

International Trade and Competition Alert

October 18, 2017

Key Points

- The Department for Business, Energy and Industrial Strategy published a Green Paper consulting on amendments to UK merger control and public interest intervention legislation to cover gaps in the current framework for reviewing transactions from a national security perspective.
- The proposal includes immediate short-term measures to lower merger control thresholds to just £1 million in revenues to capture additional transactions involving companies active in the military and dual-use as well as advanced technology sectors.
- The long-term proposal involves wholesale reform of the UK's investment review regime and considers both expanding the current voluntary notification system, and introducing mandatory notification for investments into **essential infrastructure**.



New UK Regime for National Security and Infrastructure Investments

On Thursday, October 17, 2017, the UK's Department for Business, Energy and Industrial Strategy published a [proposal for national security and infrastructure investment review](#) (the "Proposal"). The Proposal consults on both short-term and long-term measures for reforming the UK's investment review powers. The short- and long-term consultations have separate deadlines for response. The deadline for comments relating to the short-term reforms is **November 14, 2017**, and the long-term reforms deadline is **January 9, 2018**.

The UK government has promised reform of its national security review powers ever since its review of EDF and China General Nuclear's bid to construct a nuclear reactor at Hinkley Point, which was finally cleared by Theresa May's government in September 2016 despite reported concerns about Chinese involvement in critical energy infrastructure.. The Proposal explains that reform is necessary because the UK's current powers of review have been outpaced by developments to the UK's national security risk profile. The Proposal highlights new national security threats, including cumulative investments in industries allowing espionage, new risks associated with greenfield investments, the use of technology in cyber terrorism and investments in assets in physical proximity to critical infrastructure. The Proposal notes the need to strike a balance between greater review powers and the UK's desire to remain open and investment-friendly.

Critical infrastructure

'Critical infrastructure' has been a key phrase used by the government to describe the scope of the forthcoming changes to investment review. It mirrors the open-ended language used in the EU-level foreign direct investment regime currently proposed by the European Commission, as well as the EU Network Information Security Directive. However, 'critical infrastructure' is neither defined (there is a reference to the UK's 13 national infrastructure sectors in this context, followed by an admission that not everything within a sector will be deemed 'critical') nor used consistently in the Proposal (the terms 'essential functions', 'critical businesses', 'essential services', 'essential national security interests', 'critical sectors' and 'critical assets' all make appearances).

Current review powers

The UK government has identified gaps in its power to review investments with a national security element. Its current powers derive from a patchwork of legislation, various sector regulators, the Takeover Panel (which is currently consulting on amendments to the process and timetable for takeovers) and contractual terms in agreements with private undertakings. According to the Proposal, this patchwork of powers harms business certainty and transparency and is unsophisticated compared to the US, Canadian and French regimes.

Critically, the government can currently only intervene on public interest grounds in 'relevant merger situations', i.e. where the Enterprise Act 2002 (either £70 million annual turnover or an increase of a 25 percent share of supply on any given market) or EU merger control threshold is met. Below these thresholds, it has very limited 'special public interest' intervention powers, which it can use in respect of government contractors only.

The Proposal argues that developments in technology and the global security context have given rise to national security concerns in new settings, including in smaller businesses. The government may see the announcement by Chinese-backed Canyon Bridge of an intention to acquire UK technology company Imagination Technologies (a transaction which is not caught by UK merger control thresholds and thus difficult to catch for the purposes of a public interest review) as an example of such a transaction.

Short-term reform

The government is looking to close these gaps "immediately" following the current consultation, and proposes to do so through secondary legislation (which could be passed in a matter of days). The amendments would lower the threshold in the target turnover limb from £70 million to £1 million and remove the need for an increment (competitive relationship between the parties) in the market share limb for transactions involving the (i) military and dual-use and (ii) advanced technology sectors.

The Proposal suggests using the current [Strategic Export Control Lists](#) to determine the scope of military and dual-use concerns, while technology would catch a broad range of companies involved in "multi-purpose computing hardware" (including as designers or as owners of related intellectual property) as well as quantum-based technology.

The Competition and Markets Authority's (CMA) guidance on voluntary notifications will continue to apply to these transactions, meaning that the parties are to self-assess whether a filing is needed. Similarly, the CMA will continue to assess any notifications under the same procedure it currently uses for public and special public interest interventions.

Long-term reform

The government's proposals for the long-term include one or either of: (i) a voluntary notification regime featuring an expanded 'call-in' power modeled on the existing Enterprise Act 2002 power (but which would allow the government to scrutinize a broader range of transactions for national security concerns, including new projects and bare asset sales) with a three-month 'call-in window' and (ii) a mandatory notification regime applicable to only certain parts of key sectors (although these would include, as a minimum, civil nuclear, defense, energy, telecommunications and the transport sector as well as the manufacture of military and dual-use items and advanced technology).

The government emphasizes that the national security review will be distinct from the CMA's competition review and that the review powers would not extend beyond the public interest in national security to other public interests. The government also proposes to offer guidance and engagement for businesses considering whether their merger might raise national security issues.

Contact Information

If you have any questions concerning this alert, please contact:

Davina Garrod

davina.garrod@akingump.com
+44 20.7661.5480
London

Sebastian Casselbrant-Multala

sebastian.casselbrant-multala@akingump.com
+44 20.7012.9697
London

Jasper Helder

jasper.helder@akingump.com
+44 20.7661.5308
London

Corey Roush

croush@akingump.com
+1 202.887.4115
Washington, D.C.

Kevin Wolf

kwolf@akingump.com
+1 202.887.4051
Washington, D.C.

Christian Davis

chdavis@akingump.com
+1 202.887.4529
Washington, D.C.