

# PANDEMIC-PROOFING M&A

## NEW POWERS FOR THE UK TO INTERVENE IN M&A TRANSACTIONS

The UK Government yesterday tabled new powers that will allow ministers to screen certain transactions, in order to guard against “*hostile approaches*” during the COVID-19 pandemic. The new powers are intended to mitigate risks in the short term ahead of more comprehensive powers for foreign investment screening being introduced in the forthcoming National Security and Investment (NS&I) Bill.

### Foreign investment screening in the UK: the current picture

At present, the UK Government can scrutinise foreign direct investment (FDI) in specific and limited circumstances, provided the Competition and Markets Authority (CMA - the UK merger control authority) or the European Commission has jurisdiction to review the relevant transaction under the merger control rules.

Under the Enterprise Act 2002 (EA02), these powers are restricted to intervention in a transaction on public interest grounds, narrowly defined as cases involving national security, media plurality, or the stability of the UK financial system.

The UK Government has intervened on public interest grounds under the EA02 on only 20 occasions since 2002: 12 on national security grounds, seven on media plurality grounds and once on financial stability grounds. No transaction has ever been blocked on public interest grounds.

The last addition to the EA02 public interest grounds was during the 2008 financial crisis, when the “financial stability” ground was introduced, allowing the Government to intervene to push through Lloyds’ takeover of HBOS in September 2008, despite the CMA finding that it raised competition concerns.

### The new powers - what’s changing?

#### New power 1: public health emergencies

The Government has introduced a fourth specified public interest ground to the EA02: combatting a public health emergency. This gives the Government the power to impose remedies on, or even block, acquisitions which might threaten “*the need to*

*maintain the capability to combat, and mitigate the effects of, public health emergencies*”. Although the immediate application of this new power is to the ongoing COVID-19 pandemic, Alok Sharma MP envisages the instrument applying to any future pandemic also.

This amendment formalises powers that might already have been available to the Government, if they had interpreted “national security” to include “public security”, consistent with EU interpretation of the term. The European Commission considers that “public security” can cover “*security of supplies to the country in question of a product or service considered of vital or essential interest for the protection of the population’s health*”.

In particular, this new power is aimed at protecting businesses “*with critical capabilities [that] are more susceptible to takeovers*”. Key companies, deemed critical to the UK’s pandemic response, would include medical research companies (especially where involved in the search for a vaccine), PPE manufacturers, and businesses involved in food supply chains, among others.

**“My message is clear: the UK is open for investment, but not for exploitation. I am changing the law to protect those important businesses from being taken over by opportunistic investors”**

Alok Sharma MP, Secretary of State for Business, Energy and Industrial Strategy

The public health emergency intervention powers enter into force today, Tuesday 23 June 2020.

#### New power 2: key technology sectors

The second new power will allow the Government to scrutinise takeovers of smaller companies specialising in new technologies, namely artificial intelligence, advanced materials, and cryptographic authentication technology. The new law will lower the UK merger control thresholds in relation to these three sectors,

meaning that the Government’s ability to intervene on public interest grounds kicks in even for acquisitions of new or small companies. The turnover test for intervention in these sectors will be lowered to £1 million in the UK (the standard threshold is £70 million in the UK), and the ‘share of supply’ test will be met where the target enterprise supplies at least one quarter of all goods or services of a particular description, with no requirement for a merger to increase the share of supply (as there is under the standard test).

The change in the jurisdictional thresholds in these three sectors follows a similar lowering of the thresholds in 2018 for transactions in sectors involving military / dual-use products, computing hardware, and quantum technology.

Unlike the new power enabling intervention on the ground of combatting a public health emergency, this new power will not come into effect until both Houses of Parliament have debated and approved it.

#### The wider context: the EU and the NS&I Bill

The measures tabled yesterday are intended to “send an important signal to [foreign investors] seeking to take advantage of those struggling as a result of the pandemic that the UK government is prepared to act where necessary to protect our national security”, according to Alok Sharma MP.

The new powers arrive in the context of the European Commission’s March 2020 Communication, which

urged Member States to strengthen their existing FDI screening regimes, or put new regimes in place where they do not already exist, in order to protect businesses important to the EU’s response to the COVID-19 pandemic from predatory foreign takeovers (see discussion in [this briefing](#)). Many Member States have already responded to this call by bolstering their FDI screening processes, including Germany, the Netherlands and Spain.

The new UK measures are intended to address national security risks in the short-term, ahead of the NS&I Bill which is expected to be announced later this summer (first proposed in summer 2018 - see the brief history of FDI screening in the UK, below). It is expected that the forthcoming legislation will contain more comprehensive powers for scrutinising foreign investment into the UK by way of a formal screening regime, and will potentially mean that any transaction with national security concerns will have to be notified for approval.

*“It’s an important first step given the crisis, but this isn’t just about public health and it would be good to [go] further as soon as possible”*

Tom Tugendhat MP, Chair of the Foreign Affairs Select Committee

#### A brief history of public interest interventions and FDI screening in the UK

OCTOBER 2008	“Financial stability” ground added to the list of public interest grounds in the EA02.
JUNE 2018	Lower UK merger control thresholds introduced to allow the Government to intervene in transactions involving military or dual use items, quantum technology or computing hardware.
JULY 2018	Theresa May’s government published a White Paper proposing extensive new powers allowing the UK Government to review transactions on national security grounds (discussed fully in <a href="#">this briefing</a> ).
OCTOBER AND DECEMBER 2019	Boris Johnson’s government outlined a proposed National Security and Investment Bill in the briefing notes accompanying the Queen’s Speech (in which the Government sets out its agenda at the opening of each parliamentary session).
22 JUNE 2020	New powers tabled to introduce a new public interest ground for “ <i>combatting a public health emergency</i> ” and lower the UK merger control thresholds for an additional three sectors: artificial intelligence, advanced materials, and cryptographic authentication technology.
30 JUNE 2020	Deadline for closure of the Foreign Affairs Committee’s inquiry into the FCO’s role in FDI screening and the safeguards required in the forthcoming NS&I Bill.
EXPECTED LATER IN SUMMER 2020	NS&I Bill to be put forward (BEIS has stated that the legislation will be tabled “ <i>when Parliamentary times allows</i> ”).

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