

UK Government to Reform M&A Rules to Protect National Security

IN SHORT

The Situation: The UK government is introducing new protectionist measures concerning acquisitions of businesses operating in the United Kingdom.

The Impact: The government intends to expand the scope of acquisition transactions it can scrutinize—and block—on public interest grounds, in particular acquisitions of companies active in the United Kingdom in military, dual-use, and advanced technology sectors. There are also plans to introduce reforms to enable the government to examine and intervene in foreign takeovers covering a wide range of industries.

The UK government has announced plans to introduce new legislation that will give it greater scrutiny over deals raising national security concerns and foreign takeovers of businesses trading in the UK. This delivers on the commitment made in the Queen's speech earlier this year, where the Prime Minister announced that she would strengthen the government's powers to scrutinize certain foreign investments and intervene where it sees fit. The government's [plans](#) are available for open consultation until January 9, 2018.

Limitations of the Current Law

Under the Enterprise Act 2002 ("Act"), the government can intervene in certain mergers or takeovers only where national security, media plurality, or financial stability public interests are implicated. Other than in certain UK defense industry or media deals, the government can only intervene if the acquired company has annual turnover in the UK of more than £70 million (US\$92 million), or the merging companies together have a 25 percent share of supply of goods or services in the UK, provided the merger results in an increment to that share. As such, most mergers involving small and medium-sized businesses fall outside the scope of the Act, as well as many transactions of potential interest that do not lead to an increase in the merging parties' combined share of supply.



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The government has also highlighted failings with the current laws for regulating foreign investment. It argues that they appear inconsistent across markets and sectors, are too reliant on voluntary powers, and cause uncertainty for businesses. The government compares the UK regime unfavorably with regimes in countries such as Canada and Australia. It considers these to be more consistent in their approach, such as by requiring all foreign investors attempting to take control of significant infrastructure firms to give notice of their intent and seek approval before finalizing transactions. Notification of such deals in the United States is voluntary, but they can be called in for review post-completion if not notified in advance.

Proposals and Likely Timing

The government's proposals are divided into short and long term plans. In the short term, the government proposes closing the current loopholes in the Act by amending the existing jurisdictional thresholds. This is to enable it to scrutinize mergers in two areas where new risks to national security have emerged since the introduction of the Act—the military and dual-use sectors (items used for civilian purposes that may have military applications), and parts of the advanced technology sector. For these areas, together with media and financial sector deals, the government proposes to both lower the turnover threshold from £70 million to £1 million (US\$1.3 million), and remove the requirement for an *increase* in the share of supply, meaning that the target alone could trigger the 25 percent share of supply threshold. The government is looking to rush in its changes. Its consultation ends on November 14, 2017.

For the time being, notification to the government of qualifying deals will likely remain voluntary. This means that merging parties may complete deals raising national security concerns at their own risk. In those circumstances, the government will have four months from completion of the deal being made public to assert jurisdiction over it and ultimately, if it so wishes, to unravel the deal.

In the longer term, the government intends to undertake what it describes as a comprehensive reform to its powers, focusing on whether foreign investment in businesses essential to the UK raises any national security concerns. Two potential reforms have been mooted: (i) an expanded version of the 'call-in' power, which will allow the government to use the current voluntary notification regime to scrutinize a

broader range of transactions of national security concern than it can review at present, and (ii) a mandatory notification regime for foreign investment into identified key parts of the economy, or into specific businesses or assets. The consultation on these longer-term reforms ends on January 9, 2018.

THREE KEY TAKEAWAYS

1. The UK government is introducing new protectionist measures regarding takeovers of certain businesses active in the United Kingdom.
2. The government plans to amend the jurisdictional thresholds for deals in the military, dual-use, and advanced technology sectors, together with those in the media and financial sectors; it proposes to lower the turnover threshold from £70 million to £1 million, and remove the requirement for an increase in the parties' share of supply, meaning that the target alone could trigger the threshold.
3. The government is carrying out a comprehensive reform of its powers to regulate foreign investment in M&A to address national security concerns.

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