



Department for  
Business, Energy  
& Industrial Strategy

# ENTERPRISE ACT 2002: CHANGES TO THE TURNOVER AND SHARE OF SUPPLY TESTS FOR MERGERS.

Draft Guidance 2018

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# ENTERPRISE ACT 2002: CHANGES TO THE TURNOVER AND SHARE OF SUPPLY TESTS FOR MERGERS.

## Draft Guidance

The guidance can be found on the BEIS section of GOV.UK:

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ENTERPRISE ACT 2002: CHANGES TO THE TURNOVER AND SHARE OF  
SUPPLY TESTS FOR MERGERS.

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# Introduction

## Context

- i. The Government published a Green Paper, 'National Security and Infrastructure Investment Review'<sup>1</sup>, on 17 October 2017. In this, the Government proposed short and long-term proposals to reform how Government can ensure that national security is not undermined by investments or mergers. Two consultations followed.
- ii. The first consultation focused on the proposals that resulted in the changes to the Enterprise Act 2002 described in this guidance. That consultation closed on 14 November 2017. A summary of the input to the consultation, and the Government's response to the consultation, is published alongside this guidance.<sup>2</sup>
- iii. The second consultation set out broad options for longer term, more far-reaching reforms. That consultation closed on 9 January 2018. The Government is considering the responses and will set out its proposals in a White Paper in due course.

## Purpose of this guidance

- iv. This guidance was produced by the Department for Business, Energy and Industrial Strategy (BEIS) to accompany the Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018 and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018 ('the Orders').
- v. The Orders amend the Enterprise Act 2002 ('the Act') to deal with national security threats arising from mergers in which it would otherwise not be able to intervene.
- vi. This guidance explains why the Government amended the Act, describes the legal and practical effect of the amendments, and offers advice to businesses and others about what they should do (and not do) as a result of these changes.
- vii. This guidance is not statutory guidance. This guidance does not change, for example, the legal duties of the Competition and Markets Authority (the CMA). Nor does it impose legal duties on businesses or any other organisation.
- viii. It should be borne in mind that, whilst the guidance is intended to provide an indication of how the national security public interest merger regime will operate in practice, and the approach the Secretary of State is likely to adopt in considering cases, each transaction will be looked at on its merits on a case by-

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<sup>1</sup> Department for Business, Energy and Industrial Strategy (2017), 'National Security and Infrastructure Investment Review', <https://www.gov.uk/government/consultations/national-security-and-infrastructure-investment-review>

<sup>2</sup> [www.gov.uk](http://www.gov.uk)

case basis. Businesses should consider their own particular circumstances and, where necessary, seek their own legal advice.

- ix. The guidance does seek, however, to provide clear and practical advice from Government to those affected, or potentially affected, by the amendments to the Act. The Government will keep this guidance under review, updating it to ensure it remains as relevant and as useful as possible. It welcomes comments from parties about any additions or clarifications that would be helpful.

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# Executive summary

- i. The Government is committed to making the UK the best place in the world to do business. The UK is a strong advocate for free trade; this has helped drive growth and wealth in the UK and around the world. However, the Government will not hesitate to take the necessary actions to ensure that our national security is protected. As a result, it has amended the Act to make targeted changes to ensure it has sufficient powers to act when necessary.
- ii. The guidance focuses on the tests in the Act that determine whether the Government can intervene in mergers. Amendments were made to section 23 (relevant merger situations), including by introducing new subsections (2A), (2B), (4A) and (4B), and a new section 23A was introduced by the two Orders to ensure that the Government has sufficient powers to deal with threats to our national security.
- iii. The Government does not foresee instances where mergers affected by the changes to the tests under the Act would raise media plurality or financial stability concerns. In addition, neither the Government nor the CMA expect the new provisions to bring about any material change in the CMA's approach to the assessment of mergers on competition grounds.
- iv. 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 European Commission's powers are not affected. Parties whose merger meets the Commission's tests are still required, under the EU Merger Regulation, to notify (and obtain approval from) the Commission in advance of the transaction being completed.
- v. 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.The guidance gives further practical detail about these activities, although it does not limit the amendments or affect their meaning.
- vi. 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 £1 million, rather than £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%.

- vii. The changes to the thresholds only apply to mergers which result in a relevant enterprise ceasing to be distinct after the new provisions come into force.
- viii. The Government made these changes only for the purposes of protecting national security. It does not envisage intervening in a merger on the basis of new thresholds unless there may be national security concerns in connection with the merger which need to be investigated.
- ix. 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.
- x. The Government does not expect mergers brought into scope of the regime by the amendments to raise competition-related concerns. However, it remains for the CMA to assess the effect of a merger on competition.
- xi. 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 Enterprise Act 2002 and involving the CMA as appropriate.
- xii. This process first involves the issuing of a public interest intervention notice by the Secretary of State. This leads to a 'Phase 1' report from the CMA. This can either lead to the merger proceeding, to the agreement of undertakings offered by the parties or, if appropriate, a further 'Phase 2' investigation by the CMA. After a Phase 2 investigation (which to date has never happened in connection with a national security-related intervention), the Secretary of State can accept final undertakings or make orders to remedy, mitigate or prevent any adverse effects to the public interest or (in extremis) block the merger altogether.
- xiii. The Government welcomes engagement with parties involved in mergers that could raise national security concerns. If businesses consider it possible that a transaction might do so, they are encouraged to speak to the relevant department as early as possible, in the manner set out in this guidance.



# Chapter 1: When Government can intervene in mergers

## Summary

Under the Enterprise Act 2002, the Government can only intervene in limited circumstances:

- when a transaction constitutes a “relevant merger situation”, i.e.:
  - it involves two or more enterprises ceasing to be distinct; and
  - the merger meets tests related to specific turnover and/or share of supply; and
- when the merger raises at least one of three specific public interest issues – national security, financial stability, or media plurality.

The only exception to the above is in relation to the limited circumstances prescribed by the Special Public Interest Regime.

## Introduction

- 1.1. The tests for when and how Government can intervene in mergers are set out in the Enterprise Act 2002. As the Act’s explanatory notes<sup>3</sup> described, a key change introduced by the Act was to provide that “final decisions on most mergers are to be taken by independent competition-focused authorities<sup>4</sup> rather than by the Secretary of State”.
- 1.2. As a result, the Act deliberately limited ministers’ ability to intervene in mergers to cases where they raised “public interest considerations”. The Act ensured that ministers could only intervene in mergers that met certain turnover and/or share of supply tests<sup>5</sup>. These same thresholds permit the competition authorities to intervene in order to prevent a merger from substantially lessening competition.
- 1.3. As described in the next chapter, the Government has concluded that the thresholds as set in 2002 are no longer working effectively as a threshold for intervention on national security grounds in certain areas of the economy. Chapter 3 and 4 respectively describe in more detail the areas of the economy concerned and the amendments to the thresholds for intervention.

<sup>3</sup> <http://www.legislation.gov.uk/ukpga/2002/40/notes/division/4/3>

<sup>4</sup> At the time of introduction, this was the Office of Fair Trading and the Competition Commission. These were replaced by the Competition and Markets Authority in 2014 following the Enterprise and Regulatory Reform Act 2013.

<sup>5</sup> A limited exception to this applies in cases where a merger qualifies as a “special public interest merger”. In such a case, Ministers can intervene where the threshold tests would not be met as described later in this chapter.

### **The tests set out in the Enterprise Act 2002**

- 1.4. Under the Enterprise Act 2002, there are a number of steps that must be met before the Government<sup>6</sup> can intervene:
  - a) there must be a relevant merger situation; and
  - b) the intervention can only be on certain 'public interest' grounds
- 1.5. The Government can also intervene in a merger subject to the European Commission's jurisdiction.

#### ***a) a relevant merger situation***

- 1.6. Section 23 of the Enterprise Act 2002 defines a relevant merger situation. The first limb of the definition provides that a relevant merger situation occurs when "two or more enterprises have ceased to be distinct enterprises". Section 26 of the Act goes on to define further what "ceasing to be distinct" means.
- 1.7. The CMA has published statutory guidance<sup>7</sup> describing and explaining these, and other issues, in more detail – including the meaning of "enterprise".
- 1.8. Under the Act, the second limb of the definition of a relevant merger situation is that:
  - the acquired business must have an annual UK turnover of more than £70 million; and/or
  - the merger must result in the creation of, or increase in, a 25% or more combined share of sales or purchases in the UK (or in a substantial part of it) of goods or services of a particular description.
- 1.9. The new provisions of the Act amend the two tests mentioned in paragraph 1.8 in relation to specific areas of the economy.
- 1.10. The 'Special Public Interest Regime', which allows ministerial intervention in the absence of the requirements for a relevant merger situation being met in full so long as certain other conditions are satisfied, is described later in this chapter.

#### ***b) the intervention can only be on certain 'public interests' grounds***

- 1.11. At present, under the Enterprise Act 2002, Ministers can only intervene in domestic and EU merger cases that raise the following public interest considerations<sup>8</sup>:
  - national security (including public security);
  - financial stability;
  - media plurality.

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<sup>6</sup> The Act actually permits a 'Secretary of State', a Government minister, to intervene in mergers.

<sup>7</sup> Competition and Markets Authority (2014), 'Mergers – the CMA's jurisdiction and procedure: CMA2', <https://www.gov.uk/government/publications/mergers-guidance-on-the-cmas-jurisdiction-and-procedure>

<sup>8</sup> Prudential regulation is also recognised as a legitimate interest under the EU Merger Regulation but is not a public interest ground in the Enterprise Act 2002.

- 1.12. The changes to the Act will not amend or extend these public interest considerations. The Government will only be able to intervene in additional mergers as a result of the amendments if they raise the existing public interest considerations listed in the Act. Indeed, the Government does not foresee instances when it would intervene in mergers brought into scope by the amendments for any other public interest ground than national security given the nature of the businesses described in Chapter 3.

#### ***Intervening in a merger subject to the European Commission's jurisdiction***

- 1.13. The Enterprise Act also provides that the Government can intervene in a merger that is both a “relevant merger situation” and meets the test for notification to the European Commission for approval. As set out in the EU merger regulation<sup>9</sup>, the Commission has jurisdiction over cases which qualify as a concentration with an EU dimension. As part of this, a transaction will need to exceed certain turnover thresholds, namely:
- where the combined worldwide turnover of all undertakings concerned is over €5 billion, and the aggregate EU-wide turnover of at least two undertakings is over €250 million; *or*
  - where the combined worldwide turnover of all undertakings concerned is over €2.5 billion, the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €100 million; *and*
  - the combined aggregate turnover all of the undertakings concerned is over €100 million in at least three Member States (MSs); *and*
  - and in each of at least three of these MSs the aggregate turnover of at least two of the undertakings concerned is over €25 million.
- 1.14. But the European Commission will not look at cases if all the undertakings concerned achieve more than two-thirds of their aggregate EU-wide turnover within one and the same MS<sup>10</sup>.

#### **The Special Public Interest Regime**

- 1.15. The Enterprise Act 2002 does establish particular arrangements for Government to intervene in mergers that do not meet the normal UK turnover and share of supply tests (and which therefore do not amount to a relevant merger situation, whether on the original thresholds or the new thresholds). This is set out in the Special Public Interest Regime as described in section 59 of the Act.

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<sup>9</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings

<sup>10</sup> On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

1.16. Under the Special Public Interest Regime, the Government is able to intervene on the specified public interest grounds in any transaction which meets all the requirements for a relevant merger situation *other than* the UK turnover or share of supply test in cases involving the following categories of businesses:

- government contractors who hold or receive confidential defence-related information; and
- certain newspaper and broadcasting businesses.

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# Chapter 2: Why the new provisions are required

## Summary

Since 2002 the same tests (related to UK turnover and share of supply) applied to interventions on both competition and public interest grounds across the economy. The only exceptions have related to two specific instances under the Special Public Interest Regime.

The Government concluded that this arrangement poses risks to our national security. Since 2002, there have been a number of technological and economic changes that mean that the thresholds are no longer effectively safeguarding our national security in all areas of the economy.

- 2.1. Since the public interest regime was introduced by the Act, some far-reaching changes have occurred. There have been considerable technological advances, developments in local, national and global economic structures, and changes in the national security threat facing the UK.

## Technological advances

- 2.2. Technological advances have changed the way in which people interact and businesses develop and grow. New products and services offer the potential to radically transform the way we live – computers are exponentially more powerful than in 2002, and internet connectivity has been integrated into daily lives and an ever-increasing range of goods. The Government is proud that British businesses have been at the forefront of this change – driving innovation that has brought huge benefits to the global economy and society.
- 2.3. However, these technological changes have also brought challenges. Some of these challenges are national security-related. As described in more detail in relation to specific businesses to which the revised thresholds will apply, hostile intent and action can be multiplied in more ways than ever before.
- 2.4. The businesses that are driving the development of innovative goods and technological advances are not necessarily those with large turnovers. In fact, some of the most radical, far-reaching developments are by made by enterprises with small turnovers. In addition, often a merger in this area will not raise the parties' combined share of supply because the target firm is undertaking a unique activity.
- 2.5. The Government wishes to ensure that it has sufficient powers to address national security threats that may arise from mergers involving these businesses.

## Economic developments

- 2.6. The last fifteen years have also seen significant change in the global economic market which, while bringing enormous benefits, raise national security challenges for all countries.
- 2.7. Since the Enterprise Act 2002 was introduced, the global market has become even more connected:
- more than \$18 trillion<sup>11</sup>, in current terms, has flowed across international borders in the form of foreign direct investment (FDI);
  - overall, countries are becoming less restrictive in their approach to FDI<sup>12</sup>.
- 2.8. At the same time, industries now have deeper, broader and more complicated supply chains. 30 companies manufacture automotive vehicles in the UK. But they are supported by 2,500 component providers.<sup>13</sup> Meanwhile, one engineering company alone, Rolls-Royce, has more than 18,000 suppliers.<sup>14</sup>
- 2.9. As a result of this change, essential goods and services are provided by increasingly more diverse networks of businesses, including those specialist in focus with small turnovers. The Government wishes to ensure that it can address any national security concerns that can arise when these businesses are acquired.

## The changing national security threat

- 2.10. The final relevant change relates to the national security threat facing our country. The most recent overarching UK national security risk assessment took place in 2015.<sup>15</sup> It showed that the country faces greater and more complex threats compared to the last assessment published in 2010.
- 2.11. Foreign intelligence agencies continue to engage in hostile activity against the UK and our interests, and against many of our close allies. This includes human, technical and cyber operations at home and overseas to compromise the Government, diplomatic missions, Government-held information and critical national infrastructure; attempts to influence Government policy covertly; and operations to steal commercial secrets and disrupt the private sector. This could have significant negative consequences not just for particular businesses, but the entire UK economy and our national security as a whole.

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<sup>11</sup> Source: Data from United Nations Conference on Trade and Development Date Centre <http://unctadstat.unctad.org/EN/> sum of outward and inward FDI flows for the world for 2003-2016

<sup>12</sup> Data from the Organisation for Economic Co-operation and Development (OECD) (2017), 'FDI restrictiveness', see <http://dx.doi.org/10.1787/c176b7fa-en>

<sup>13</sup> The Society of Motorcycle Traders <https://www.smmt.co.uk/industry-topics/uk-automotive/>

<sup>14</sup> <http://www.rolls-royce.com/~media/Files/R/Rolls-Royce/documents/customers/nuclear/so-supply-chain-management-tcm92-24001.pdf>

<sup>15</sup> HM Government (2015), 'National Security Strategy and Strategic Defence and Security Review 2015', <https://www.gov.uk/government/publications/national-security-strategy-and-strategic-defence-and-security-review-2015>

# Chapter 3: The relevant enterprises to which the revised tests will apply

## Summary

The amendments to the Act relate to businesses active in three areas of the economy:

- 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.

New section 23A of the Act defines each of these. This guidance gives further details and examples to aid businesses and other parties.

The new provisions only relate to mergers which involve businesses in these areas of the economy being acquired.

- 3.1. In light of the developments and national security concerns described in the previous chapter, the amendments to the thresholds in the Act are focused on particular areas of the economy where the Government has concluded that (without these changes) the Act would not permit Government to intervene in mergers that might raise national security concerns.
- 3.2. The amended thresholds apply to "relevant enterprises" as defined in new section 23A of the Act. Section 23A provides definitions of business activities which raise the clearest risks to national security.
- 3.3. This chapter describes how the revised thresholds are focused on the *target* of a merger or takeover (rather than on the business that is acquiring another). The chapter then considers each of the three business activity areas in more detail.
- 3.4. This guidance gives further practical advice about the types of business activities, goods and services which would make an enterprise a "relevant enterprise". However, this is not an exhaustive list, nor is it a definitive interpretation of the law. If you are unsure and wish to establish whether your business, or a business you are considering acquiring, is a relevant enterprise, you may wish to seek independent legal advice.

## The amendments relate to the 'target' of a takeover

- 3.5. The new thresholds only relate to mergers when enterprises in the relevant areas of the economy are taken over or are, for example, the subject of certain joint ventures. That means that mergers involving relevant enterprises acquiring non-relevant enterprises are not covered by the revised thresholds.

- 3.6. In each case, the revised thresholds apply to businesses which undertake certain activities. This applies whether the activity is the business's entire field or only a part of it. However, the Government will only be able to intervene (on national security grounds) when a merger involves a change in material influence or control over that particular activity.
- 3.7. For example, the amendments would apply to the takeover of a business with several divisions, only one of which designs quantum sensors. However, if the merger were structured such that the division designing quantum sensors was not subject to the new acquirer's material influence or control (i.e. it was retained under the existing ownership and control), then Government intervention in the merger (on national security grounds) involving the other divisions would only be permitted if it met the existing tests, such as the enterprise being taken over having UK turnover in excess of £70 million<sup>16</sup>.

#### **Example of how the revised thresholds relate only to the target in a takeover**

Company A designs processing units. It is, therefore, a relevant enterprise for the purpose of the Orders.

A is considering acquiring Company B – a UK-based business that makes software. B is not a relevant enterprise (nor an enterprise covered by the Special Public Interest Regime). This transaction, therefore, is not covered by the amendments. As a result, the Government could only intervene (on national security or other specified public interest grounds) if B had a UK turnover of over £70 million or if the two businesses' merger led to an increase in share of supply of goods or services in the UK (or a substantial part thereof) to, or above, 25%.

A is also considering expanding into the quantum technology sector by acquiring company C which designs quantum sensors. This would be A's first venture in that sector and market. The target of this merger, C, is a relevant enterprise and so this transaction would be subject to the revised thresholds. Government could, therefore, intervene (on national security or other specified public interest grounds) if C had a UK turnover over £1 million or at least a 25% share of supply of those goods in the UK or a substantial part thereof.

A's Board concludes that its long-term interests would be better served by establishing a joint venture with B. New company D would be the result of an equal merger of A and B – that is to say, they would pool their resources and their respective previous owners would have 50% of D. Because one party (in this case, A) is a relevant enterprise, this merger would be covered by the new tests.

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<sup>16</sup> Under existing powers, the Government can intervene in certain limited categories of mergers that do not meet the normal UK turnover and share of supply tests (and which therefore do not amount to a relevant merger situation, whether on the original thresholds or the new thresholds). This is set out in the Special Public Interest Regime as referred to paragraphs 1.15-1.16 in this document



## Military and dual-use item technologies

### *Government's national security interests*

- 3.8. Military and dual-use technologies cover the design and production of military items (such as arms, military and paramilitary equipment) and so-called dual-use items which can be used for both military and civil purposes.
- 3.9. The national security interests in this sector are obvious – these items can, in the wrong hands, pose clear and immediate risks to the UK, our people and society. There are also 'indirect' national security interests – thanks to UK businesses' innovation, our military and defence forces have a clear operational advantage over others. The acquisition of items which provide this advantage can, therefore, raise legitimate and significant national security concerns for the country as a whole.

### *Export control*

- 3.10. This risk is one of the reasons that the Government, like many others, controls the export of these items. Through the Export Control Joint Unit within the Department for International Trade, the Government assesses application for export licences for so-called strategic items, delivering an efficient service for businesses while ensuring that the items do not end up in the wrong hands.
- 3.11. The items subject to strategic export control are set out in a number of lists, collectively known as Strategic Export Control Lists (SECLs). The individual lists are:
- the UK Military List (Schedule 2 to the Export Control Order 2008 (ECO 2008));
  - the UK Dual-Use List (Schedule 3 to the ECO 2008);
  - the EU Human Rights List (Annexes II and III of Council Regulation (EC) No. 1236/2005);
  - the UK Security and Human Rights List (Articles 4A and 9 (to the ECO 2008)
  - the UK Radioactive Source List (Schedule to the Export of Radioactive Sources (Control) Order 2006); and
  - the EU Dual-Use List (Annex I to the Council Regulation (EC) No. 428/2009).
- 3.12. The lists are derived, in large part, from various international commitments related to the non-proliferation of conventional arms and of weapons of mass destruction, as well as from concerns around national security and human rights. However, there are items on the control lists in which Government has no national security interests. Therefore, **not all businesses which produce or design items subject to export control are subject to the amended thresholds.**

### *Which businesses are covered by the new provisions*

- 3.13. The amendments do not include all of the control lists. Specifically, they exclude those items on the EU Human Rights List (as per Annexes II and III of Council Regulation (EC) No. 1236/2005) where Government's interests are not national security-focused.

- 3.14. New section 23A, instead, will be based on the following lists:
- the UK Military List (Schedule 2 to the Export Control Order 2008 (ECO 2008));
  - the UK Dual-Use List (Schedule 3 to the ECO 2008);
  - the UK Radioactive Source List (Schedule to the Export of Radioactive Sources (Control) Order 2006); and
  - the EU Dual-Use List (Annex I to the Council Regulation (EC) No. 428/2009).
- 3.15. To ensure that the Government can adequately protect national security by preventing the acquisition of relevant enterprises, not just the export of controlled items, the new provisions bring into scope of the amended tests under the Act businesses that:
- **develop or produce** these goods or services or;
  - **hold related information** (including but not limited to information comprised in software and documents such as blueprints, manuals, diagrams and designs) that is capable of use in connection with the development or production of these goods and the information is responsible for achieving or exceeding the performance levels, characteristics or functions of the good or service where ‘these goods or services’ are items on the lists set out in 3.14
- 3.16. The revised thresholds do not apply to the development or production of equipment or components not on the above lists.

**The development and production of military and dual-use items – example 1 of what is, and what is not, covered**

*Ships*

Waterborne vessels can, in theory, be used for military or civil purposes. However, the vast majority of boats do not fall under export control – nor, therefore, would the manufacturers or designers of that majority of boats come into scope of the new provisions.

Specifically, the UK Military List includes only specific types of **waterborne vessels**. Under section ML9, it stipulates that only “vessels of war” and specially designed components for those vessels are subject to export control. It goes on to specify that this means, for example, vessels “specially designed or modified for military use” (ML9.a.1) and/or with “automatic weapons” integrated (ML9.a.2.a) are subject to export control. Manufacturers of non-military vessels, therefore, are unaffected by the changes made by the new provisions.

## **The development and production of military and dual-use items – example 2 of what is, and what is not, covered**

### *Acoustic and optical sensing systems*

Part 6A of the EU Dual Use List covers “acoustic systems, equipment and components” and “optical sensors”. Those unfamiliar with export control may consider this to be a wide range of items. However, the specific list actually subject to export control is narrow, clear and with obvious military and national security implications.

For example, it is seabed mapping equipment (6A001.a.1.a.2) that requires an export licence, as do “monospectral imaging sensors” designed for remote sensing applications and with an Instantaneous-Field-Of-View (IFOV) of less than 200 microradians (6A002.b) The latter relates to sensors which are capable of acquisition of imaging data from one discrete spectral band. Both items, in the wrong hands, could undermine our national security – either directly (by aiding hostile military forces) or indirectly (by undermining UK Armed Forces’ advantage).

Development and production of both items are undertaken by specialised firms. Their owners, and any investor undertaking reasonable due diligence, would be aware of the (actual or potential) military application and therefore that the business is in scope of the revised tests.

### *How to check whether business in this sector comes into scope of the new provisions*

- 3.17. A large proportion of the items on the lists are clear and unambiguous. For example, existing businesses and would-be investors will be under no doubt as to whether they:
- produce semi-automatic type weapons (ML1.b.2.b);
  - design rotor blades incorporating “variable geometry airfoils” for helicopters (7E004); or
  - manufacture sensors specially designed for wind tunnels designed for speeds of Mach 1.2 or over (9B005.a).
- 3.18. If there had been doubt, the well-established and reasonable principle of export control, and the specific UK system for this, means the Government expects businesses will be reasonably aware that export of their goods is subject to export control, or would be subject to export control if they transferred them to other countries. This similarly applies to a business or entity giving serious consideration to acquiring (or merging with) a business.
- 3.19. However, the Government accepts that there may be some businesses or investors who may be unsure as to whether they are covered by the scope of new provisions. This might be particularly the case if the business has not, to date, exported items. Equally, there may be investors interested in acquiring a business who may not be sufficiently familiar with its activities to have confidence about whether it would be covered by the new provisions, and

therefore the amended thresholds for Government intervention on national security grounds.

- 3.20. If a party would like assistance with this, the Government advises parties to use the Goods Checker Tool<sup>17</sup>. Guidance is also available about how parties should best use the tool<sup>18 19</sup>.
- 3.21. If parties have followed these steps and still require further advice as to whether particular businesses are subject to the revised thresholds, they can contact [contact details] with specific queries. The Government will endeavour to provide clear, informal (non-binding) advice as quickly as possible. However, any such advice (like this guidance) is not legal advice. Businesses are encouraged to seek their own independent legal advice.

#### *How changes to the SECLs will affect the amended thresholds*

- 3.22 The Government will periodically lay further secondary legislation amending section 23A of the Act to reflect updates to the SECLs. This will ensure that as items are added to, or removed from, the list of what is subject to export control – the businesses which design or produce them will similarly be brought into, and out of, scope of the amendments to the Act. The process of amending the lists operates, and will continue to operate, independently from any consideration of whether or not a merger or takeover involving a company designing or manufacturing items on the lists should be subject to amended tests.
- 3.23 The majority of the items to which the revised tests will apply are controlled for export because they appear on lists agreed in the four international export control regimes<sup>20</sup>. Changes to these lists are agreed with partner countries in the regimes and implemented either via national legislation or by the EU (or by a combination thereof). Changes to controls on military items, and other items subject to national control, are implemented by way of a statutory instrument. Changes to controls on dual-use items are implemented by the EU through amendment to Council Regulation 428/2009. Updates are done on a regular basis – the UK lists are typically updated every six months, the EU lists on an annual basis. Businesses or other interested parties can subscribe to the Export Control Joint Unit's Notices to Exporters<sup>21</sup> in order to keep updated about these or other related changes.
- 3.24 For the avoidance of doubt, businesses which design or manufacture items subject to *temporary* export controls will not be in scope of the new thresholds.

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<sup>17</sup> <https://www.ecochecker.trade.gov.uk/spirefox5live/fox/spire/>

<sup>18</sup> <https://www.spire.trade.gov.uk/docs/guidance/Goods%20Checker%20Guidance.pdf>

<sup>19</sup> In using the checker tool parties should also bear in mind that there may have been updates to the SECLs which may not yet have been reflected in amendments to the Act – see paragraph 3.22 for details.

<sup>20</sup> The regimes are the Wassenaar Arrangement (WA); Nuclear Suppliers Group (NSG); Missile Technology Control Regime (MTCR) and Australia Group (AG).

<sup>21</sup> See <https://www.gov.uk/government/collections/notices-to-exporters> for further details.

## Changes to the SECL – when the Government can intervene in a merger

### *Updates to the SECL*

The new provisions will not have retrospective effect. That is, Government will not be able to intervene in any merger where enterprises cease to be distinct before the amendments to the Act come into force (unless it meets the previous thresholds set out in the Enterprise Act 2002).

When the SECL is updated with new items, the Government proposes to lay new secondary legislation under the Enterprise Act to update section 23A so that any additional businesses developing or producing those newly added items would then be subject to the amended thresholds. From the point that the relevant amendments to the Act are in force, the Government would be able to intervene in a merger relating to one of these additional businesses on national security grounds providing that the thresholds within the new provisions were met.

However, once again the amendments would not be given retrospective effect and Government would only be able to intervene on the basis of updates to the SECLs in a case where the enterprises ceased to be distinct after the point the amendments to the Act to reflect the changes to the SECLs came into force, even if the business is developing or producing an item newly added to the SECL.

### *The Special Public Interest Regime*

- 3.25. Some mergers involving businesses which produce military and dual-use items will remain covered by the scope of the Special Public Interest Regime. Specifically, mergers affecting relevant government contractors, as defined by section 59 of the Act, who have been informed that their business holds confidential defence-related information and whose turnover and share of supply does not meet the tests set out in the Act.
- 3.26. However, due to the new provisions, some mergers that were previously covered by the scope of the Special Public Interest Regime, will now be covered by the tests introduced by the new provisions.
- 3.27. Given the amended thresholds also apply to determine which mergers are subject to scrutiny on competition grounds, businesses which are now in scope of the revised thresholds may wish to consider whether a merger they are contemplating raises competition issues. Chapter 4 of this guidance describes the Government's view as to why this is unlikely to be the case; however, this remains a matter for the independent assessment of the CMA.

## Computing hardware

### *Government's national security concerns*

3.28. 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. Advances in technology now mean that there are ubiquitous goods with the potential to be directed remotely should a hostile actor obtain access or control. Mergers related to businesses that undertake these activities, therefore, have the potential to give hostile actors knowledge or expertise that could be used to undermine our national security.

### *Which computing hardware technology firms are subject to the new provisions*

- 3.29. New section 23A specifies two activities in this area of the economy:
- the ownership, creation or supply of intellectual property relating to the functional capability of:
    - i. computer processing units;
    - ii. the instruction set architecture for such units;
    - iii. computer code that provides low level control for such units
  - the design, maintenance or provision of support for the secure provisioning or management of:
    - i. roots of trust of computer processing units;
    - ii. computer code that provides low level control for such units

#### **What are “roots of trust”?**

“roots of trust” means hardware, firmware, or software components that are inherently trusted to perform critical security functions, (including, for example, cryptographic key material bound to a device that can identify the device or verify a digital signature to authenticate a remote entity).

- 3.30. This means that enterprises that own, create or supply intellectual property in relation to the way that processing units function will be in scope. Businesses that manage roots of trust in relation to processing units are also in scope. This could include businesses that design firmware containing the cryptographic material for a processing unit.
- 3.31. If businesses or investors wish to discuss the new provisions as they relate to computing hardware, they should contact [NSIIRewiew@beis.gov.uk](mailto:NSIIRewiew@beis.gov.uk). Like this guidance, any such discussion cannot change the legal scope of the Orders and cannot be considered binding. If businesses or investors are considering a merger it may be advisable to seek independent legal advice.

### **Computing hardware – example 1 of what is, and what is not, covered**

Company A has a UK turnover of over £1 million, but under £70 million and has significant expertise in the production of processing units and firmware. Whilst they have ceased to produce processing units themselves, as a result of historic activity in this area, they have built up substantial intellectual property and they license this intellectual property to other companies who produce the units.

Party B is interested in acquiring A. The Government believes that this acquisition would raise national security concerns.

Because A is in scope of the new turnover threshold, as it has a UK turnover of over £1 million, the Government is able to intervene in this transaction on national security grounds, regardless of the size of Company A (or whether there has been an increase in) the share of supply.

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## Quantum technology

### *What is quantum technology?*

- 3.32. Quantum theory arose in the first quarter of the 20th century to explain how light and matter behave on a fundamental level.
- 3.33. While a conventional computer uses binary 'bits' which take the value 0 or 1, the fundamental unit of information in a quantum computer is the qubit which can be in the state 0, 1 or a combination of both simultaneously.
- 3.34. A new generation of quantum technologies are now driving and enabling a new generation of devices and systems, from very powerful medical imaging devices to entirely new methods of computing to solve currently intractable problems – all made possible by the engineering of quantum effects into next-generation technologies<sup>22</sup>.

### *Government's national security concerns*

- 3.35. The Government strongly supports the quantum technology sector in the UK. The Blackett review published in November 2016<sup>23</sup> highlighted the significant potential offered by new post-digital quantum technologies.
- 3.36. The Government is aware, however, that the huge potential offered by quantum technology also presents national security challenges. Quantum technology has the potential to break currently secure computer and telecommunications systems. It could also transform military power – giving vehicles and weapons systems substantial additional abilities.

### *Quantum technology – example 1 of what is, and what is not, covered*

#### *Quantum computing*

University A has been undertaking innovative research aimed at applying quantum phenomena to particular types of computing systems. Recognising the potential commercial application, researchers establish Company B, which holds the intellectual property and which provides commercial services based on this, with a view to commercialising the research.

B has more than 25% share of supply of the particular services underpinned by quantum technology (e.g. it provides consulting services in relation to quantum simulation). Party C, with no role in the UK quantum sector, is interested in acquiring B. The Government believes that this acquisition would raise national security concerns.

<sup>22</sup> See the National Strategy for Quantum Technologies (<https://www.gov.uk/government/publications/national-strategy-for-quantum-technologies>) for further information

<sup>23</sup> Government Office for Science (2016), 'The Quantum Age: technological opportunities', <https://www.gov.uk/government/publications/quantum-technologies-blackett-review>



Because B is in scope of the revised thresholds, the Government is able to intervene in this transaction on national security grounds, notwithstanding that B has a UK turnover of less than £70 million (and, indeed, £1 million) and that the merger would not increase the parties' combined share of supply.

*Which quantum technology firms are covered*

3.37. The definition of relevant enterprise in section 23A covers the following quantum technology activities:

- quantum computing or simulation;
- quantum imaging, sensing, timing or navigation;
- quantum communications; and
- quantum resistant cryptography.

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### **Quantum technology – the areas covered by the changes made by the Orders**

*quantum computing or simulation* means the study, simulation or realisation of systems that utilise certain properties of quantum mechanics, in particular superposition or entanglement, to process information, run algorithms or perform operations on data;

*quantum imaging* means utilising certain properties of quantum mechanics, in particular superposition or entanglement, to create images of objects with a resolution or other imaging criteria that is beyond what is possible in non-quantum optics;

*quantum sensing* means utilising certain properties of quantum mechanics, including measurements of suspensions of atoms or ions, to determine a property or rate of change in the property of an object, or the effect of an object on a measurable quantity, with a resolution or sensitivity that is beyond what is possible in non-quantum devices or systems;

*quantum timing* means utilising certain properties of quantum mechanics, including measurements of suspensions of atoms or ions, to provide a timing signal with a resolution or sensitivity that is beyond what is possible in non-quantum devices or systems;

*quantum navigation* means utilising certain properties of quantum mechanics, including measurements of suspensions of atoms or ions, to establish the location or movement of objects with a resolution or sensitivity that is beyond what is possible in non-quantum devices or systems;

*quantum resistant cryptography* means methods of securing information or data being transmitted or stored, including by non-quantum means, with a view to resisting attack by a quantum computer; (quantum computers make direct use of quantum-mechanical phenomena, such as superposition and entanglement, to perform operations on data);

*quantum communications* means the transmission of information, from one location to another (point-to-point) or across a network, utilising the properties of quantum mechanics, in particular superposition or entanglement and includes the establishment of cryptographic keys and the generation of true random numbers using a quantum physical process.

- 3.38. The revised thresholds apply to businesses which research, develop, or produce goods designed for use in these activities or which supply services employing these activities. It is intended that “development” means all stages prior to production (e.g. design, assembly and testing of prototype). This would include the creation of intellectual property (even if not yet put to commercial use). Businesses supplying quantum technology components to other firms would, therefore, be covered by the definitions in section 23A. Similarly, businesses offering services (such as consultancy advice, or data

analysis) which use quantum-based technology would also be within scope of the revised tests.

- 3.39. Businesses which provide non-quantum technology-related goods, or services, to quantum technology businesses are not covered by the definitions in section 23A unless covered in their own right. A firm providing accountancy services, for example, to a quantum technology business is not in scope of the changes.
- 3.40. The definitions for these activities come, in part, from the National Strategy for Quantum Technologies and have been informed by the Government's consultation last year. The Government considers that those businesses which undertake these activities, and any investors with a serious intent to acquire them, will be clear about the scope of the new provisions.

#### **Quantum technology – example 2 of what is, and what is not, covered**

##### *Companies using quantum technology*

The new provisions only apply to businesses which carry out research into, design or manufacture quantum technology. Those which use quantum goods or services provided by others are not in scope.

Pharmaceutical company A is developing a new drug. This requires substantial computing power in order to try various permutations of data. It employs quantum business B to use its quantum technology computers to significantly increase the speed at which these calculations can happen.

Company A is unaffected by the new provisions. Any competition or national security-related intervention in the takeover of A would be subject to the £70 million UK turnover threshold, and the requirement for the merger to increase the share of supply to or over 25%.

- 3.41. If businesses or investors wish to discuss the new provisions as they relate to quantum technologies they should contact [NSIIRewiew@beis.gov.uk](mailto:NSIIRewiew@beis.gov.uk). Like this guidance, any such discussion cannot change the legal scope of the Orders and cannot be considered binding. If businesses or investors are considering a merger it may be advisable to seek independent legal advice.

#### **Business operating in more than one [area] covered by the new provisions**

- 3.42. Businesses may operate in more than one area of the economy covered by new section 23A of the Act. This does not affect the new provisions' applicability to them. Businesses only need to be undertaking activities in one of the described areas, for a relevant merger in which they are involved be subject to the new provisions.

# Chapter 4: The new turnover and share of supply tests

## Summary

For mergers in relation to the relevant enterprises as set out in Chapter 3, the new provisions mean that a relevant merger situation will arise if the target firm has UK turnover of over £1 million, or an existing share of supply of at least 25%. The existing share of supply test (where a relevant merger situation is created if a merger leads to an increase in the share of supply to or beyond 25%) will continue to apply.

The Government will be able to intervene in the transaction if at least one of these tests is met and it believes that the merger may raise national security concerns.

## Turnover test

- 4.1. For those businesses active in the three areas set out in Chapter 3, the new provisions mean that a relevant merger situation will arise if the business being acquired is a relevant enterprise (or if there is a change of control over a relevant enterprise in any other scenario such as a pure merger) and the relevant enterprise has UK turnover of over £1 million, rather than £70 million. This still excludes the acquiring of micro-businesses from the scope of the revised thresholds, ensuring that the Government take as proportionate and focused approach as possible to delivering its policy intention.
- 4.2. The new provisions do not change the definition of turnover or how the turnover of the enterprise being taken over is calculated, nor do they alter the fact the threshold relates only to UK turnover. As set out in the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 and the CMA's guidance, in essence this relates to sales to (or acquisitions from) UK customers or suppliers. In assessing whether a firm is active in the UK, the CMA will have regard to whether its sales or purchases are made directly or indirectly (via agents or traders) to UK customers. In the event that the Government wishes to intervene in a merger brought into scope by the amendments, the CMA retains its role in confirming whether the deal meets the relevant thresholds, including turnover.

- 4.3. The CMA's guidance<sup>24</sup> provides greater detail on how the turnover test is interpreted in various scenarios such as a straightforward acquisition, a full legal merger, or a joint venture.

#### Share of supply test

- 4.4. The new share of supply test means that (in the case of transactions in which a relevant enterprise is acquired or in a pure merger or other transaction involving a change of control or the acquisition of material influence over a relevant enterprise) the Government can intervene in a merger if those carrying on the relevant enterprise had an existing share of supply of at least 25% before the merger.
- 4.5. This approach is taken because the Government wishes to ensure that it can act when a merger or takeover raises national security concerns because it involves a business with a significant share of the supply of particular critical goods or services in the UK. Whether the other businesses involved in the merger have an overlapping share of supply in the UK, is immaterial to this national security risk. Indeed, there is a significant risk that hostile actors could invest via a 'clean' business, unconnected to the target's sector, in order to evade Government's scrutiny of national security implications.
- 4.6. The new provisions adds to, rather than replaces, the previous share of supply tests in relation to the acquisition of relevant enterprises. That is to say that the Government could intervene in a merger where a relevant enterprise (with less than 25% share of supply) merges with another business and this transaction leads to an increase to, or over, a combined 25% share of supply.

#### When the new provisions take effect

- 4.7. The new provisions do not apply retrospectively. Under Article 6 of the Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018 and Article 3 of the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018, the Government cannot rely on the new provisions to intervene in mergers where the parties have ceased to be distinct before they come into force. The Government can, however intervene on national security grounds in mergers which are underway (for example, are subject to ongoing negotiation) but where the parties have not yet ceased to be distinct at the time that the new provisions take effect.

#### The assessment of whether a particular merger is covered by the new provisions

- 4.8. As the next chapter sets out in greater detail, mergers within scope of the amended thresholds will follow the same statutory process as those in any other area of the economy. That means that **it will be the CMA which will determine whether a relevant merger situation has arisen** and thus whether the Government can refer a merger for investigation on national

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<sup>24</sup> CMA (2014), 'Mergers: Guidance on the CMA's jurisdiction and procedure': CMA2'  
<https://www.gov.uk/government/publications/mergers-guidance-on-the-cmas-jurisdiction-and-procedure>

security grounds. Following the issue of an intervention notice by the Government, the CMA is obliged to report to the Secretary of State (under section 44 of the Enterprise Act 2002) on a number of matters including whether a particular merger qualifies as a “relevant merger situation”.

### The grounds on which Government can intervene

- 4.9. Because of the structure of the Enterprise Act 2002, following the amendments to the Act, the Government will in theory be able to intervene in mergers in the relevant sectors for any of the public interest criteria – namely:
- national security (including public security);
  - financial stability; and
  - media plurality.
- 4.10. The Government’s rationale for the changes to the Act is related solely to national security. The Government does not foresee any circumstances where it would wish to, or need to, intervene in a merger brought into scope of its power by the new provisions, for reasons other than national security. The Government cannot foresee any circumstances where media plurality concerns would be raised by mergers covered by the revised thresholds. Nor can it foresee any instance of where a merger of these firms would undermine or risk the country’s financial stability given the nature of the relevant enterprises covered by the new provisions as described in Chapter 3.
- 4.11. The Government believes that free, well-regulated markets remain the best way to develop economic growth and wealth. It has been free markets, with international flows of capital and investment that have transformed the global economy and lifted millions out of poverty. The new provisions do not undermine this wider commitment. The UK will remain the strongest advocate for free trade.

### National security

- 4.12. National security is about protecting lives and protecting our way of life. Mergers and acquisitions can, in theory, put either of these at risk in three different manners:
- the greater opportunity to undertake **disruptive or destructive actions** or an increase in the impact of such action;
  - the increase access (to businesses, physical assets, people, operations or data) and ability to undertake **espionage**; and
  - the ability to exploit an investment to dictate or alter services or to utilise ownership or control as **inappropriate leverage** in other negotiations.
- 4.13. Businesses and others will appreciate that Government (cannot give detailed guidance about what factors might cause national security concerns in a particular merger (nor, for that matter, can the CMA). Doing so would, of course, help those determined to cause us harm.
- 4.14. However, it is the case that, in the broadest terms, foreign investment is more likely than domestic investment to raise national security concerns. Foreign

investors are less likely to have the UK's interests at heart and may be controlled or influenced by hostile state actors who wish to undermine our country, society, military or way of life. However, the overwhelming majority of foreign investment poses no national security concerns – and Government would expect this to remain the case in relation to the businesses covered by the revised thresholds.

- 4.15. Any national security assessment must, necessarily, be undertaken on a case-by-case basis. An investor acquiring one business may pose no national security concerns but would in relation to a different company.

#### **What the Government can do as a result of the amendments**

- 4.16. The Government wishes to ensure that mergers can go ahead in such a way as to not undermine national security. The Government is clear that not all mergers or takeovers in the three areas of the economy, even those that meet the new thresholds, raise national security-related concerns. It has amended the Act to ensure it has sufficient powers to intervene in the rare instances where national security concerns do arise.
- 4.17. For those deals that do raise national security concerns, the Government would follow the process set out in the Act, which it has followed for the previous seven instances when it has intervened on the basis of national security. This is set out in more detail in the following chapter.
- 4.18. If the Government intervenes formally in a deal, the CMA's first Phase 1 report to the Government will detail any undertakings voluntarily proposed by the parties in order to deal with any national security (or other public interest) concerns or will report that undertakings are being considered. In all seven national security-related interventions to date, this process has been sufficient. However, if this was to prove insufficient (and following a CMA-led Phase 2 investigation), the Government can issue orders to ensure that a merger does not undermine national security.
- 4.19. Whether proposed voluntarily in undertakings or imposed by order, remedies can take two broad forms – behavioural and structural. The first relates to parties doing, or not doing, certain activities to protect national security. Structural conditions relate to the organisational structure of enterprises or the merger.
- 4.20. An example of behavioural undertakings in relation to national security could include limiting access to certain physical sites, or other tangible or non-tangible assets of the target business to those with appropriate UK security clearances.
- 4.21. Structural undertakings, meanwhile, could include (but not be limited to) a requirement that control over a particular division or asset is not part of a wider merger. This might be the case where the acquired party undertakes a broad range of economic activity in addition to the activity subject to the revised thresholds. A suitable remedy might be that that activity is not part of the merger so does not change hands.

- 4.22. In the event that Government has intervened in a merger, it would welcome parties' suggestions at the earliest point as to acceptable undertakings which they consider could deal with the Government's concerns.
- 4.23. Before deciding whether to refer a merger for a Phase 2 investigation, the Secretary of State would consider whether any national security concerns could be adequately addressed by undertakings offered by the parties. Only when this process has been followed and any offered undertakings have been found to be insufficient to deal with national security concerns, would the Government refer a merger for a Phase 2 investigation<sup>25</sup>. Only following the Phase 2 investigation and as a last resort would the Government impose remedies or, when even this was insufficient to protect national security, would it block a deal altogether. The Government has never had to use the power to block for national security-related interventions since the Enterprise Act 2002 was introduced.
- 4.24. The Government's intervention in a deal and any decisions in relation to undertakings or remedies will, as with all powers, be reasonable and proportionate. Parties which consider that Government is acting otherwise can seek judicial review of its actions under section 120 of the Act, and as set out in the next chapter.

#### **The new provisions' interaction with the competition regime**

- 4.25. The new provisions were introduced for these three areas of business in order to permit the Government to intervene effectively in mergers, if necessary, on national security grounds. The new provisions, and thus the amended thresholds, also apply to the assessment of whether the CMA has jurisdiction for the purpose of undertaking a competition assessment under the Act. As such, those mergers that Government can now intervene in for national security reasons could in principle also be investigated by the CMA for competition concerns. Therefore, the amendments do, in theory, also bring more mergers within scope of the CMA's jurisdiction.
- 4.26. While competition assessment remains a matter for the CMA, which is an independent body, the Government notes that the CMA is only concerned with relevant merger situations that raise competition concerns<sup>26</sup>. The CMA has stated that it does not consider the defined sectors should be treated differently from other sectors for competition reasons. The Government therefore does not expect the Orders to bring about any material change in the CMA's approach to the assessment of mergers on competition grounds.
- 4.27. For further guidance on the impact of the new provisions on the CMA's merger review function see the CMA's published 'Guidance on changes to the jurisdictional thresholds for UK merger control'.

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<sup>25</sup> As described in more detail in chapter 5, the CMA can also refer cases to Phase 2 investigation on competition grounds.

<sup>26</sup> See sections 3.1 to 3.6 of the CMA guidance 'Guidance on changes to the jurisdictional thresholds for UK merger control'



### Summary of what the new provisions do not change

4.28. The new provisions make important changes to the Government's powers to protect national security. However, the changes do not affect a number of key tests, powers or processes as set out in the Act. This section summarises these in order, the Government hopes, to reassure all parties about the proportionate and focused amendments to the Act.

4.29. The amendments do not change:

- the definition of an enterprise as described in the Act
- the definition of what constitutes enterprises "ceasing to be distinct" which remains as set out in section 26 of the Act;
- what constitutes UK turnover;
- the way in which a share of supply is determined;
- the requirements on businesses set out in the EU Merger Regulation, including the requirement to notify relevant mergers to the European Commission;
- the process by which mergers subject to public interest interventions are scrutinised by the CMA to confirm they meet jurisdictional tests;
- the powers open to the Secretary of State in respect of relevant mergers; and
- the ability for affected parties to pursue a judicial review of all actions and decisions made by the Government under the public interest regime.

# Chapter 5: The process for any Government interventions in mergers

## Summary

The process for Government intervention remains as set out in the Enterprise Act 2002.

This statutory process involves:

- the Government issuing (and publishing) a Public Intervention Notice;
- following a call for evidence and a review, the CMA provides the Secretary of State with a Phase 1 report. This report includes its assessment as to whether the merger meets the relevant jurisdictional tests, including any relating to UK turnover or share of supply;
- the Secretary of State can decide i) there are no public interest concerns, ii) to accept (subject to consultation) voluntary undertakings provided by the parties, or iii) to refer the transaction for further investigation;
- in the event of further investigation being required, the CMA undertakes a Phase 2 investigation before providing a report to the Secretary of State;
- the Secretary of State can then either decide there are no public interest concerns, accept undertakings, or impose an order to deal with the public interest concerns;
- parties can pursue judicial review of any decision made by the Secretary of State.

## The statutory process

- 5.1. The amendments to the Act do not change the statutory process by which mergers can be scrutinised for public interest, including national security, concerns. The Government wishes to retain the clarity, the transparency and fairness of the current process. The process is set out in detail in guidance.<sup>27</sup> This section of the guidance seeks only to summarise the process.<sup>28</sup>

### *The Public Intervention Notice*

- 5.2. The first formal step for the Government's intervention in a merger is the issuing of a **Public Intervention Notice**. The Secretary of State issues an intervention notice to the CMA if he or she has "reasonable grounds for suspecting" that it is or may be the case that a relevant merger situation has

<sup>27</sup> CMA (2014), 'Mergers: Guidance on the CMA's jurisdiction and procedure: CMA2' <https://www.gov.uk/government/publications/mergers-guidance-on-the-cmas-jurisdiction-and-procedure>

<sup>28</sup> The statutory process is slightly different for some media- and newspaper-related mergers where Ofcom has a role. This chapter does not seek to cover the process for such a merger.

been created or is in progress, and one of the public interest considerations in section 58 of the Act is relevant. This notice has to be published.

- 5.3. In the case of a national security-related intervention, the Secretary of State is likely to have taken advice from the Ministry of Defence (MOD) and/or other parts of Government about the national security risks. However, this is not required in the legislation.
- 5.4. In the event of a merger that has already taken place, the CMA (under section 24 of the Enterprise Act 2002) can decide up to four months after it completed whether to refer the case to a Phase 2 investigation on competition grounds. The Secretary of State has the same four month period in which to decide, having issued a Public Intervention Notice, whether to refer a completed merger for a Phase 2 investigation of whether it is likely to operate against the public interest. Where the CMA is investigating the merger, however, the Secretary of State must intervene before the CMA reaches a decision on whether to make a reference to Phase 2 on competition grounds.

#### *Phase 1*

- 5.5. Following an intervention notice, the CMA is obliged to prepare a report for the Secretary of State by a date specified by the Secretary of State. To enable it to produce this report, the CMA will carry out an investigation of the merger and will publicly seek third party views on the merger.
- 5.6. Following this investigation, the CMA will report on its views on the competition issues and whether, if it were not a public interest case, it would refer the matter for further investigation (a so-called “Phase 2” investigation) or accept undertakings in lieu of a reference. The report will also summarise the views received on the public interest aspects of the merger and, where relevant, it may refer to any undertakings offered by the parties to mitigate the public interest concerns.
- 5.7. Having received the report, the Secretary of State has three options:
  - they may conclude that there are no relevant public interest concerns and the merger can proceed (assuming the CMA has not raised any competition-related concerns);
  - they can (subject to a public consultation) accept undertakings offered by the parties in order to mitigate national security risks and/or any competition concerns raised by the CMA;
  - refer the merger for further investigation.
- 5.8. There is no statutory deadline for the Secretary of State to respond to the CMA’s Phase 1 report. They are likely to also receive advice from the MoD and/or other parts of Government in order to inform this decision.

- 5.9. In all seven of the interventions on national security grounds to date, the Secretary of State has been able to accept undertakings following a consultation.

### *Phase 2*

- 5.10. In the event that the Secretary of State wishes the merger to be investigated further, it is referred to the CMA which will establish a group of independent panel members (not involved in the Phase 1 investigation) to look at the matter. This group will undertake a further investigation into whether the merger is likely to operate against the public interest, taking account of any competition issues and the public interest consideration. It will also consider whether any remedies are appropriate to deal with either or both considerations.
- 5.11. The CMA must submit its Phase 2 report to the Secretary of State within 24 weeks (with a possible extension for a further eight weeks). This report is published.
- 5.12. The Secretary of State has 30 days from receipt of the Phase 2 report to consider their decision. If they consider that there are relevant public interest considerations, they may choose to accept undertakings. Alternatively, the Secretary of State may make orders imposing conditions or, if they consider no remedies can adequately address the public interest concerns, they can block the deal entirely. If they conclude that there are no relevant any public interest considerations, the Secretary of State cannot make any finding at all on the competition issues (if there are any); any such decision will be the CMA's alone.

### *Intervention in an EU merger*

- 5.13. Where the Secretary of State believes that they may wish to exercise their powers under Article 21(3) of the EU Merger Regulation to protect legitimate interests, they will issue a European Intervention Notice under the Enterprise Act 2002. The process then broadly follows the procedure for public interest cases described above. However, the CMA would investigate and report solely on the public interest issues, as the competition aspects of the case fall within the competence of the European Commission.

### *Judicial review*

- 5.14. The Secretary of State's decisions at each stage of the process may be challenged by a judicial review<sup>29</sup>. Specifically, affected parties can request judicial review of the decision to serve (or not to serve) a Public Interest Notice, any decision that follows a Phase 1 report, or any decision that follows a Phase 2 report. In each case, the courts will scrutinise whether the Secretary of State acted in a reasonable and lawful manner.

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<sup>29</sup> For applications to the CAT for review see section 120 of the Enterprise Act.

*Information sharing*

- 5.15. The Government may choose to share information provided by parties throughout the process with other parts of Government and with the CMA. However, this will always be done in accordance with its obligations under the Enterprise Act 2002 and other relevant legislation as regards the handling of confidential information.

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# Chapter 6: What you should do as a result of the new provisions

## Summary

No immediate action is required. However, relevant businesses or their advisors, may wish to familiarise themselves with the implications of the amendments so as to be well-placed ahead of any future relevant merger.

## Immediate action needed following enactment of the Orders

- 6.1. The new provisions do not impose any legal obligation on any business or other private organisation. Therefore, businesses need take no immediate action as a direct consequence of the amendments coming into force.
- 6.2. Relevant enterprises, or their advisers, may wish to familiarise themselves with the implications of the changes to the Act so as to be well placed ahead of any relevant merger in future that might raise national security-related concerns.

## Process for any future merger brought into scope by the new provisions

- 6.3. For mergers brought into scope of Government intervention as a result of the amendments, parties may wish to voluntarily notify Government as they are currently able to do for mergers which already qualify for intervention. The statutory process set out in the previous chapter will remain the same for any and all mergers in which the Government intervenes for national security reasons.
- 6.4. As set out in Chapter 4, the Government does not anticipate the need for businesses to change their “self-assessment” on whether they should voluntarily notify the CMA about a merger (including a merger affected by the new provisions purely on competition grounds.
- 6.5. The Secretary of State will deal with any future Public Interest Interventions undertaken as a result of the new provisions, as ever, on a case-by-case basis. To inform the Secretary of State’s final decision, relevant government departments’ officials will seek to work as closely as possible, as early as possible, with the parties. They will communicate directly with parties, recognising mergers can be fast-moving. They will seek to understand and discuss (where possible) any national security-related concerns with a merger, and how these might be mitigated.
- 6.6. While the information to inform the Secretary of State’s decision will differ on a case-by-case basis, it is likely to be informed, in part, by the following types of information provided to relevant government departments’ officials:

- which business, or part of a business, will change hands;
- who is acquiring material influence or control over this business or division – the individual or business name, any existing holdings in these or other sectors,
- what form will that influence or control take – for example, how is any new business being structured, what share of voting rights will the acquirer have, or how many Board members can they appoint;
- how could that influence or control be manifested – for example, will they have access to assets or information that Government may have national security issues with? If so, which assets or information?
- any proposed mitigations that the parties propose in order to deal with Government's national security concerns; and
- with whom Government should engage.

6.7. The Government welcomes parties' informal notification of mergers with potential national security concerns as early as possible. This can allow it to begin its assessment process. Where relevant, it can also allow Government to say that it has no national security concerns with a deal so that parties can choose to proceed. However, such a declaration is not binding on Government as other information may come to light, or relevant circumstances may change.

6.8. Businesses and investors who wish to engage with the Government about transactions that they believe may have a national security dimension should contact their existing government contact or the department that has responsibility for their area of the economy.

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