# UK REGULATION OF INWARD INVESTMENT – AN ONGOING PROCESS OF CHANGE

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The United Kingdom has traditionally seen itself as open to foreign investment – until recently controls on foreign inward investment were limited. The Enterprise Act 2002, which sets out the basis of UK merger control (on economic grounds) provides that the Competition and Markets Authority (CMA) will take its decision only based on economic criteria – i.e. does this merger lead to a substantial impediment to effective competition on one or several UK markets?

Until January 2022, other grounds for intervening were limited to the protection of defence and national security or maintaining the plurality of the media. However, since then , the National Security and Investment Act 2021 has allowed the Secretary of State to intervene on a wider set of grounds. The CMA continues to be able to intervene in foreign acquisitions of businesses based in the UK on economic grounds under the 2002 Act.

**The UK now has stronger mechanisms for strategic sectors**

The National Security and Investment Act is intended to fill the perceived gaps in in the British system of protection of 'national' assets said to be of a 'strategic' character. The Minister's power of intervention in the 2002 Act are now replaced with reinforced powers of intervention on national security grounds:

- the Minister may now issue so-called 'call-in' notices on a wider range of criteria;
- a notice may now be issued not only where a strategic business located in the UK is being acquired, but also in relation to the acquisition of strategic assets not amounting to a business;
- the acquirer of a business or asset in a strategic sector is required to notify the merger or acquisition to the Ministry – this notification is separate from any notifica-

tion which might be needed for 'traditional' merger control to the CMA;

- the 17 economic sectors in which the 'call in' power under the 2021 Act can be used are set out in a statutory instrument (secondary legislation). In addition to defence technologies (already covered by the 2002 Act), new sectors covered by the call-in power include space, cryptography, energy, data infrastructure and synthetic biology technologies;
- the statutory instrument may of course be changed in the future if the need to protect other strategic UK sectors arises;
- a merger can also be examined as soon as the acquirer holds 25% or more of the voting rights in the target company (a lower threshhold than under the 2002 Act);
- the acquisition of an asset can occur when the acquirer obtains greater rights to use the asset than before the transaction;
- the Secretary of State must respond to the notification within 30 days – which can be extended by another 45 days in certain cases;
- if a call-in notice is issued within this timescale, the transaction may not close without approval from the Secretary of State;
- it is a criminal offence to close a notifiable acquisition without having notified it;
- the sale and purchase agreement will be void.

This revised legislative framework will allow the UK government to investigate in depth not only sensitive business acquisitions by foreign companies, but also (for example) the acquisition and installation of foreign components into the UK telecommunications infrastructure. Following the visit of the then US Secretary of State, Mike Pompeo, in 2020, the UK government announced that the installation of components sourced from the Chinese firm Huawei would be prohibited in the UK and that all existing Huawei components will need to be removed from the network by 2027.

**Merger control on economic grounds still run the by the CMA**

The existing regime under the Enterprise Act will continue to apply where there may be concerns about the economic effects of (foreign) acquisitions in UK markets. Unlike many countries, the UK does not make prior notification of mergers / acquisitions of UK based businesses or companies mandatory. However, the CMA has the power to intervene to require a deal to be 'frozen' while it makes enquiries - it has the power to ask for information not only from the parties to the transaction, but also from third parties. This intervention can take place up to four months from when the deal becomes public or when it closes, whichever is later.

**A new regime with wider scope has been criticised**

The new regime has been criticised, particularly during the Parliamentary process. The statutory consultation on the delegated legislation defining the sectors to be subject to control forced the government to limit somewhat the scope of its initial proposals. Now 'only' 17 sectors will be included. The new regime, which came fully into force at the beginning of 2022, has already thrown up some headline grabbing issues. In particular, the UK government (along with its US counterparts) has objected to the acquisition of the UK based semi-conductor manufacturer ARM by its US competitor Nvidia. The interventions were primarily on economic rather than security grounds – ARM is already wholly owned by the Japanese company SoftBank, which acquired it without regulatory difficulty in 2016 – but have led to the deal being abandoned. There are rumours of an initial public offering of ARM shares by SoftBank instead.

**Thawing a possible chilling effect on FDI**

What will the longer-term impact of the new regime be? Foreign investors into the UK could become more cautious in the light of the penalties for non-compliance with the new system. The maximum penalties for failing to comply with the National Security and Investment Act notification requirements are a fine of up to £10 million or 5% of the world-wide turnover of the acquirer, whichever is the greater. Executives who have tried to avoid the requirements of the Act can also be prosecuted, with a maximum penalty of 12 month imprisonment.

The wide margin of discretion given to the Secretary of State by the Act may also give rise to difficulties. For example, it is unlikely that an Anglo-French joint venture to build a new nuclear power station in the UK would be prevented under the Act – although notification would still likely be required. But if the joint venture included a Chinese partner, as was the case with at least one proposed project, the UK government is likely to intervene.

Clearly the chilling effect of this regime could harm the UK by discouraging inward investment in the future. Accordingly, the UK regime has included a system of (voluntary) pre-notification. The parties to a potentially sensitive transaction can approach the Ministry in advance of concluding their deal to see if the proposal is likely to

raise any concerns under the National Security and Investment Act. Although a voluntary submission might increase the risk of the UK government examining the transaction in depth, the view given (in confidence) by the Ministry will allow the transaction to proceed with minimal regulatory risk, provided full disclosure has been made.

**The UK regime compared to France and the EU**

The UK regime under the National Security and Investment Act 2021 now resembles more closely than previously the French legislation dealing with the same issues. The French 'loi Pacte' of 2019 also allows the Minster to examine (and if necessary) block acquisitions in France on national security grounds. The timescales for action and the penalties for non-compliance are comparable and the scope of the minister's power to act also covers similar sectors.

Whether this growing tendency for European countries to give themselves new powers to prevent unwelcome (or even hostile) acquisitions in strategic sectors will mark the beginning of a general move towards more protectionism in international trade between Europe and the rest of the world remains to be seen.