court. The grounds for judicial review are general limited to errors of law and procedure, and judicial review is not an appeal on the merits.

22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

Generally, the CMA insists on confidentiality in any pre-notification requests for advice or meetings, subject to material being shared between the transacting parties. Both the CMA and Commission publish decisions, communications and submissions, subject to the removal of confidential information or business secrets, and may share documents with other interested parties. Claims to confidentiality must be substantiated and non-confidential versions of documents can be required for publications. The Commission publishes guidelines on such claims for confidentiality.

In cases where the secretary of state has intervened in the EU merger control procedures, the secretary of state has discretion to restrict the flow of information in the public interest. For article 346 mergers, the UK can prevent the notification of mergers to the Commission and can prevent the transacting companies from providing certain information to the Commission insofar as the member state considers that the disclosure of such information is contrary to the essential interests of its security.

It should be noted that the CMA and secretary of state may be required to update their procedure for dealing with confidential information in light of the EU's 2017 proposals for a Regulation to replace the E-Privacy Directive.

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

21st Century Fox/Sky

In December 2016, 21st Century Fox announced that it would pursue a takeover of the UK satellite broadcaster, Sky. The deal resurrects

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an earlier attempt by another part of the same media empire, News Corporation, to purchase Sky. The earlier News Corporation deal was approved by the European Commission, but ultimately fell apart under considerable political pressure in relation to the question of whether News Corporation fulfilled the requirement for media proprietors to be 'fit and proper' persons under the public interest test as applied to media mergers. A range of remedies were proposed to strengthen editorial independence, notably in relation to board membership, but were not ultimately agreed.

It is important to emphasise how unusual the context was giving rise to these concerns. The concerns stemmed from allegations of ethical issues in the running of News Corporation newspapers, especially in relation to the use of telephone hacking. The case thus represented a very rare example of politics intruding into normal competition-based analysis under very specific and unusual circumstances.

It would seem that many of these concerns remain prevalent in the UK, as indicated early on in the process by a 2017 letter signed by many of the main protagonists in the case against the 2010 deal, with signatories including Sir Vince Cable, current leader of the Liberal Democrats, and the former Labour Party leader Ed Miliband.

The letter pushed for Ofcom to open a new inquiry into the question of whether the improprieties at News International undermine the case that Sky is a fit and proper broadcast licence holder, revisiting the question of James Murdoch's role in the company, and raising the issue that James Murdoch has a management position is Fox and issues concerning the extent and nature of control of Sky through the Murdoch family trust.

The Secretary of State Karen Bradley requested that Ofcom consider the merger in light of three public interest considerations: media plurality, broadcasting standards, and fit and proper person to hold a broadcasting licence. Ofcom delivered its report to the secretary of state, highlighting in particular concerns about media plurality. The parties had offered undertakings in lieu, which the secretary of stateindicated on 29 June 2017 she was not minded to accept, instead indicating that she was minded to refer the merger to the CMA for the Phase 2 investigation on the media plurality ground, and minded not to refer on the broadcasting standards ground, indicating a period in which interest parties could make further submissions.

In a letter to Ofcom dated 7 August 2017, the secretary of stateindicated that a number of submissions received were considered to be substantive, and requested further advice in relation to Ofcom's broadcasting standards analysis. Following correspondence throughout August, the secretary of state announced on 20 September 2017 the referral of the merger to the CMA for a Phase 2 investigation on both media plurality, and commitment to broadcasting standards grounds. At the time of writing, the CMA has issued an Issues Statement, requesting input from interested parties for their investigation, and both Sky and Fox have made initial submissions to the CMA on both grounds.

Also, in September 2017, the campaign group Avaaz launched a legal challenge against Ofcom's ruling that Sky would remain 'fit and proper' to hold a UK broadcasting licence if it were acquired by Rupert Murdoch's Fox.

This will certainly be a merger to watch as the CMA progresses through its investigation, and Avaaz's legal challenge is addressed, particularly in light of wider concerns about media neutrality. One aspect of the case that raises concerns for other 'public' interest interventions is the very long drawn out nature of the process, with the Minister taking advice from both Ofcom and the CMA, the review process has taken nearly a year to date, and looks likely to drag on into 2018.

Kraft Foods/Cadbury

Kraft Foods, at the time the second-largest US food company took over Cadbury, a profitable UK food and confectionery company in 2009 following a hostile takeover bid. It emerged following the takeover that Kraft had purchased Cadbury to achieve the scale necessary to separate its operations in the confectionery and snacks markets respectively. In doing so, it announced a Cadbury closure programme, contrary to representations it had made in the run-up to the bidding process.

There were significant criticisms of the UK takeover regime following the Kraft takeover. Many parties were critical of the takeover and the fact that there was no legitimate public interest basis for the secretary of state to intervene. A parliamentary select committee concluded that the merger control procedures were open and transparent and that the secretary of state was correct in not intervening. The evidence given to the committee made it clear that there was scope for improvement in the processes under the UK merger control but that any additional powers of intervention should be approached cautiously in view of the significant economic benefits that could attach to investment in the UK from foreign entities.

A number of changes were introduced in the Takeover Code in 2011 following the *Cadbury/Kraft* takeover. Predominantly these acted to strengthen the position of the target companies by improving transparency, giving greater recognition to employees and giving shareholders the ability and duty to look at a bid in the long term and not simply on price. In doing so, the intentions of the parties communicated in the lead-up to the bid could become reasonable considerations to shareholders and competition authorities alike.

Despite proposals to do so, no additional ministerial powers of intervention were included in the change and the public interest test for ministerial intervention was not broadened at that time. No specific provisions were made in merger regulation for foreign investment, but the Takeover Code was amended to improve disclosure of information at the pre-bid stage. That information could later be relied on in shareholder actions. Care will therefore be needed in drafting statements to select committees, parliamentary committees and in responses to questions in the takeover process in addition to those representations made concerning employees and shareholders.

Pfizer/AstraZeneca

In May 2014, it was announced that Pfizer, a US based pharmaceutical company intended to make a bid for the UK company, AstraZeneca. Significant competition concerns were raised during the pre-bidding stage, one of which being that the takeover would be detrimental to

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a number of aspects of the UK pharmaceutical industry, including in particular the research and development carried out by AstraZeneca.

The bid was ultimately abandoned after being the subject of extensive public and government debate. The public interest test for intervention was again examined in detail and proposals were made for further changes to the Takeover Code to distinguish between commitments made by bidding companies into whether they 'intended to' or 'committed to' certain actions.

It is an open question whether statements made in the course of the bid would have been actionable because the bid was abandoned.

It is understood that research and development capability is regarded in certain political circles as of critical importance to the future of the UK, and that much R&D is publicly funded through the education, university and state aid system, giving the state a stake in the use to which R&D is put and a greater concern over businesses that are involved in R&D in the UK. Such businesses might be caught by proposals set out in the Update and trends.

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