

Extending 'National Security' in Merger Control and Investment: A Good Deal for the UK?

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Abstract

As part of preparations for life after Brexit, the Government of the United Kingdom has introduced wide-ranging proposals for strengthening its powers to scrutinise mergers, acquisitions and investments that raise national security concerns in specific sectors. The proposals seek to extend the scope that the government currently has to intervene in transactions in order to ensure the national security of the UK, while simultaneously minimising any adverse effect these reforms may have on predictability and procedural transparency. Yet, while the government's proposal document makes all the right noises with regard to investor certainty, the resurrection of ministerial decision-making under the proposed reforms could yet act to deter foreign direct investment (FDI) by creating perceptions of an assessment process based on subjective criteria.

Introduction

The vast majority of countries that establish a merger control regime choose to adopt a primarily competition-based approach to merger assessments.¹ However, studies have estimated that almost 9 out of every 10 merger regimes also afford formal consideration to some form of public interest criteria,² the most common of which has been criteria that permit governments to intervene on the grounds of 'national security'.³ These national security criteria are widely accepted as legitimate on the basis that they ensure additional scrutiny is directed at mergers involving firms with assets, operations or geographic locations that are in some way critical to the safety and security of citizens. Outside the realms of their competition regimes, many countries have also incorporated national security criteria within a separate foreign direct investment (FDI) review process, which enables governments to evaluate not only mergers but also broader types of investments – such as greenfield investment or the sale of bare assets – and to subject them to regulatory approval.

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¹ A study of 75 merger regimes in 2016 found that 81.3% of countries adopt a predominantly competition-based approach to assessments; David Reader, 'Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights' (2016) CCP Working Paper 16-3, 19 <http://ssrn.com/abstract=2736917> accessed 10 January 2018.

² *ibid*; an estimated 88% of domestic merger regimes incorporate at least one public interest criterion.

³ Andreas Heinemann, 'Government Control of Cross-Border M&A: Legitimate Regulation or Protectionism?' (2012) 15(3) *Journal of International Economic Law* 843, 844-852.

But while national security criteria ostensibly serve a legitimate purpose, there is nonetheless a risk that these criteria can be abused by governments, who may adopt a broader definition to the concept of ‘national security’ in order to, for example, pursue industrial policy goals by restricting foreign takeovers and broader FDI in sectors of strategic national interest.⁴ These industrial policy pursuits can arouse suspicions of protectionism which, in turn, may reduce the incentives of prospective foreign investors to seek ventures in a particular country. This poses a conundrum for countries that are seeking to introduce national security criteria or extend their existing criteria. If investors are alive to the possibility that national security criteria will be afforded an expansive protectionist application, any efforts by a country to extend the scope of its national security review risks undermining its attractiveness as a destination for FDI. As such, reforms of this kind would seem to warrant a high standard of transparency and predictability so as to mitigate any adverse effect the new measures will have on investor confidence.

In October 2017, the Government of the United Kingdom published its long-awaited Green Paper on *National Security and Infrastructure Investment (NSII)*,⁵ outlining a series of transformative proposals for extending the government’s powers to intervene in mergers and wider forms of investment on national security grounds. At a glance, the Green Paper’s repeated emphasis of the need to maintain a regime that promotes business certainty and procedural transparency would seem to be music to the ears of potential investors. However, the proposals are also set to resurrect a central role for ministerial decision-making in the UK investment landscape which, particularly in the light of a new industrial strategy and the shadow of impending Brexit, carries the risk of creating a suspicion that politicians will base their decisions on industrial policy grounds under the guise of national security.

This article offers a critical evaluation of some of the core components of the NSII Green Paper. By placing this evaluation within the broader rhetoric surrounding Brexit, the UK’s industrial strategy and the growing scepticism directed towards FDI, the article pitches an argument for restraining the role of ministerial decision-making under the new regime.

A sign of the times: emerging scepticism towards FDI in the UK

To evaluate the Green Paper at face value is to blinker oneself from the key political context that lurks beneath the surface of the government’s proposals. Understanding this political context is crucial in order to gain a robust insight into how foreign investors are likely to interpret and respond to the proposals, in the event that they are enacted into law. Firstly, by way of a brief introduction to the legal framework for investment in the UK, the absence of a formal FDI review regime in the UK has meant that investors have largely been concerned with

⁴ *ibid* 868-869.

⁵ Department for Business, Energy & Industrial Strategy, *National Security and Infrastructure Investment Review* (Green Paper, 2017).

navigating through one or more of two processes: (i) the merger control regime under the Enterprise Act 2002, and (ii) the corporate governance regime under the Takeover Code.⁶

Having historically implemented a minister-led merger control regime based on a broad public interest test under the Fair Trading Act 1973, the UK has – for many years – enforced a competition-based approach to merger assessments under the stewardship of independent competition authorities.⁷ The Enterprise Act 2002 provides that, in any instance where a relevant merger situation has been created,⁸ the outcome of a merger will be determined by the Competition and Markets Authority (CMA) on the basis of whether the merger ‘has resulted, or may be expected to result, in a substantial lessening of competition’ within the relevant market.⁹ Nevertheless, the 2002 Act retains a residual power for the Secretary of State to intervene in the CMA’s assessment on prescribed public interest grounds: (a) national security, (b) media plurality and broadcasting standards, and (c) stability of the UK financial system.¹⁰ The Secretary of State may also add or remove a public interest ground from this list, subject to parliamentary approval, by exercising his/her power under section 58(3). The power to issue a public interest intervention notice (PIIN) or – in the case of a merger with an EU dimension – a European intervention notice (EIN) currently lies with the Secretary of State for Business, Energy & Industrial Strategy (the BEIS Secretary), with the exception of mergers that raise concerns regarding media plurality or the presentation of news, where the Secretary of State for Digital, Culture, Media & Sport has the authority.¹¹

Although PIINs and EINs have been a relatively uncommon in practice,¹² the national security criterion under section 58(1) has had the most frequent use of the three public interest grounds to date.¹³ The 7 national security cases that have arisen (as of the time of writing) are perhaps among the least controversial of the 12 public interest cases to have materialised, with commentators observing that national security cases often ‘fall below the political radar’ and

⁶ While the merger control regime seeks to review the competition and (on occasion) public interest implications of a transaction, the City Code on Takeovers and Mergers outlines a broad range of behavioural and procedural standards for the merging parties to adhere to during and after the offer period.

⁷ This competition-based approach was originally introduced by the so-called ‘Tebbit doctrine’ when it was presented to the House of Commons in 1984; HC Deb 5 July 1984, vol 63, cols 213-14W.

⁸ A relevant merger situation is created if either: (a) the value of the target firm’s UK turnover exceeds £70m (the ‘turnover test’), or (b) the merger would create or enhance a situation where the merged entity is supplying/purchasing at least 25% of a particular good/service in a substantial part of UK (the ‘share of supply test’); Enterprise Act 2002, s 23. See sub-s (1)(b) for the turnover test, and sub-ss (3) and (4) for the share of supply test for goods and services respectively.

⁹ *ibid* s 22(1)(a).

¹⁰ *ibid* s 42(2). The specific public interest grounds are listed under s 58.

¹¹ Media public interest mergers were also ruled upon by the BEIS Secretary (or the equivalent department in charge of business) until the *NewsCorp/BSkyB* merger, when the incumbent Secretary of State evoked perceptions of bias by revealing his intentions to “declare war on Rupert Murdoch” to undercover journalists; Robert Winnett, Andrew Porter and Holly Watt, ‘Humiliated Cable stripped of media role’ *The Telegraph* (London, 22 December 2010) 1-2.

¹² At the time of writing, only 12 mergers have been the subject of a PIIN under the 2002 Act.

¹³ Of the 12 PIINs, 7 have been made on national security grounds, compared to 4 on media plurality and only one for financial stability.

‘seem to proceed along well-trodden and predictable lines’ in contrast to the media and financial stability cases the UK has witnessed.¹⁴

The rise of the “Open for Business” rhetoric (2010 – 2016)

As the Green Paper itself alludes to, the UK has historically punched above its weight in terms of attracting high levels of FDI.¹⁵ The reason for this can, in part, be attributed to measures to reduce the regulatory burden on foreign investors as part of an “open for business” stance that has been adopted by successive governments in order to aid the UK’s recovery in the wake of the 2007-08 global financial crisis.¹⁶ Yet there has been a mixed response from the British public in terms of how desirable a permissive investment regime actually is. There are signs, for example, that greenfield investments from overseas are regarded as a welcome prospect among UK citizens, given that these can create new jobs and stimulate economic activity.¹⁷ In contrast, it appears a deep-set scepticism has emerged towards the perceived benefits of foreign takeovers among a significant proportion of the UK population,¹⁸ which is likely to have arisen as a result of economic downturn,¹⁹ the rise of anti-globalisation sentiment within the EU and US,²⁰ and the headline-grabbing media coverage of foreign bids for so-called ‘crown jewel’ firms, such as Cadbury and AstraZeneca.

The takeover of Cadbury by US firm Kraft in 2010 is perhaps the most notorious example of how foreign investment can backfire whenever a beloved national institution is involved. Despite making pre-merger commitments to continue operations at Cadbury’s historic Somerdale chocolate factory, Kraft ultimately took the decision to close the plant, leading to some 400 job losses. In the wake of this case, the Business Secretary, Lord Peter Mandelson, dismissed the possibility of introducing a political test for scrutinising foreign ownership, maintaining that ‘protectionism is not in [the UK’s] interests’.²¹ Nevertheless, the Kraft/Cadbury case acted to sew the seeds of doubt in minds of the British public and proved

¹⁴ Cosmo Graham, ‘Public Interest Mergers’ (2013) 9(2) *European Competition Journal* 383, 404.

¹⁵ The Green Paper refers to UNCTAD data which ranks the UK as being the third-highest recipient of FDI; NSII Green Paper (n 5) para 6.

¹⁶ An early reference to the “open for business” stance can be found in the Conservative Party manifesto for the 2010 General Election; Conservative Party, *Invitation to Join the Government of Britain* (2010 General Election Manifesto, April 2010) 19.

¹⁷ One survey has estimated that 82% of UK citizens consider overseas greenfield investment to be beneficial, compared with a global median of 74%; Pew Research Center, ‘Faith and Skepticism about Trade, Foreign Investment’ (*Global Attitudes & Trends*, 16 September 2014) 13 and 40 <http://assets.pewresearch.org/wp-content/uploads/sites/2/2014/09/Pew-Research-Center-Trade-Report-FINAL-September-16-2014.pdf> accessed 10 January 2018.

¹⁸ It is estimated that only 39% of UK citizens consider foreign takeovers to have a positive impact on the country (note that the global median was 45%), whereas 53% felt they have a negative impact; *ibid* 13.

¹⁹ Alison Jones and John Davies, ‘Merger Control and the Public Interest: Balancing EU and national law in the protectionist debate’ (2014) 10(3) *European Competition Journal* 453, 455.

²⁰ David Reader, ‘At a Crossroads in EU Merger Control: Can a Rethink on Foreign Takeovers Address the Imbalances of Globalisation?’ (2017) 1(2) *European Competition and Regulatory Law Review* 127, 128.

²¹ Lord Mandelson, ‘Mansion House Speech’ (Trade and Industry Dinner, London, 1 March 2010).

to be a catalyst for the first meaningful debate around extending the public interest regime under the Enterprise Act 2002.²²

After assuming power in the General Election of 2010, one of the key initiatives of the Conservative-Liberal Democrat coalition government was to commission a review on economic growth, which was led by the Conservative peer Lord Michael Heseltine. The findings of the Heseltine Review included a recommendation for the government to show a ‘greater willingness’ to use its public interest powers under the 2002 Act, in anticipation that this would (i) aid the Government’s negotiating efforts with prospective foreign investors seeking to invest in strategic industries, and (ii) discourage unwanted investment in exceptional cases.²³ In an emphatic renewal of its “open for business” stance, the government rejected this recommendation on the basis that it was already committed to engaging with foreign firms in order to promote investment that benefits the economy.²⁴

The “open for business” stance of the coalition government — or, more specifically, its Conservative Party wing — again came under scrutiny in 2014 when US pharmaceutical giant Pfizer lodged a bid for its UK-listed counterpart AstraZeneca. The ultimately unsuccessful bid was met with strong opposition from Members of Parliament both within and outside of government, where Pfizer’s questionable track record for asset-stripping had generated anxieties over the retention of skilled jobs and R&D investment. At the time, one of the most prominent voices calling for a tougher stance on foreign takeovers that threaten the national interest was that of Sir Vince Cable, the Business Secretary. Sir Vince proposed numerous safeguards to counteract these perceived threats, including: (i) to remove the “wobble room” under the Takeover Code that seemingly allowed firms to renege on their pre-takeover commitments, (ii) to introduce financial penalties for firms who fail to honour their commitments, and (iii) to amend the public interest provisions under the Enterprise Act 2002 as a ‘last resort’ to protect the national interest.²⁵ As a consequence, changes to the Takeover Code in early-2015 appeared to address the “wobble room” concern by clarifying much of the uncertainty surrounding the ‘binding’ nature of commitments.²⁶ However, this in itself appeared insufficient to appease growing concerns

²² Buch-Hansen suggests that the reluctance to extend the public interest test to combat certain foreign takeovers in the wake of Kraft/Cadbury was indicative of a deep-set preference for neoliberal ideas to inform UK merger control; Hubert Buch-Hansen, ‘The political economy of regulatory change: The case of British merger control’ (2012) 6(1) Regulation & Governance 101, 114.

²³ Lord Heseltine, *No Stone Unturned: In pursuit of growth* (Independent Report, BIS 2012) paras 5.102-5.111 and Recommendation 73.

²⁴ HM Treasury and Department for Business, Innovation & Skills, *Government’s response to the Heseltine review* (Cm 8587, 2013) para 1.48 and 59. Indeed, of the 89 recommendations that Lord Heseltine put forward, this was one of only five recommendations that the Government rejected outright.

²⁵ Vince Cable MP, ‘Strengthening confidence in the UK’s takeover laws’ (*Liberal Democrat Voice*, 13 July 2014) www.libdemvoice.org/vince-cable-writesstrengthening-confidence-in-the-uks-takeover-laws-41522.html accessed 10 January 2018. For a critique of these proposals, see David Reader, ‘Pfizer/AstraZeneca and the Public Interest: Do UK Foreign Takeover Proposals Prescribe an Effective Remedy?’ (2014) 10(1) CPI Antitrust Chronicle www.competitionpolicyinternational.com/pfizerastrazeneca-and-the-public-interest-do-u-k-foreign-takeover-proposals-prescribe-an-effective-remedy accessed 10 January 2018.

²⁶ The Takeover Code now distinguishes between ‘post-offer undertakings’ (Rule 19.5) and ‘post-offer intention statements’ (Rule 19.6); the former amounts to a binding *commitment* for the firm to take a particular course of

within the Labour Party and the Liberal Democrats, who each included pledges for a ‘stronger public interest test’ in their 2015 General Election Manifestos.²⁷ The Conservative Party manifesto, in contrast, remained silent on the matter.

The ‘Brexit’ vote and aftermath (2016)

A Conservative victory in the 2015 General Election looked to have put paid to any imminent changes being made to the public interest regime. Yet a surprise ‘Leave’ result in the UK’s EU Membership Referendum in June 2016 prompted the resignation of David Cameron as Prime Minister – a staunch advocate of the Conservatives’ “open for business” policy – and, in his place, the arrival of Theresa May. In contrast to her predecessor, the new Prime Minister believed that cases such as Pfizer’s failed bid for AstraZeneca illustrated the need for the government to have greater powers to control FDI. Indeed, she took the opportunity to use the launch event of her leadership campaign to outline her plans for a ‘proper industrial strategy’ that would allow the government to step in to defend strategically important sectors from unwanted foreign investment.²⁸ Her subsequent victory in the party leadership race meant that, for the first time in 6 years, the government had a captain who looked set to steer the ship away from its permissive investment policy.

A matter of days later, shortly after the Japanese tech firm SoftBank announced it had made a successful bid of £24.3bn for UK chip-maker ARM Holdings, Theresa May’s government confirmed it had engaged in behind-closed-doors negotiations with the parties in order to seek reassurances on SoftBank’s commitment to job retention and maintaining ARM’s presence in the City of Cambridge.²⁹ The deal came as a surprise to those who had anticipated a new era of subjecting foreign takeovers to tougher scrutiny. On the contrary, the Chancellor of the Exchequer hailed the takeover as a sign that ‘Britain is open for business – and open to foreign investment’.³⁰ Yet, while the government chose to give its backing to the deal, it also took the opportunity to announce its intention to subject all foreign takeovers to case-by-case scrutiny based on a ‘national interest’ test.³¹

This national interest test – which has no formal basis in existing legislation – represented an additional hurdle for foreign takeovers that was entirely separate from the provisions of the

action, whereas the latter need only be an accurate expression of the firm’s *intentions* at the time the statement was made.

²⁷ Labour Party, *Britain can be better* (2015 General Election Manifesto, April 2015) 21; Liberal Democrat Party, *Stronger Economy. Fairer Society. Opportunity for Everyone* (2015 General Election Manifesto, April 2015) 35.

²⁸ Theresa May MP, ‘We can make Britain a country that works for everyone’ (Conservative Leadership Campaign Launch, Birmingham, 11 July 2016) <http://press.conservatives.com/post/147947450370/we-can-make-britain-a-country-that-works-for> accessed 10 January 2018.

²⁹ See George Parker and Yukako Ono, ‘ARM takeover puts focus on UK’s industrial strategy’ *Financial Times* (London, 18 July 2016) www.ft.com/content/f71acc52-4cdb-11e6-88c5-db83e98a590a accessed 10 January 2018.

³⁰ Sean Farrell, ‘ARM Holdings to be sold to Japan's SoftBank for £24bn’ *The Guardian* (London, 18 July 2016) www.theguardian.com/business/2016/jul/18/arm-holdings-to-be-sold-to-japans-softbank-for-234bn-reports-say accessed 10 January 2018.

³¹ This approach was announced by the Prime Minister’s spokesperson; Parker and Ono (n 29).

Enterprise Act 2002. This is significant for two reasons. The first is the reference to a ‘national interest’ standard, the scope of which stands to be broader than the definition afforded to ‘national security’ under UK merger control, meaning a wider range of criteria may be considered by the current government. Indeed, there was no suggestion that the SoftBank/ARM merger raised any national security concerns, nor any other public interest issue listed under the 2002 Act. The second point to note is that the national interest test was to be applied to ‘all’ foreign takeovers. In other words, the government had signalled its intentions to intervene regardless of whether or not the foreign takeover met the ‘turnover’ or ‘share of supply’ tests that are necessary to create a relevant merger situation under the Act.³² This would de facto mean that the government could informally review many more transactions than the formal process would otherwise permit it to. SoftBank/ARM itself appeared to fall well short of the 2002 Act’s jurisdictional thresholds,³³ but ARM’s strategic significance appears to have been the draw for the government. Ironically, had the merger met the jurisdictional thresholds, the only way the government could have conducted its national interest scrutiny would have been for the BEIS Secretary to issue a PIIN and, in doing so, exercise his section 58(3) power in order to propose that ‘national interest’ be added to the list of public interest grounds – an unlikely scenario.

The national interest test predictably exposed Theresa May to criticism from proponents of open investment, who pointed to the adverse impact the test was likely to have on the predictability of outcomes within the assessment process.³⁴ Indeed, this particular cocktail of political decision-making, vague assessment criteria and private negotiations would seem to represent something of an unholy trinity as far as legal certainty, predictability and transparency are concerned. Even though the test had no legal basis and, as such, foreign bidders were perfectly entitled to refuse to engage with the government, it is likely that bidders would have felt compelled to enter into a dialogue in an effort to establish a positive relationship with the government,³⁵ and to avoid any delays presented by government opposition.³⁶

Further details on the government’s plans for FDI came in September 2016, when the BEIS Secretary announced that the government was giving the green light to an £18bn nuclear power station development at Hinkley Point C, having renegotiated an investment agreement in principle with the partly French state-owned EDF and the fully Chinese state-owned CGN.³⁷ To coincide with the announcement, the BEIS Secretary confirmed that the government would

³² Enterprise Act 2002, s 23. See explanation in (n 8).

³³ In 2015, 1% of ARM’s £968.3m worldwide turnover (approx. £9.7m) was in the UK, £61.3m less than what is necessary to satisfy the turnover threshold; ARM Holdings plc, *Annual Report 2015: Strategic Report* (ARM 2016) 2 and 5.

³⁴ Parker and Ono (n 29).

³⁵ eg Pfizer met with the UK government to offer assurances over its bid for AstraZeneca, with Pfizer’s CEO remarking ‘[the government’s view] matters to me. We want to come where we are welcome’; Business, Innovation and Skills Committee, *Oral evidence: The Future of AstraZeneca* (HC 2013-14, 1286-I) Q36-37.

³⁶ eg The UK government has previously indicated that it would openly oppose any foreign bid for British oil giant BP; George Parker and Christopher Adams, ‘UK government warns BP over potential takeover’ *Financial Times* (London, 26 April 2015) www.ft.com/content/06a3207e-e901-11e4-87fe-00144feab7de#axzz3a1BMJxzZ accessed 10 January 2018.

³⁷ Greg Clark MP, ‘Hinkley Point C’ (Oral statement to Parliament, House of Commons, 15 September 2016).

press ahead with a review of the public interest regime under the Enterprise Act 2002 and that it would also introduce ‘a cross-cutting national security requirement’ for ownership of critical infrastructure.³⁸ This was the first indication that the forthcoming Green Paper would include proposals relating to broader transactions, such as greenfield investment, in addition to takeovers. It also marked an evident backtrack from the ‘national interest’ test that the government was supposedly seeking to apply to all foreign takeovers in the wake of SoftBank/ARM. Indeed, although sparse in detail, the BEIS Secretary’s statement suggested that only transactions involving ‘critical infrastructure’ would be subject to review and, moreover, that these would be assessed in accordance with the narrower and more familiar ‘national security’ standard. Theresa May would later confirm in an interview that the government was minded to adopt this narrower approach, while also stating that the government’s proposals would be presented in a standalone Green Paper for public consultation, rather than as part of the government’s broader consultation on a new industrial strategy.³⁹

Industrial strategy and General Election (2017)

By March 2017, a Parliamentary Select Committee report on the government’s industrial strategy had recommended that, in light of Theresa May’s previous comments on foreign takeovers, the government should ‘provide much greater clarity and certainty as to what steps it intends to take to intervene in foreign takeover deals and in what circumstances’.⁴⁰ The government’s response to this recommendation was to confirm that its public consultation on the forthcoming Green Paper would incorporate its own desire ‘to ensure that there are adequate safeguards in place where national security is concerned’.⁴¹ This response was criticised by the Chair of the Committee, Rachel Reeves MP, who described the government’s response as ‘lacklustre’ in its attempts to provide clarity, while also suggesting that the Prime Minister seemed to be ‘going cold’ on her original ambitions of intervening in foreign takeovers to ‘support and protect strategically important British businesses’.⁴²

Meanwhile, the British electorate was once again returning to the polls as Theresa May called a snap General Election for June 2017. In an apparent attempt to blend the old with the new, the Conservative manifesto reiterated the party’s “open for business” stance, while also pledging to update merger and takeover rules and to ‘ensure that foreign ownership of companies controlling important infrastructure does not undermine British security or essential

³⁸ *ibid.*

³⁹ George Parker, ‘Theresa May steps back from tough stance on foreign investment’ *Financial Times* (London, 20 January 2017) www.ft.com/content/44bca766-df38-11e6-9d7c-be108f1c1dce accessed 10 January 2018.

⁴⁰ Business, Energy & Industrial Strategy Committee, *Industrial Strategy: First Review* (HC 2016-17, 616-I), para 150.

⁴¹ Business, Energy & Industrial Strategy Committee, *Government Response to the Committee’s Second Report of Session 2016-17* (HC 2017-19, 337-I) 9.

⁴² Business, Energy & Industrial Strategy Committee, ‘Government’s approach to Industrial Strategy shows danger of fizzling out’ (Press Release, 18 September 2017) www.parliament.uk/business/committees/committees-a-z/commons-select/business-energy-industrial-strategy/news-parliament-2017/industrial-strategy-govt-response accessed 10 January 2018.

services’, earmarking nuclear power, telecoms, defence and energy as sectors which will become subject to stronger ministerial scrutiny.⁴³ Elsewhere, the Labour Party manifesto featured a pledge to ‘amend the takeover regime to ensure that businesses identified as being ‘systematically important’ are protected from hostile takeovers’ and to ensure ‘there is a clear plan in place to protect workers and pensioners’ during takeover proceedings.⁴⁴

Despite her election victory, Theresa May returned to Parliament with a depleted government and later chose to enter into a confidence-and-supply agreement with the Democratic Unionist Party (DUP) in order to retain a de facto majority. At the State Opening of Parliament on 21 June 2017, the Queen’s Speech – which sets out the government’s legislative and policy agenda for the forthcoming parliamentary session – gave the clearest indication yet of the proposals that the Green Paper would carry, by making explicit reference to the government’s plans to ‘consolidate and strengthen’ its powers to ensure that ‘foreign ownership of companies controlling important infrastructure does not undermine British security or essential services’.⁴⁵ This would include new powers to access information in order to assess and act upon threats to national security, while simultaneously keeping the UK open to trade and investment.

The Green Paper on National Security and Infrastructure Investment

In October 2017, over a year since it was first announced, the government published the NSII Green Paper, a 77-page review of the national security implications arising from foreign investment and control, alongside proposals to reform and strengthen the government’s powers for scrutinising these implications. The proposals seek to update the existing legal framework in order to respond to advances in technology and data-rich industries which have, in the government’s view, generated an increased risk of foreign investors (i) engaging in espionage (due to increased access to assets, personnel and data), (ii) undertaking sabotage, and (iii) using their control over important British firms to leverage power in negotiations towards other deals.⁴⁶

Proposals for reform

The Green Paper divides its proposals into two distinct categories. The first features ‘short-term options’ for reforming the public interest merger regime under the Enterprise Act 2002, which broadly seek to extend the types of mergers that can be reviewed by the government under the existing merger control procedure. The proposal is to subject mergers arising in two sectors – (i) the dual use and military use sector, and (ii) parts of the advanced technology sector – to lower jurisdictional thresholds. For these sectors only, the turnover threshold would be reduced from £70m to £1m, while the share of supply test – the alternative threshold by

⁴³ Conservative and Unionist Party, *Forward Together: Our Plan for a Stronger Britain and a Prosperous Future* (2017 General Election Manifesto, May 2017) 17-18.

⁴⁴ Labour Party, *For the Many, Not the Few* (2017 General Election Manifesto, May 2017) 17.

⁴⁵ Cabinet Office and Prime Minister’s Office, *The Queen’s Speech and Associated Background Briefing* (Policy Paper, 21 June 2017) 71.

⁴⁶ NSII Green Paper (n 5) para 46.

which a relevant merger situation may materialise – would be amended so that it would no longer be necessary for a merger to ‘increase’ the share of supply to – or above – 25% (the test would be satisfied if the target firm alone has an existing share of 25% or more).⁴⁷ The government has been reluctant to give an indication of how many new public interest cases would arise under these proposed jurisdictional boundaries, except to say that they ‘do not expect a large number’.⁴⁸ The CMA also considers it ‘very unlikely’ that it will need to review an increased number of transactions as a result of the proposed reforms.⁴⁹

The second category sets out a series of more speculative ‘long-term options’ for enabling the government to scrutinise a broader range of investments (outside of merger control) in critical national infrastructure on national security grounds; an area which the government perceives as a gap in the existing enforcement powers.⁵⁰ The government anticipates that the Green Paper consultation will assist in informing the shape and scope of these reforms before it publishes more specific proposals in a White Paper in 2018. The most substantive of these reforms is a proposal to expand the government’s ‘call-in’ power which, mirroring the powers that the Secretary of State has in respect of public interest mergers under the Enterprise Act 2002, would enable the government to intervene in order to subject an ‘acquisition of significant influence or control over any UK business entity’ to national security scrutiny and, if necessary, to impose conditions or, in extreme circumstances, block or unwind the transaction.⁵¹ Depending on the outcome of the consultation, there is a possibility that this call-in power could also be applied to investments in new projects and to the sale of bare assets.⁵² In practice, it is anticipated that the Secretary of State would make a special “national security intervention” wherever there was a reasonable suspicion that a transaction raised national security risks.⁵³ The government is open to these reforms functioning within either a voluntary or mandatory notification regime. If a mandatory regime is adopted, the government’s preference is to write into statute a mandatory notification list of specific classes of business that serve ‘essential functions’ within certain parts of key sectors.⁵⁴ However, the Green Paper also refers to the possibility of naming specific businesses, assets or plots of land that would be subject to mandatory notification,⁵⁵ the concept of which bears resemblance to a pledge by the UK Independence Party before the 2010 General Election to create a ‘British Register’ that would

⁴⁷ *ibid* paras 96-97.

⁴⁸ Letter from Margot James MP to Lord Whitty (20 November 2017).

⁴⁹ Competition and Markets Authority, *Response to Government’s National Security and Infrastructure Investment Review Green Paper* (CMA, 8 November 2017) www.gov.uk/government/publications/national-security-and-infrastructure-investment-review-cma-response accessed 10 January 2018.

⁵⁰ NSII Green Paper (n 5) para 110.

⁵¹ *ibid* paras 113 and 147. The government estimates that the expanded call-in power would capture ‘fewer than 100 transactions per year’; *ibid* para 154.

⁵² *ibid* paras 123-124.

⁵³ *ibid* para 118. The government is minded to conclude that ‘significant influence or control’ can be achieved via: (i) the acquisition of more than 25% of a company’s shares or votes, or (ii) another transaction (eg ‘an investor obtaining unrestricted access to sensitive sites or data’) that directly or indirectly result in significant influence over a company’s assets or businesses in the UK; *ibid* 118 and 120.

⁵⁴ *ibid* paras 132-135. The government considers the key sectors to be, as a minimum, (i) civil nuclear, (ii) defence, (iii) energy, (iv) telecommunications and (v) transport, with the likely possibility of (vi) manufacture of military and dual use items and (vii) advanced technology, and potentially (viii) government and (ix) emergency services.

⁵⁵ *ibid* paras 136-138.

impose stricter public interest conditions on specific UK companies of national significance.⁵⁶ The government anticipates that this mandatory regime could be reinforced by criminal, financial or director disqualification penalties for non-compliance.⁵⁷

Reaction and implications

Following release of the Green Paper, the aforementioned former Business Secretary Sir Vince Cable described the government's proposals as "underwhelming" and "a case of too little, too late".⁵⁸ In apparent reference to the Pfizer/AstraZeneca saga that he oversaw as Business Secretary, Sir Vince said the scope of the proposals "must be widened to properly defend Britain's entire science base, not just a narrow subset of businesses in the military and computer hardware sectors". Herein lies one of the primary criticisms that has been aimed at the Green Paper: while the Prime Minister's remarks in July 2016 had envisioned new powers that would enable the government to defend AstraZeneca from another Pfizer takeover bid, there is nothing in the Green Paper to suggest that the Pfizer/AstraZeneca transaction would be captured by the new proposals.⁵⁹ AstraZeneca's business operations do not clearly fall within any of the sectors of national security significance mentioned in the short or long-term options for reform and, even if they did, an assessment on national security grounds would not have encompassed a review of the main objections expressed in relation to the deal (namely, investment in the UK science base, asset stripping and job losses).

As Fountoukakos and Herron note, the Green Paper fails to identify any previous mergers or investments that might otherwise have been caught under the proposed reforms.⁶⁰ Indeed, in addition to Pfizer/AstraZeneca, the other merger that Theresa May referenced in her leadership campaign speech, Kraft/Cadbury, is another that would not have fallen within the sectoral scope of the proposed regime and, once again, nor would it have raised national security concerns. However, it is certainly conceivable that the SoftBank/ARM merger, which fell short of the existing jurisdictional thresholds under the 2002 Act, would qualify for formal review under the revised merger regime, on account of both ARM's position within the advanced technology sector and its UK turnover being in excess of £1m. Equally, it seems wholly apparent that EDF and CGN's greenfield investment in the Hinkley Point C project would have

⁵⁶ UK Independence Party, *Empowering the people* (2010 General Election Manifesto, April 2010) 13.

⁵⁷ NSII Green Paper (n 5) para 140.

⁵⁸ Ben Chapman, 'Government to protect key British firms from foreign takeovers that raise national security concerns' *The Independent* (London, 17 October 2017) www.independent.co.uk/news/business/news/british-firms-protected-foreign-takeovers-national-security-concerns-plans-greg-clark-a8004276.html accessed 10 January 2018.

⁵⁹ In any case, had it been successful, the scale of the Pfizer/AstraZeneca deal means it would have fallen within the European Commission's jurisdiction; on this, see Reader (n 25) 4-6. This stands to be less of an obstacle post-Brexit, if the UK is no longer a party to the EU Merger Regulation; on the safeguard that the EUMR provides, see Rachel Brandenburger and Mark Jones, 'Protectionism or Legitimate National Interest? A European Perspective on the Review of Corporate Acquisitions by Foreign Purchasers' (2014) 10(1) *CPI Antitrust Chronicle*.

⁶⁰ Kyriakos Fountoukakos and Molly Herron, 'Merger control and the public interest: European spotlight on foreign direct investment and national security' (2017) *CPI Europe Column* 10 www.competitionpolicyinternational.com/merger-control-and-the-public-interest-european-spotlight-on-foreign-direct-investment-and-national-security accessed 10 January 2018.

prompted the Secretary of State to issue a special “national security intervention” under the proposed FDI review regime, where parts of the ‘civil nuclear’ sector are mooted for mandatory notification.

In general, the tone flowing through the Green Paper is much more closely aligned with the “open for business” stance of David Cameron’s governments than that of Theresa May’s leadership campaign speech. In his foreword, the BEIS Secretary expresses the view that mergers and takeovers should continue to be conducted in an orderly and transparent way, conducive to a stable policy environment with regards to investment.⁶¹ This sentiment is represented in the five ‘principles underpinning the Government’s review’ which seek to: (i) ensure the UK remains attractive to FDI, (ii) provide certainty and transparency wherever possible, (iii) reflect national security concerns, (iv) ensure a targeted scope wherever possible, and (v) ensure powers are proportionate.⁶² Objectively speaking, these principles are reassuring for investors and indicative of a government that is wary of the adverse prospects that Brexit uncertainty poses to FDI into the UK,⁶³ along with the risk of implementing reforms that actually act to aggravate these uncertainties, which could reduce incentives to invest in the UK or to offer premiums for UK companies.⁶⁴ In as far as certainty and transparency promote the attractiveness of the UK as a location for investment, principles (i) and (ii) are clearly interlinked. Yet perhaps the greatest risk to certainty and transparency within the Green Paper is the expansive role it is minded to afford to political decision-making. This warrants separate discussion.

The threat posed by political decision-making

The Green Paper acknowledges that the expanded ‘call-in’ power proposed under the long-term options for reform is modelled on the Secretary of State’s existing power to intervene in merger assessments on national security grounds under the Enterprise Act 2002.⁶⁵ However, the institutional arrangement in the special “national security intervention” procedure does not fully replicate that of the 2002 Act as the Green Paper is silent on whether the Secretary of State will take decisions unaided or having received independent advice.

In the 7 merger cases that, to date, have raised national security concerns and given rise to a PIIN or EIN, the Secretary of State has sought formal advice from the CMA (or its predecessor at Phase I, the Office of Fair Trading) before making his/her final decision on whether or not to refer the merger to an in-depth Phase II assessment. The report that the CMA prepares for the Secretary of State will advise on any relevant jurisdictional and

⁶¹ NSII Green Paper (n 5) 2.

⁶² *ibid* 8.

⁶³ One economic study makes a conservative estimate that Brexit will usher in a 22% decline in FDI; Swati Dhingra and others, ‘The impact of Brexit on foreign investment in the UK’ (2016) CEP Brexit Analysis No. 3, 3 <http://cep.lse.ac.uk/pubs/download/brexit03v2.pdf> accessed 10 January 2018.

⁶⁴ Aeron Davis and others, ‘Takeovers and the Public Interest: Responsible Capitalism in Practice’ (2013) Policy Network Paper, 11 www.policy-network.net/publications/4435/Takeovers-and-the-Public-Interest accessed 10 January 2018.

⁶⁵ NSII Green Paper (n 5) para 113.

competition issues and will also provide a summary of any representations that the CMA has received regarding national security concerns.⁶⁶ Historically, either the Ministry of Defence (MoD) or the Home Office has been an active contributor to the CMA's consultation process, submitting representations on any concerns the merger raises with regards to – for example – strategic capabilities and classified information.⁶⁷ In each of these 7 cases, the MoD or Home Office has also prepared undertakings (in consultation with the merging parties) to alleviate any national security concerns the merger raises.

Not one of the 7 national security cases resulted in the Secretary of State referring the merger to a Phase II assessment; instead the Secretary chose to accept the undertakings that the parties had negotiated with the MoD or the Home Office in lieu of a referral. Nonetheless, the procedure was – and continues to be – in place for the CMA Panel to become involved in the process if a Phase II referral is made. In such a case, the CMA Panel would be required to submit a report to the Secretary of State, advising them on both the competition and public interest (or, more specifically, national security) implications of the merger.⁶⁸ Under the proposed “national security intervention” procedure, however, the Green Paper suggests that the Secretary of State will undertake their evaluation of an investment's impact on national security *without* receiving advice from the CMA or any other independent body.

There are doubts as to whether an investment review regime based solely on the assessments and decision-making of politicians or government departments (either via sole assessment by the Secretary of State, or in consultation with the MoD or Home Office) would create an environment that instils confidence in prospective investors. Perceptions of bias and inconsistent political decision-making are well-documented in the context of UK merger control;⁶⁹ indeed, the uncertainty this produced amongst investors was a key rationale behind the UK's decision to move away from its politically-driven public interest regime under the Fair Trading Act 1973.⁷⁰

Moreover, the perception of bias is potentially aggravated by assigning the ultimate decision-making role to the BEIS Secretary, who is also tasked with heading-up the government's proposed Industrial Strategy. A key proposal of the government's White Paper, *Industrial Strategy: Building a Britain fit for the future*, is to target specific companies to invest in the UK as part of individual sector deals, in addition to ensuring that the regulatory

⁶⁶ Enterprise Act 2002, s 44(3).

⁶⁷ This role has typically been undertaken by the MoD because, in the first 6 national security PIINs, the target firms in question had notable contractual ties with the British Armed Forces (to supply eg armoured vehicles, military helicopters and aerospace systems). The Home Office adopted this role in the most recent national security PIIN, the Hytera/Sapura case, which involved a target firm with contractual ties to emergency service authorities in the UK.

⁶⁸ Enterprise Act 2002, s 50.

⁶⁹ See eg the perceived issues of political short-termism in the UK context of media mergers; David Reader, 'Does Ofcom Offer a Credible Solution to Bias in Media Public Interest Mergers in the United Kingdom?' (2014) 4(1) CPI Antitrust Chronicle www.competitionpolicyinternational.com/does-ofcom-offer-a-credible-solution-to-bias-in-media-public-interest-mergers-in-the-united-kingdom accessed 10 January 2018.

⁷⁰ See Bruce Lyons, David Reader and Andreas Stephan, 'UK competition policy post-Brexit: taking back control while resisting siren calls' (2017) 5(3) Journal of Antitrust Enforcement 347, 352-353.

process is easier for these companies to navigate.⁷¹ This raises a potential conflict of interests in a scenario where the BEIS Secretary is having to rule on the national security implications of a foreign takeover or investment in the advanced technology sector, while also negotiating to attract a separate foreign company to invest in the same sector. Given the important role that foreign investment plays within the proposed Industrial Strategy and the new powers that the BEIS Secretary would have over mergers and investments (if the Green Paper's reform options were implemented), investors may perceive the threat of the BEIS Secretary seeking to use these powers to further the UK's Industrial Strategy, rather than to protect national security.

This is both a benefit and drawback of the Prime Minister's decision to separate out the public consultations on NSII and Industrial Strategy. The separation implies that industrial strategy considerations are not intended to enter into the NSII decision-making process (a benefit for legal certainty), yet it also prevents either consultation from directly addressing the inherent links between the two. Given that the Green Paper is itself borne out of a broader ambition to protect strategic industries in the national interest, it is conceivable that foreign investors will approach a politically-driven regime with suspicion.

Negating the risk posed by political decision-making

It is important that any amending legislation should include measures that act to mitigate any perceptions of a risk of bias arising from political decision-making. This has, to a certain degree, been facilitated within the context of public interest mergers under the 2002 Act, where the Secretary of State is required to seek advice from specific independent regulators before making a Phase II referral and before reaching his/her final decision.⁷² Although the Secretary of State is only legally bound to accept the CMA's findings in relation to competition,⁷³ the advice (s)he receives on the public interest element of the merger at least acts to incorporate independent evidence into the assessment process.

By analogy, one option for negating perceptions of political bias during a "national security intervention" process would be to establish an independent national security review body, which would – in effect – assume the role that the CMA plays in the context of public interest mergers (with the exception of advising of competition matters). This review body could bring expertise in security and public safety to the assessment process; expertise that the CMA has itself conceded to lack.⁷⁴

⁷¹ HM Government, *Industrial Strategy: Building a Britain fit for the future* (White Paper, Cm 9528, 2017) 190.

⁷² This advice is predominantly received from the CMA, but Ofcom will advise on the public interest aspect of mergers raising certain issues relating to media plurality and the presentation of news during Phase I; Enterprise Act 2002, s 44A(2).

⁷³ The requirement for the SoS to accept the findings of the CMA with respect to competition is stipulated under s 46(2) of the 2002 Act. A similar requirement is imposed on the SoS for following the CMA's Phase II investigation, s 54(7).

⁷⁴ Competition and Markets Authority, *A report to the Secretary of State for BEIS on the anticipated acquisition by Hytera Communications Corporation Ltd of Sepura plc* (Phase I Report, 4 May 2017) para 12.

Opponents to this proposal may cite the ‘constitutional legitimacy concern’, which suggests that decisions of overarching public interest (such as national security) are best left to publicly-elected representatives. Yet an independent body of this type may derive constitutional legitimacy from being delegated investigatory powers by elected representatives (via legislation) and by being prescribed objective and finite criteria to operate within.⁷⁵ In any case, under this proposal, the Secretary of State would remain as the ultimate arbiter, with the national security review body acting in an advisory role – and with no requirement for the Secretary of State to accept the review body’s advice. This would permit a greater degree of transparency within the process and, assuming that the Secretary of State’s decision would be subject to judicial review and appeal – as is the case in the public interest merger regime – it would mark a significant step towards minimising the business uncertainty created by political decision-making.

In terms of overcoming the potential conflict of interests and, therein, the temptation for the BEIS Secretary to consider industrial strategy goals as part of his or her NSII decision-making, there is a compelling case for following a similar approach to the one taken in media public interest mergers under subsections 58(2A)-(2C) of the 2002 Act, where – as previously mentioned – the Secretary of State for Digital, Culture, Media & Sport is the ultimate decision-maker. By analogy, this would therefore mean the Defence Secretary or Home Secretary were assigned competence over national security cases. Although this doesn’t entirely remove the possibility of industrial strategy considerations entering into the assessment process, it does at least reassign the decision-making powers to someone other than the senior politician tasked with leading on the government’s industrial strategy.

Conclusion

Whether the proposals of the Green Paper represent a good deal for the UK very much depends on one’s own political ideologies, in addition to the form that the final proposals take. Supporters will point to the government’s pragmatic efforts to avoid discouraging FDI, while ensuring that the investment regime is fit for purpose as new threats to national security present themselves. Critics, while buoyed by the prospect of seeing the scope of the regime extended, may view the Green Paper as a missed opportunity to explore the possibility of considering wider public interest implications in a broader range of sectors, in order to defend against ‘unwanted’ investment.

In reality, it is conceivable that the proposals could have taken on an entirely different form were it not for the government’s convergence back towards its traditional “open for business” stance. The result is a set of proposals which, if implemented precisely and alongside the guidance and transparency that the Green Paper alludes to, present a feasible framework in

⁷⁵ For a discussion of this reasoning in the context of competition authorities, see Anna Gerbrandy and Jan Polański, ‘Addressing the legitimacy-problem of competition authorities taking into account non-competition values’ (9th ACLE C&R Meeting, Amsterdam, December 2013) <https://ssrn.com/abstract=2398956> accessed 10 January 2018.

which to protect national security without deterring FDI to any significant extent.⁷⁶ The notable exception is the Green Paper's allocation of extensive decision-making powers to politicians – and, specifically, the BEIS Secretary – which risks undermining the certainty and transparency that the other proposals strive to deliver. To overcome this, it is imperative that the forthcoming White Paper outlines specific safeguards that would negate the risk of industrial policy considerations entering into the decision-making process. With the implementation of these reforms likely to coincide with the UK's departure from the EU, the true impact of the reforms on the level of FDI may not be discernible. But as attracting foreign investment will play a key role in the government's industrial strategy, understanding the long-term impact of these proposals is paramount.

About the author

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⁷⁶ Fountoukakos and Herron describe this as a fine line for the government to tread; (n 60) 13.