

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE**

Investment Policy related to national security

Notification by the United Kingdom

23 October 2018.

On 27 September 2018, the United Kingdom notified the OECD of a new investment policy related to national security pursuant to its obligations under the Codes of Liberalisation and the National Treatment instrument. This document reproduces the notification, which will support discussions of the measure at Freedom of Investment Roundtable 29 on 23 October 2018.

investment@oecd.org

JT03436652

Investment policy related to national security Notification by the United Kingdom

Since the Enterprise Act 2002 (“the Act”) came into force, technology has advanced and the nature of potential national security risks has evolved. As a result, the original jurisdictional tests in the Act have become a less appropriate threshold for Government intervention in mergers on national security grounds.

On 11th June 2018, the United Kingdom therefore brought into force two orders, that amended the Act to deal with national security threats arising from mergers in which the Government would otherwise not have been able to intervene.

1. Scope

Amendments were made to section 23 of the Act which sets out the criteria for a merger to be a “relevant merger situation”, thereby qualifying it for investigation by the Competition and Markets Authority (CMA) for competition issues and also by the Secretary of State on the grounds of specified public interest considerations, including national security, where appropriate; and a new section 23A was introduced, defining the businesses to which the new rules apply.

Previously, a “relevant merger situation” was created if: two or more enterprises had ceased to be distinct, and at least one of the following thresholds was met:

- (a) the value of the turnover in the UK of the enterprise being taken over exceeded GBP 70 million (the “turnover test”); or
- (b) the merger would result in the creation or enhancement of at least a 25% share of supply of goods or services in the UK, or in a substantial part of the UK (the “share of supply” test).

Section 23 of the Act has been amended to revise the turnover threshold and share of supply tests to allow the Secretary of State to examine and potentially intervene in mergers that previously fell outside these merger control thresholds, but only in certain specified areas of the economy.

The revised tests only apply in relation to mergers in three areas of the economy, as defined in new section 23A:

- the development or production of items for military or military and civilian use (‘dual use’);
- the design and maintenance of aspects of computing hardware; and
- the development and production of quantum technology.

For mergers which involve the takeover of businesses covered by section 23A, the two tests are amended as follows:

- the ‘target’ business must have UK turnover over GBP 1 million, rather than GBP 70 million;

- either the existing share of supply test must be met, or the target must have a share of supply of 25% or more of relevant goods or services in the UK, i.e. goods or services connected with their activities in the three defined areas of the economy. It is therefore no longer a requirement that the merger must lead to an increase in the merging parties' share of supply to, or over, 25%.

The changes to the thresholds only apply to mergers which result in a relevant enterprise ceasing to be distinct after the new provisions came into force on 11th June 2018.

The changes to the Act do not require any business to take any direct action. They do not affect the fact that the UK retains a voluntary notification mergers system – both for competition, and public interest, considerations.

The UK Government made these changes only for the purposes of protecting national security. It envisages intervening in a merger on the basis of new thresholds only when national security concerns in connection with the merger need to be investigated. The CMA has indicated that it does not anticipate the introduction of separate jurisdictional thresholds resulting in any material change to its approach to opening own-initiative competition investigations.

2. Rationale

The military and dual-use sector covers the design and production of military items (such as arms, military and paramilitary equipment) and so-called dual-use items which could have both military and civilian uses. The acquisition of UK businesses with this expertise and intellectual property can, therefore, raise legitimate and significant national security concerns for the country as a whole.

Advanced technology (covering computing hardware and quantum technology) is the other area of activity where Government wishes new thresholds to apply. Technological advances have changed the way in which people interact and businesses develop and grow. New products and services offer the potential to transform the way we live. Much of this depends on continuing advances in computing power and in connectivity, in and out of the home. These changes have also brought challenges. Cyber security is now a real concern for almost every business and consumer, for example. The changes also raise national security concerns for Government too. Advances in technology now mean that there are ubiquitous goods with the potential to be directed remotely. Mergers related to companies that undertake these activities, therefore, have the potential to give unlimited access to knowledge or expertise that could be detrimental to the UK's national security.

3. Outcome

The amendments only involve changes to the jurisdictional thresholds for merger scrutiny under the Act. They do not change any other aspects of the regime. As a result, any mergers in which the Government intervenes as a result of the new provisions will follow the same clear and transparent process as all others under the Act and involving the CMA as appropriate.

Based on the Government's analysis, between 5 to 29 additional mergers and acquisitions per annum would be brought into scope as a result of the amendments made to the Act. Based on recent data and trends, the Government expects only a small minority of these

(1 to 6 per annum) to raise national security concerns requiring the issue of a Public Interest Intervention Notice by the Secretary of State.

4. Proposed Amendment to the Entry

No amendment to the current entry in the [list of measures reported for transparency under the National Treatment instrument](#) is necessary.

Annexes

1. [Enterprise Act 2002 \(Share of Supply Test\) \(Amendment\) Order 2018, SI 2018/578;](#)
2. [Enterprise Act 2002 \(Turnover Test\) \(Amendment\) Order 2018, SI 2018/593](#)

—