Foreign Direct Investment Regimes in Europe

The United Kingdom
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Public interest intervention

The UK Government (acting by the Secretary of State), can intervene in a “relevant merger situation”, either on its own initiative or on the recommendation of the CMA, by issuing a public interest intervention notice (“PIIN”), as provided for in the Enterprise Act 2002 (“EA”). This acts as a screening mechanism for acquisitions of UK businesses, and can theoretically block transactions in certain situations, on grounds of “public interest”. However, there is currently no specific legal framework to deal with foreign investment as a more general concept: there is no distinction between domestic and foreign investment, and at no point are the terms “foreign investor” or “foreign investment” defined.

Merger control

Foreign investors should also be aware that for certain sectors the merger control regime is triggered due to lower thresholds.
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Scope of FDI Regime: Transactions subject to review

Does the law relate to acquisitions in only certain sectors or specific activities?

- The law on foreign direct investment screening in the UK is currently focused on “public interest” transactions, and it is only applicable in relation to activities concerning: national security, plurality of the newspapers and the media, stability of the UK financial system, and public health emergencies.
- Lower merger control thresholds apply to entities active in military use goods or dual use technology; multi-purpose computing hardware; quantum technology; advanced materials; cryptographic authentication products; and artificial intelligence.

Can minority stakes be caught?

- Minority stakes can be caught, as the Secretary of State can intervene wherever there is a “relevant merger situation”, which may include minority acquisitions. One of the criteria for such is that “two or more enterprises cease to be distinct”, i.e. where they are brought under common ownership or common control. Control exists where the enterprise is able to exercise material influence over the other enterprise (such as the ability to influence policy, such as through voting rights as a shareholder).
- Under this relatively wide definition, a shareholding of 25% (the ability to block special resolutions) is likely to provide “material influence”, and anywhere between 15% - 25% is likely to gain scrutiny.
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Scope of FDI Regime: Transactions subject to review

What types of transactions are subject to review?
The Secretary of State can intervene in relation to:

1. **Public Interest Mergers**
   - The Secretary of State can issue a public interest intervention order ("PIIN") in relation to a relevant merger situation, for reasons of: (1) national security, (2) plurality of the newspapers and the media, (3) stability of the UK financial system, and (4) public health emergencies.
   - The Secretary of State has powers to amend the provisions in the EA, by adding or removing considerations by way of an Order, where appropriate. When the EA was first enacted it only covered national security, whereas now additional considerations have been added, most recently regarding public health emergencies in light of the Covid-19 pandemic.

2. **Special Public Interest Mergers**
   - The Secretary of State can issue a special public interest intervention order ("SPIIN") in relation to special interest mergers even where the merger does not meet the usual threshold for intervention, providing that: (a) one of the merging parties is a governmental contractor involved in confidential defence and a public interest issue arises, or (b) one of the parties supplies at least 25% of all newspapers or broadcasting.
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Scope of FDI Regime: Transactions subject to review

What types of transactions are subject to review?
Lower merger control thresholds apply to:

Certain critical technology mergers

- Transactions may otherwise be covered by the lower turnover and share of supply thresholds applicable to certain enterprises under section 23A of the EA. These lower thresholds relate to entities that are active in military use goods or dual use technology; multi-purpose computing hardware; quantum technology; advanced materials; cryptographic authentication products; and artificial intelligence.
- The more relaxed thresholds effectively provides for a lower barrier to additional scrutiny on certain transactions which are viewed as imperative from a national security or critical national infrastructure perspective.
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Scope of FDI regime: Proposed Reform

Legislative reform

- The UK government has for some time had a more long-term vision of comprehensively reforming the legislative position on foreign investment, and in July 2018 it published a White Paper on “National Security and Investment”. See page 8 on further developments regarding the National Security and Investment Bill.
- Under the proposed changes:
  - Notification of transactions is to remain voluntary;
  - Parties will be more actively encouraged to notify of their transactions, particularly in relation to “trigger events”; and
  - Where parties do not notify, the government has powers to “call in” transactions to undertake a national security assessment.
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Scope of FDI Regime: Proposed Reform

Legislative reform

- Trigger events are events which may raise national security concerns. This would include an acquisition of control (or significant influence) over an entity or asset. The White Paper highlights three main ways in which “national security risk” will be analysed:
  1. Target risk: the entities or assets being acquired, and how they could be used to undermine national security.
  2. Trigger event risk: the means of control or influence that must take place in order for the potential to undermine national security.
  3. Acquirer risk: details of the parties which the government considers more likely to pose a national security risk due to their status.
- The government will be able to impose such remedies as necessary and proportionate, including (as a last resort) blocking and unwinding the transaction. Further, the government intends to introduce both civil and criminal sanctions for non-compliance with remedies.
- It will replace the current regime under the EA, and in doing so will remove the CMA’s remit to address national security concerns, which will instead be dealt with and assessed separately by the government.
- The public consultation on the White Paper finished in October 2018, and the National Security and Investment Bill was announced in the Queen’s speech in December 2019. To date, the Bill has not been published and the timeline remains unclear.
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Thresholds

The UK regime applies where certain threshold tests are satisfied; however the thresholds differ depending on the type of legal grounds on which the Secretary of State is intervening on.

1. **Public Interest Mergers**
   - The regime only applies if either the turnover test or “share of supply” test is satisfied.
   - The turnover test requires the value of the UK turnover of the target company to be over £70 million. The “share of supply” test requires that, as a result of the merger, the combined enterprise will supply or acquire 25% 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% or more is increased.

2. **Special Public Interest Mergers**
   - The usual “share of supply” and turnover tests are not required, provided that (a) one of the merging parties is a governmental contractor involved in confidential defence and a public interest issue arises, or (b) one of the parties supplies at least 25% of all newspapers or broadcasting.
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Thresholds

Certain critical technology mergers:

- In cases regarding specific industries and activities (military use goods or dual use technology; multi-purpose computing hardware; quantum technology; advanced materials; cryptographic authentication products; and artificial intelligence), the usual “share of supply” test is amended: the requirement for there to be an increase in the share of supply is removed in instances where the share is already 25% or more. Additionally, the turnover test threshold is reduced from £70 million to £1 million.
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Procedure

Is the regime mandatory (i.e. are parties obliged to notify of the transaction)?
- Notification to the CMA of a transaction is not mandatory, although the CMA has extensive powers to intervene after completion of a transaction.

Is the regime suspensory (i.e. must parties wait for an approval decision before completing a transaction)?
- Firms can complete a merger without obtaining UK merger approval. However, if the CMA decides to investigate the merger despite a lack of notification, then the CMA has wide powers to impose interim measures, which can require the parties to hold the merging businesses separate and potentially unwind any already existing integration.

What is the timing between an approval decision being issued and the commencement of a review by the authority?
- The CMA has 40 working days to complete the initial stage of its merger review process (its Phase 1 review). At the end of the Phase 1 review the CMA states whether it believes the merger results in a realistic prospect of a substantial lessening of competition, and if it does, it will launch an in-depth Phase 2 review.
- The Phase 2 review is generally limited to 24 weeks, and therefore resulting a total of just under 30 weeks from commencement of review by the authority before approval in a full Phase 2 referral case.
- Where the Secretary of State refers a public interest or special public interest merger to the CMA, the CMA must generally deliver its report to the Secretary of State within 24 weeks. Within 30 days of receipt of the CMA’s report, the Secretary of State shall make a decision in relation to the public interest or special public interest merger.
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Procedure

How long does the authority have to commence a review before it loses jurisdiction to do so?

- The CMA has a 40 working day deadline to make a Phase 2 reference for completed mergers, which commences from the time that material facts of the case are made public, or the time the CMA is told of the facts (whichever is earlier).

What action can the authority take to protect national interests?

- The Secretary of State, once it has received the CMA’s report setting out its recommendation as to whether it raises a public interest concern (following the Secretary of State’s intervention notice), can refer the transaction back to the CMA for a Phase 2 investigation (see page 11 on timing). At this stage the CMA will prepare a detailed report regarding all competition concerns, including any specific public interest concerns. This is then returned to the Secretary of State for it to take the final decision as to whether the merger goes against the public interest.

- If this is found to be the case, the Secretary of State can take action to remedy and/or mitigate the effects of the merger, which can include blocking the deal if necessary. More commonly, however, the Secretary of State will ask the parties to provide undertakings to address the concerns, rather than resorting to blocking the deal.
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Impact on M&A

In cases which pose a potential public interest concern under the EA or its related Orders, parties should expect an increased likelihood of the CMA showing interest and investigating the transaction (if it has not already been notified). This can result in delays to completion of the transaction, requirements of undertakings from the parties to address such concerns, and potential prohibition of the deal entirely.

In relation to special public interest mergers (where one of the merging parties is a government contractor involved in confidential defence information, or where one of the parties supplies at least 25% of all newspapers or broadcasting of any description), parties should prepare for the Secretary of State to issue a SPIIN even where the usual threshold tests are not met, thus resulting in delays in the process of completing the deal, and increased uncertainty as to when to deal may complete, and whether it will be blocked.

In relation to critical infrastructure mergers (transactions regarding specific industries and activities relating to the military, dual use and quantum computing sectors), parties should prepare for potential delays in the process of completing the deal, and increased uncertainty as to when to deal may complete and whether it will be blocked, and anticipate the lower threshold required for the “share of supply” test.
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