Foreign Investment Review

Contributing editor
Oliver Borgers

2019

GETTING THE DEAL THROUGH

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Foreign Investment Review 2019

Eighth edition

Getting the Deal Through is delighted to publish the eighth 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 a new article on the European Union.

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
December 2018

United Kingdom

Timothy R W Cowen, Madeleine Gaunt and Claire Barraclough
Preiskel & Co LLP

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

The party line is that the UK is open for business, and foreign investment is therefore encouraged, subject to regulatory oversight. This is the result of the UK's long history as a trading nation and advocate of free trade and open markets.

However, the idea that more stringent controls need to be placed on foreign investment, in particular in the technology sector, and in light of concerns over the security of critical national infrastructure, has been gaining traction in policy circles for a number of years. This has resulted in some reform to safeguard critical national infrastructure, discussed below, with more on the horizon.

Thus far, the regulatory regime has not distinguished between foreign and domestic investment if there is a 'relevant merger situation', meaning that the relevant thresholds are met. These thresholds are detailed in the questions below.

This chapter focuses on the public interest issues. Those considering investment in an airline that operates in the UK should refer to *Getting the Deal Through – Air Transport 2019*. 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 to assign or novate any contracts the target has with it.

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 relevant sectoral regulator.

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors 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 five categories of transaction on public interest grounds, which are outlined below.

UK public interest mergers

These are deals within the UK merger control regime that raise public interest considerations (section 42(1) and (2) EA02).

The secretary of state can intervene in public Interest mergers, where he or she has reasonable grounds to suspect that (i) the UK merger control regime is applicable, (ii) the jurisdictional thresholds are met, and (iii) one or more 'public interest considerations' are relevant and need to be considered with relation to the deal (section 42(1) and (2) EA02).

What constitutes a public interest consideration may be varied from time to time by the secretary of state or by amending, removing or adding to the considerations listed by way of an order (section 58(2) EA02). Currently, the considerations 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 – 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). Media plurality is defined in section 58(2B) 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

These are deals within the UK merger control regime (though not necessarily meeting the same jurisdictional thresholds, and raise public interest considerations (section 59 EA02).

These interventions can happen where the jurisdictional thresholds are not met, provided that

- the structure is of a type to which the UK merger rules apply (section 59(1) EA02);
- 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 (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) EA02).

UK critical national infrastructure mergers

These are deals that are caught by recent reforms to the Enterprise Act pursuant to the Enterprise Act 2002 (Turnover Test)(Amendment) Order 2018 and the Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018.

Though not listed as a public interest consideration in section 58 EA02, in 2018 reforms were introduced to the turnover and share of supply threshold tests for particular industries, in essence addressing public interest concerns, but via a different mechanism. The turnover test share of supply test amendment orders amend the thresholds set out in section 23 EA02, resulting in many more mergers being caught by the UK regulation in particular sectors. The relevant sectors are set out in section 23A EA02, and include certain activities relating to the military, dual use and quantum computing sectors.

The effect of these reforms is to reduce the turnover threshold to £1 million, and to remove the requirement that there be an increase in share of supply, where the share is 25 per cent or more. The result is that more transactions will be subject to UK merger review in these particular sectors, which are viewed as crucial from a national security or critical national infrastructure point of view.

UK legitimate interest mergers

These are deals that qualify for notification to the Commission under EUMR but affect a legitimate interest of the UK (article 21(4) EUMR mergers).

Pursuant to section 67(1) and (2) EA02, the transaction must satisfy the jurisdictional thresholds of both UK and EU merger control for intervention in this type of merger. The secretary of state must also:

- 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).

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

These are deals that qualify for notification to the Commission under the EUMR but affect the essential interests of the UK's security (article 346 TFEU mergers).

Pursuant to article 346 TFEU, where a transaction is caught by the EU merger regime, the UK government can:

- 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.

Further reforms are expected in this area, which may subject many more investments by foreign nationals and investors to regulatory scrutiny.

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

Neither foreign investor nor foreign investment is defined in EA02, the EUMR or article 346 TFEU; the rules currently apply to all investments, regardless of provenance.

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?

There are currently no special rules in this regard, although the concept of 'back-door nationalisation' has been discussed as a political issue for SOEs acquiring UK companies. It is possible this could in future filter through to reform in this area.

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

The authorities must have a legal basis for any intervention, as a basic tenet of the rule of law. As such, in principle, there is no discretion to intervene otherwise than in accordance with the laws set out above.

However, it should be noted that the definitions in the existing legal bases are relatively broad, which could give some flexibility to intervention.

Second, the governmental departments or sectoral regulators may seek to exert influence over the normal merger control process, where the relevant thresholds are met.

Third, new public interests grounds can be added to the list set out in section 58 EA02 relatively swiftly or, alternatively, they can be removed or amended (section 58(3) EA02).

The secretary of state also has the power to intervene in transactions on the basis of a consideration that is not specified, but that in his or her opinion ought to be. Steps must then be taken as soon as practicable to ensure that it is contained in an order laid before both Houses of Parliament and approved within 28 days of the day the order was made (sections 42(7), 42(8)(b) and 124(7) EA02).

The government can also ask the Commission to recognise other legitimate interests not set out in article 21(4) EUMR, with such additions being 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?

The Competition and Markets Authority (CMA) thresholds for merger notification are as follows:

- The share of supply test: where, as a result of the merger, either (i) 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 (ii) in relation to the critical national infrastructure sectors specified in response to question three above, a 25 per cent or more share in the supply of goods or services in the UK or a substantial part of the UK, with no increase necessary (section 23 EA02 as amended by the Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018, SI 2018/578).
- The turnover test: where the value of the target entity's turnover exceeds £70 million (section 23 EA02), or in relation to the Critical National Infrastructure sectors specified in response to question 3, the value of the target entity's turnover exceeds £1 million (section 23 EA02 as amended by the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018, SI 2018/593).

Notification to the CMA is not compulsory.

The EU thresholds for turnover are crossed where either:

- 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; or
- 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 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 Commission is compulsory where the relevant thresholds are met.

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 Phase 2. Fees are payable on filing.

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 or sectoral regulators 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 TFEU 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 TFEU 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 EUMR pre-empts national jurisdiction.There is scope for a 'reference back' under article 9 of the EUMR 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 the secretary 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 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 mergers, 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

Update and trends

There are two key developments to keep an eye out for.

First, as referenced above, it is unlikely that the turnover and share of supply threshold amendments will be the last reform to the merger control regime to address concerns over critical national infrastructure. Indeed, the government is consulting on more long-term reforms to the system in light of this issue.

Second, the UK's planned withdrawal from the European Union in March 2019, and the details of any associated withdrawal or transition agreement, is likely to have a significant effect on the merger control regime.

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 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 Financial Conduct Authority 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) EAO2). 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.

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 International Competition Network meetings between competition authorities.) Meetings also occur between 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 secretary 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 EUMR 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 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 or agreeing to other mitigation arrangements?

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 or appealed?

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.

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 resurrected 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.

As the *Sky/Fox* deal was again proposed, 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, was published raising similar concerns about the deal.

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 in 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 of a Phase 2 reference, which the secretary of state indicated 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 interested parties could make further submissions.

In a letter to Ofcom dated 7 August 2017, the secretary of state indicated 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.

The CMA issued an Issues Statement, requesting input from interested parties for their investigations, and both Sky and Fox made initial submissions to the CMA on both grounds.

On 23 January 2018, the CMA provisionally found that the transaction would not be in the public interest owing to media plurality concerns, but not because of a lack of genuine commitment to meeting broadcasting standards in the UK.

The CMA sent its final report to the Department for Digital, Culture, Media and Sport, on 1 May 2018, and on 5 June 2018 the secretary of state accepted the CMAs recommendation that the transaction

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was not in the public interest owing to media plurality concerns, and accepted the CMA's recommendation that the most effective and proportionate remedy would be for Sky News to be divested to a suitable third party.

In the end, the transaction did not complete, as Fox was drawn into a bidding war by Comcast, resulting in a rare supervised bidding process in which the Takeover Panel oversaw the submission of blind bids, from which Comcast emerged the victor, offering £30 billion for full control of Sky.

Getting the Deal Through

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Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
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