

# UK Amends Enterprise Act 2002 To Protect Businesses Critical to Addressing Public Health Emergencies, Extends Powers To Protect Companies and Technologies

Skadden

June 24, 2020



If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the next page or call your regular Skadden contact.

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West  
New York, NY 10001  
212.735.3000

In recent months, European states have raced to implement protections against opportunistic acquisitions of key local businesses by foreign buyers amid the economic disruption caused by the spread of COVID-19. (See our March 27, 2020, client alert, [“Europe and the UK Race To Protect Businesses Impacted by the Coronavirus Pandemic: Foreign Investment, State Aid and Antitrust Rules Adjusted”](#) and our April 1, 2020, client alert, [“COVID-19: Early Effects on Foreign Investment Regimes and Trade Enforcement”](#).)

The United Kingdom continued this trend on June 21, 2020, with the announcement of amendments to the Enterprise Act 2002 (Enterprise Act) that will allow the government to intervene where a U.K. business considered important to efforts to combat public health emergencies is the target of a takeover. In addition, the government’s powers to scrutinize and intervene in mergers will be increased in three sectors of the economy perceived to be important to national security — artificial intelligence, cryptographic authentication technology and advanced materials.

## Background

The U.K. historically has been very open and welcoming to foreign investment. The current U.K. merger control regime is characterized by rules designed to guard against anti-competitive behavior and to uphold proper conduct in takeover situations. The ability of the government to intervene in merger situations is restricted to situations in which certain specific public interest considerations — national security, media plurality and financial stability — may be at issue, and interventions in mergers on these grounds have been very limited. The government has intervened on public interest grounds under the Enterprise Act on 20 occasions: 12 on national security grounds, seven on media plurality and once on financial stability.

In 2018, against the background of increasing concern that the U.K. government did not have sufficient powers to intervene in foreign acquisitions of U.K. businesses where national security was potentially at risk, the Enterprise Act was amended to reduce and amend the turnover (from £70 million to £1 million) and share of supply threshold tests for transactions involving target businesses in the dual military and civilian use, quantum computing and computing hardware sectors. (See our January 21, 2020, client alert, [“Conservative Party Win Paves Way for Reforms to UK National Security Reviews”](#).)

At the time these reforms were introduced, the government made it clear that it intended to embark on a more general review of the U.K.’s inward investment regime, and it appears that legislative proposals to implement the new regime in the form of a National Security and Investment Bill are now imminent.

# UK Amends Enterprise Act 2002 To Protect Businesses Critical to Addressing Public Health Emergencies, Extends Powers To Protect Companies and Technologies

## Pandemic Response

On June 21, 2020, the U.K. government announced that the Enterprise Act would be amended to add an additional public interest ground allowing the government to intervene in relevant merger situations to ensure that the transactions do not threaten the U.K.'s ability to combat a public health emergency such as the spread of COVID-19.

The amended regime allows the U.K. government to intervene in transactions that meet the existing turnover or share of supply thresholds if the transaction is relevant to “the need to maintain in the United Kingdom the capability to combat, and to mitigate the effects of, public health emergencies”. The government’s focus is to allow intervention where businesses directly involved in pandemic response, such as vaccine research companies and personal protective equipment (PPE) manufacturers, may be acquired by foreign buyers.

The existing turnover or share of supply thresholds still must be met (generally, more than £70 million turnover in the U.K. or a combined share of supply in excess of 25%), meaning smaller businesses will not necessarily be affected by the changes. Where specific lower thresholds apply (such as to businesses that are active in military or dual-use goods subject to export control, or the nil threshold for defence contractors), those lower thresholds also will apply for the purposes of a public health intervention.

## Artificial Intelligence, Cryptographic Technology and Advanced Materials

In addition to allowing the U.K. government to intervene to protect the U.K.'s capacity to combat public health emergencies, further amendments to the Enterprise Act are designed to increase the government’s powers to prevent the opportunistic acquisition of businesses with capabilities that are deemed to be critical to national security. In addition to the dual-use, quantum computing

and computing hardware sectors to which reduced turnover and share of supply thresholds were applied in 2018, the amendments have the effect of applying the same reduced thresholds for intervention in relevant merger situations under the Enterprise Act to businesses active in the artificial intelligence, cryptographic authentication technology and advanced materials sectors.

The move to reinforce the existing stop-gap measures highlights the evolving and growing focus of the U.K. government on its ability to regulate transactions with national security implications. The focus on emerging technologies also echoes that of a recent U.S. Department of Commerce review intended to identify “emerging and foundational technologies” and impose export controls on them where required. (See our January 10, 2020, client alert, “[Commerce Department Will Move Forward With More Stringent Export Controls for Certain Emerging Technologies](#)”.)

The U.K. recently moved pre-emptively to prevent anticipated acquisitions of defence contractors, securing undertakings that any proposed acquisition had been abandoned in Aerostar/Mettis Aerospace and Gardner Aerospace/Impcross.

The U.K. government has indicated that these amendments to the Enterprise Act are intended to mitigate potential risks to national security in the short term ahead of the more comprehensive powers for the government to scrutinize and intervene in transactions that are expected to be included in the forthcoming National Security and Investment Bill. That legislation is likely to bring about very significant and wide-ranging changes in the U.K.'s approach to the regulation of foreign investment.

While the new public health amendments came into effect June 23, 2020, the proposed amendments to expand the government’s powers in relation to artificial intelligence, cryptographic authentication technology and advanced materials sector investments will be subject to parliamentary debate and approval.

---

## Contacts

### John Adebisi

Partner / London  
44.20.7519.7022  
john.adebisi@skadden.com

### Scott C. Hopkins

Partner / London  
44.20.7519.7187  
scott.hopkins@skadden.com

### Jason Hewitt

Associate / London  
44.20.7519.7142  
jason.hewitt@skadden.com

### Bill Batchelor

Partner / Brussels  
32.2.639.0312  
bill.batchelor@skadden.com

### Michael E. Leiter

Partner / Washington, D.C.  
202.371.7540  
michael.leiter@skadden.com