
National Security as a Public Interest Consideration in UK Merger Control

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Abstract

The article will discuss the boundaries of UK merger control set by national security concerns against the background of public interest considerations in the decisional practice of the competent authorities. The article will first present an overview of the existing legal framework for considering public interest when reviewing mergers and acquisitions in strategic industries or companies. It will then present the main precedents where issues of national security were raised and will discuss how the CMA and the Secretary of State assessed these transactions from both a competition and national security angle. Finally, the article will present the recent legislative initiative by the UK Government to extend national security grounds reflects a new approach towards FDI.

Introduction

As the multilateral approach to international trade has lost its appeal in recent years, foreign direct investments (FDIs) in strategic industries or companies are increasingly subject to non-competition scrutiny based on public interest considerations. While such considerations are not new to merger control, their potential to introduce or complement wider industrial policy or other priorities that are unrelated to competition law has brought them back to prominence in many jurisdictions across the globe. This trend is visible not only in developing economies, which have traditionally been more prone to protectionism, but also in the historical proponents of free and open market economy such as the United States and the European Union.¹

In 2018, the U.S. Congress adopted the Foreign Investment Risk Review Modernization Act, which was implemented immediately by the provisional Pilot Program to Review Certain Transactions Involving Foreign Persons and Critical Technologies.² The reform expanded FDI review by the Committee on Foreign Investment in the United States (CFIUS) to include mandatory reporting of both controlling and noncontrolling investments in as many as twenty seven industries.³ At the same time, in the EU, following the European Commission's (Commission) heavily criticized decision to block the Siemens/Alstom merger, there have been voices advocating for a formal procedure allowing the Council to override merger scrutiny based on non-competition, public interest considerations.⁴ Even today, legitimate interests, such as public security, plurality of the media, and prudential rules, as well as other public interests that have been approved by the Commission, may justify additional intervention by national authorities.⁵

Similar screening mechanisms already exist or are being considered by many Member States with respect to transactions that are not subject to Commission review, which could lead to inconsistent enforcement and complex remedies, potentially exceeding the scope of the respective theory of harm and being used to achieve objectives of other policies such as trade. Recently, Hungary introduced a screening mechanism in January 2019, while Sweden and the Czech Republic are expected to follow suit. Overall, nearly half of the Member States have some form of public interest screening, either as part of the merger control assessment or within separate procedures on an ad hoc basis.

This shows the increasing relevance of such mechanisms for legal enforcement and certainty amidst the increasing geopolitical tensions. Moreover, there are significant differences in scope and procedure:

1. Ex-ante/ex-post assessment
2. Voluntary/mandatory notification
3. General/sectoral coverage
4. Companies/assets coverage
5. Applicability to investments from other Member States and third countries or third countries only, end the list.⁶

To enhance transparency and provide legal certainty, without harmonizing national screening mechanisms, Regulation 2019/452 established a procedural framework for cooperation between Member States and the Commission where an FDI in one or more Member States may affect the security or public order of another Member State or the EU.⁷ Given its limited scope, however, the Regulation neither requires Member States to apply public interest scrutiny to FDIs nor does it replace existing screening mechanisms with a European one-stop-shop screening. Therefore, as this article will demonstrate, each jurisdiction still enjoys a closer look at specific public interest considerations, and indeed necessary, in the current state of international trade.

In several jurisdictions, national security is one of the public interest considerations that is taken into account in the assessment of an acquisition or merger involving a foreign entity and domestic entity/assets. In terms of procedure, the threats to national security that a transaction may entail can be considered either by the competent competition authority, along the substantive competition law based appraisal of a merger, as in the United Kingdom (integrated model), or by another public body, such as a sectoral regulator or a government department, concurrently or subsequently to the competition proceedings as in the United States (dual model).⁸ The dual model is by far the most common, and interestingly, in Europe, Poland is the only jurisdiction where public interest considerations are assessed by the competition authority and no ministerial intervention is required. In terms of substance, some jurisdictions use precise and narrow definitions of public interest, while others prefer an open list of public interest considerations, or a broader, more flexible definition, leaving a considerable margin of discretion to the decision-making body. It is

nevertheless possible to distinguish the following categories of public interest considerations:

1. General and specific considerations (for example, in the energy sector: Security of supply and stable provision of energy)
2. Economic (protection of small and medium enterprises) and non-economic considerations (protection of employment, environment or public health).⁹

Given its frequent use, flexible meaning, and protectionist potential, national security stands out as one of the most controversial public interest considerations.¹⁰ This is more so in the UK, a jurisdiction with long experience in assessing concentrations pursuant to a public interest standard. It is worth noting that amidst complicated Brexit negotiations the recent government proposals on a new national security regime drastically lower the regulatory thresholds enhancing the national security scrutiny.¹¹

Historically, public interest considerations have been part of UK merger control since the 1965 Monopolies and Mergers Act. The 1973 Fair Trading Act followed suit and introduced a broad public interest test based on five major public interest categories:

1. Maintaining and promoting effective competition,
2. Price, quality and variety considerations,
3. Innovation, potential competition and reduction of costs,
4. Balanced distribution of the industry and employment and finally
5. International competitiveness.¹²

In 2002, however, the Enterprise Act (EA 2002) used effective competition as the primary test for substantive appraisal of mergers and left little room for public interest considerations.¹³ Most recently, the government again reversed course and drastically lowered the regulatory thresholds to ease scrutiny of foreign acquisitions based on national security grounds. There are still several other public interest exceptions, whose examination could provide a clearer picture of where national security stands in UK merger control.

This article will address, therefore, the boundaries of UK merger control set by national security concerns against the background of public interest considerations in the decisional practice of the

competent authorities. Accordingly, this article will first present an overview of the existing legal framework for considering public interest when reviewing mergers and acquisitions in strategic industries or companies. Next, it centers its attention on cases that have raised national security concerns, to outline the Government's current approach to such concerns. Also, this article will discuss the ramifications of the recent legislative and policy developments that have significantly extended the leeway for national security considerations in UK merger control. As a final remark, it is crucial to indicate that despite the abundant literature in relation to the nature of national security as a public good and the implications the non-rivalrous and non-excludable nature of a public good has for national security assessment, the analysis of such a topic falls outside the scope of this article. However, it is worth emphasizing the importance of public goods theory for the assessment of national security.¹⁴

The Framework for Considering Public Interest in UK Merger Control

Although the EA 2002 guarantees the primacy of a competition-based merger control in the UK, there are several public interest considerations which could justify a government intervention to block or conditionally approve a transaction. The grounds for and specific types of such interventions will set the stage for a more detailed description of institutional and procedural framework for considering public interest. The section concludes with a summary of the criticism that has been raised against this merger control framework.

Grounds and Types of Public Interest Intervention

Prior to the EA 2002, mergers in the UK were reviewed under a broad and imprecise public interest test, against which the relevant competition authority would only advise the Secretary of State on whether a transaction operates or may be expected to operate against the public interest.¹⁵ The Secretary of State would then make a final decision on how to remedy such adverse effects, including prohibition, structural or behavioral undertaking from the merging parties.¹⁶ While the concept of public interest did include competition considerations, and eventually only a few prohibitions were issued, the fact that from 1973 to 2001 the Secretary of State disregarded the competition assessment and advice on thirty-one occasions, suggests that the then

regime failed to provide much needed transparency and predictable outcomes.¹⁷

Even though the so-called Tebbit doctrine would reverse this practice in 1984, making competition assessment the rule while almost completely ignoring the previously dominant wider public interest consideration, it was not until the EA 2002 that the UK introduced a formal merger control competition test - substantial lessening of competition (SLC).¹⁸ As a result, there is a clear line between competition concerns and public interest considerations in merger control. Furthermore, there is no room left for political intervention with respect to SLC assessment. Finally, it includes the following public interest as part of an exceptional intervention mechanism:

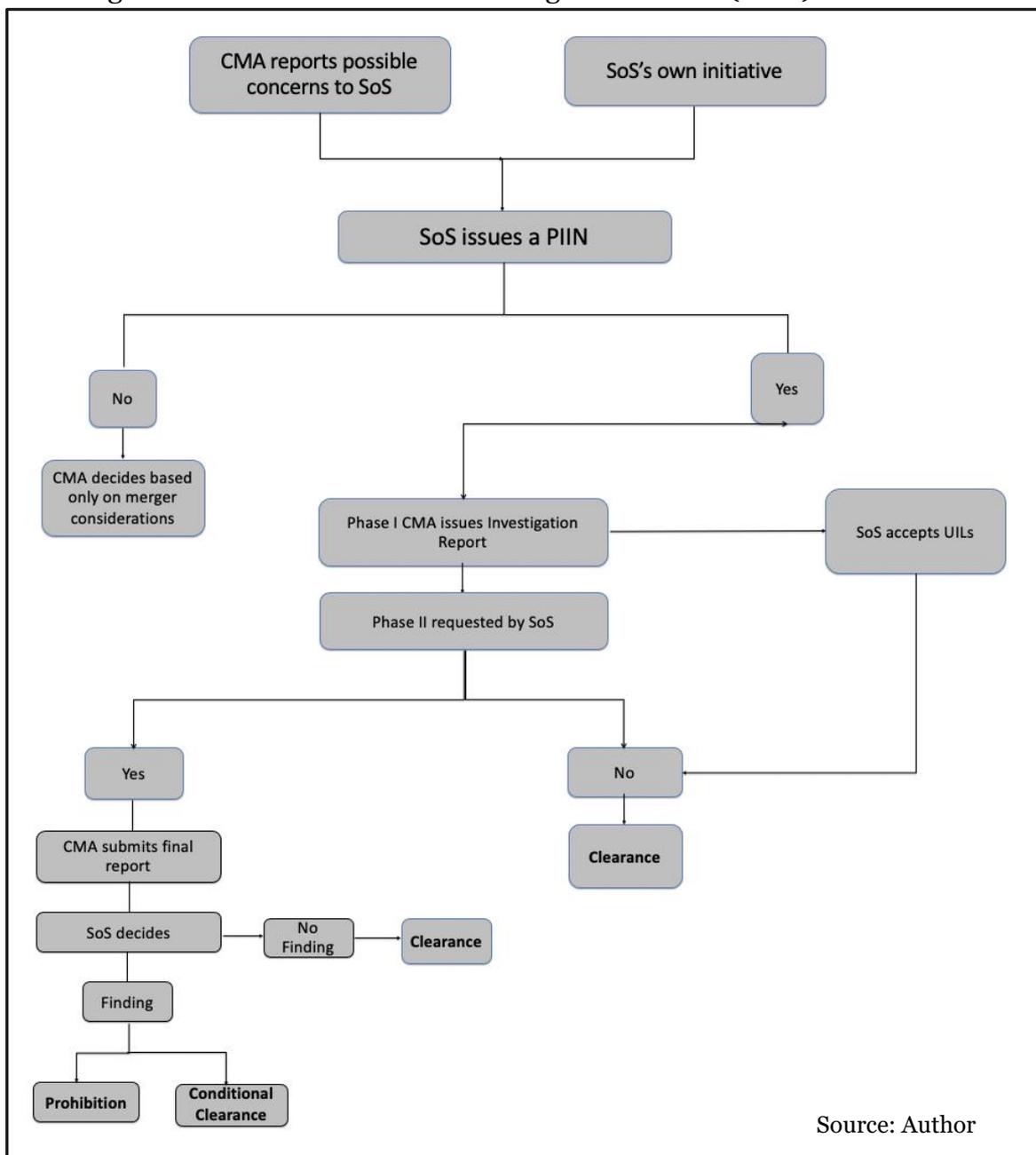
1. Specific statutory public interest considerations
2. The Secretary of State may decide new or additional public interest considerations, subject to subsequent parliamentary approval.¹⁹

Currently, there are three statutory public interest considerations: National security, newspaper and media plurality, and the stability of the UK financial system.²⁰ While national security was the only public interest consideration when the Enterprise Act was adopted in 2002, subsequent amendments completed the list with newspaper and media plurality and the stability of the financial system.²¹ The latter is also the only public interest consideration to date that has been added by an order of the Secretary of State, during the review of the Lloyds/HBOs merger in 2008.²² Despite the cautious use of this power to include new or additional public interest considerations, its existence and rationale, besides saving time whenever necessary, have been criticized for limiting the extent and effectiveness of parliamentary scrutiny. As an illustration, it took the Parliament only 9 days to approve the new public interest concern in Lloyds/HBOs.²³

The Secretary of State may raise each of the three public interest considerations mentioned above during three types of public interest intervention. They can also be part of two groups depending on whether a competition-based merger control takes place in parallel. The competition authority reviews transactions involving a government contractor in the defense sector or newspaper/media companies which supply at least one quarter of the newspapers/broadcasting of any

description and meets neither the UK nor the EU jurisdictional threshold, and the Secretary of State may issue a Special Public Interest Notice (SPIN). However, the cease to be distinct test still applies to special merger situations.²⁴ By contrast, where the Competition and Markets Authority (CMA) or the European Commission are already investigating a merger, the Secretary of State may, depending on the case, intervene by issuing a Public Interest Intervention Notice (PIIN) or a European Intervention Notice (EIN). The former requires that a transaction constitutes a relevant merger situation, whereas the latter applies to a concentration with an EU dimension.²⁵

Figure 1. The UK Public Interest Merger Procedure (PIIN).



Source: Author

With respect to national security, redefining any of these jurisdictional concepts—by lowering the required turnover thresholds—can significantly expand the scope of merger control, typically in pursuit of non-competition policy goals, and allow for more frequent public interventions. However, as far as EIN are concerned, any public interest considerations which do not fall under the category of legitimate interests—public security, plurality of media and prudential rules—need prior approval by the European Commission.²⁶

It is worth emphasizing at this point that although the article focuses on the implications of public interest intervention based on national security concerns for merger control, it is possible that such a public intervention cloaks the trade policy implementation. This is not as evident in the UK as it is in other jurisdictions. For example, in response to the initiatives of foreign entity targeting in the United States, China's Ministry of Commerce has also adopted the Provisions on the Unreliable Entity List which became law on 19th September 2020.²⁷ According to Article 1 of the law, it aims at safeguarding national sovereignty, security and development interests, maintaining fair and free international economic and trade order, as well as protecting the legitimate rights and interests of enterprises, other organizations, and individuals of China.²⁸ A legitimate concern is that this list as well as the similar list the US government has published can be used as a legitimized façade to impose sanctions on countries rather than entities themselves. The Qualcomm/Broadcom and NXP/Qualcomm transactions illustrate the impact that such policies can have on entities, as they became victims of the trade war and the broader geopolitical tensions between the United States and China.²⁹

Institutional and Procedural Framework of Public Interest Intervention

In contrast to the paradigm shift it operated with respect to the substantive test for merger control, the EA 2002 essentially preserved the former institutional and procedural approach to public interest considerations. At the same time, it also seems to have given credit to the idea that public interest interventions are mainly political, hence biased, and arbitrary. Currently, the Secretary of State for Business, Energy, and Industrial Strategy—or, in the case of newspaper or media mergers, the Secretary of State for Digital, Culture, Media and Sport—

(Secretary of State) is at the center of an institutional and procedural framework which aims to ensure that public interests are duly considered whenever the competition appraisal of a merger might interfere with it. The Secretary of State must act in a scrupulously fair and impartial manner, in other words, in a quasi-judicial capacity.

Following the 2013 reform, which abolished the Office of Fair Trading (OFT) and the Competition Commission and merged their functions into the CMA, the Secretary of State cooperates primarily with the competition authority to establish and remedy an issue of public interest during merger review.³⁰ Occasionally, where a transaction concerns newspaper or media companies, the procedure also involves the Office of Communications (Ofcom), which would be advising on the public interest concerned in parallel to the competition assessment by the CMA.³¹ Either way, as far as public interest interventions are concerned, the communications regulator and the competition authority are tasked with gathering and analyzing input from various stakeholders, such as the competent ministry or government department and the industry concerned, which is then reported in a timely manner to the relevant Secretary of State.

The procedure itself commences with the Secretary of State, either upon a recommendation from the CMA or *sua sponte*, issuing an intervention notice—a SPIN, a PIIN, or an EIN—that outlines the relevant public interest consideration(s) whenever he believes that it is or may be the case that one or more than one public interest consideration is relevant to a consideration of the relevant merger situation.³² Accordingly, either the CMA or the Ofcom proceeds to prepare a report in relation to the specified public interest and whether it might be at issue, based on feedback to a public interest test of the merger under review. Additionally, where a transaction falls under its jurisdiction, the CMA will present its Phase 1 conclusions on the competition assessment of the merger. Those conclusions should, in particular, address whether there is a relevant merger situation, whether the merger could result in a substantial lessening of competition, whether the markets concerned are of sufficient importance, whether the arrangements are sufficiently far advanced, whether there are outweighing benefits which offset the adverse effects of substantially lessening of competition, and whether it would be appropriate to deal with the matter by way of undertakings.³³ By contrast, where a merger is being reviewed by the European

Commission, the CMA has no competence to assess the competition aspects of the case; it can only deal with the public interest considerations specified in the EIN and make the appropriate recommendation to the Secretary of State. This initial phase concludes within a deadline set by the Secretary of State in its intervention notice, which is typically the statutory forty-day period for completing Phase 1 assessment of all mergers. However, it is possible to reduce this period where necessary, considering the urgency of the matter for example, 26 working days in Lloyds/HBOS.³⁴

At this stage of the procedure, in light of the CMA or Ofcom public interest reports, the Secretary of State may:

1. Clear the merger, including where public interest outweighs any anti-competitive concerns
2. Refer it to the CMA for an in-depth Phase 2 investigation
3. Accept undertakings from the parties concerned in lieu of a Phase 2 reference.³⁵

While all public interest cases to date have resulted in undertakings addressing the Secretary of State's concerns, the CMA may be required to conduct an in-depth inquiry into the relevant public interest consideration, even where there is no likelihood of substantial lessening of competition—the standard threshold for a Phase 2 reference.³⁶ In any event, the Secretary of State must accept the Phase 1 competition assessment; he may disregard it in the name of a specific public interest, but cannot call it into question to trigger an in-depth inquiry. Thus, any anti-competitive outcome would be adverse to the public interest unless there is a relevant public interest consideration justifying it.³⁷ By contrast, the Secretary of State can under no circumstance allow a merger to take place on public interest grounds where the European Commission has already prohibited it competition grounds.

Phase 2 assessment of public interest considerations is similar to that of ordinary merger cases.³⁸ The CMA Inquiry Group is in charge of reviewing the matter and preparing a detailed report within 24 weeks, which can be extended by another 8 weeks in case of special reasons.³⁹ Importantly, no new public interest consideration or such that has not been finalized by the end of the twenty-fourth week following the Secretary of State's public interest intervention notice may be part of the in-depth inquiry. The Secretary of State may, however, delay a

Phase 2 reference until the public interest consideration is finalized at Phase 1 or, if earlier, 24 week period expires.⁴⁰ The questions that need to be addressed during this inquiry include whether a relevant merger situation has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, whether such a situation has or may be expected to result in a substantial lessening of competition, whether, taking account only of any substantial lessening of competition and/or the admissible public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest, and most importantly, whether the Secretary of State or anyone else should take an action for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the relevant merger situation.⁴¹

Upon receipt of the CMA's Phase 2 recommendations, which need to provide a comprehensive a solution as is reasonable and practicable to the adverse effects to the public interest, the Secretary of State has thirty days to decide whether to make an adverse public interest finding, or to make a no finding at all in the matter, thereby clearing the merger.⁴² A no-finding decision is warranted only where there is no public interest consideration which is relevant to a consideration of the relevant merger situation concerned.⁴³ On the other hand, an adverse public interest finding enables the Secretary of State to take such actions that can reasonably remedy, mitigate, or prevent the adverse effects to the public interest, including where necessary the prohibition of the merger on public interest grounds.

Overall, the UK public interest institutional and procedural framework represents a complex mechanism involving a regulator and a political decision maker. The CMA's duty in Phase 1 is to collect, summarize and publish all representations from the relevant parties. In a Phase 2 investigation, in contrast, the CMA has wide powers to investigate the public interest implications of the relevant merger case.⁴⁴ In practice, some argue that the joint decision-making mechanism brings along a transparent process compared to a sole ministerial decision-making process due to the autonomous nature of the competition authority and that of its assessment.⁴⁵

Critical Assessment of the Framework for Considering Public Interest

The institutional and procedural setting for considering public interest in UK merger control is not without criticism. One common line of criticism is that the CMA lacks extensive expertise in national security cases.⁴⁶ Unlike media mergers, occasionally sent to Phase 2, thereby allowing the CMA to develop the necessary specialist expertise, those involving national security considerations are solved normally in Phase 1 upon accepting measures from the parties concerned. Furthermore, the CMA's role in balancing public interest and competition concerns, which is far from being a straightforward task, seems to run against its statutory duty to promote competition.⁴⁷ However, it is important to bear in mind that, save for financial stability grounds, public interest considerations such as media plurality and national security do not require any balancing against competition assessment. In any event, since the CMA has no decision-making powers in matters related to the public interest, any balancing of conflicting considerations at stake falls upon the Secretary of State.

A second line of criticisms points out the risk of political bias when the Secretary of State intervenes to review a merger on public interest grounds. For example, NewsCorp's bid to acquire the remaining 60.9 percent of the BskyB shares in 2010 was met with unprecedented skepticism, suggesting that the deal was problematic on political grounds, among others.⁴⁸ While initial regulatory concerns revolved around cross-media ownership issues—NewsCorp was then the biggest newspaper company in the UK, accounting for one third of the whole market, and Sky was the biggest broadcaster—subsequent political scandals, which led to a public inquiry by Lord Justice Leveson, ultimately resulted in the withdrawal of the bid. Also, the then SoS Vincent Cable stepped down because of a statement to some reporters, indicating that he had declared war on Rupert Murdoch just after he issued an EIN on 4 November 2010, and during the investigation a phone-hacking scandal emerged. Against this background, it was suggested that a greater involvement of the CMA in assessing public interest considerations would ensure more consistency and continuity, hence reducing the unpredictability of political decision-making.⁴⁹ However, no political decision is, in and of itself, predictable and perfectly transparent.⁵⁰ Also, the lack of extensive Phase 2 experience with national security considerations in merger control, prevents the

CMA from ensuring a degree of consistency that would be welcome for the legal and business community.

It is noteworthy that the above criticism does not apply equally to all three of the existing public interest considerations. While the current institutional and procedural framework seems best suited for dealing with financial stability concerns—mainly because the CMA has the enforcement capacity to effectively balance competition and financial stability consideration and that, given the importance of time in the finance sector, a final decision by the Secretary of State at the end of Phase 1 is preferable to a lengthy Phase 2 inquiry—national security cases might still raise several issues. First, a politically independent market authority such as the CMA appears to have little legitimacy to deal with national security matters. By contrast, such matters are less likely to create a conflict of interest involving political decision-makers. Furthermore, inadvertent disclosure of sensitive national security information to the CMA could itself pose a threat to national security. For example, in *Hytera/Sapura* the Home Office bypassed the CMA and presented directly to the Secretary of State about the security concerns with the transaction under review.⁵¹ Finally, there is always the suspicion that national security as a public interest consideration in merger control serves for the implementation towards a hidden industrial policy.

The Assessment of National Security as a UK Public Interest Consideration

Historically the first statutory public interest consideration in the UK and, occasionally, cast as something more than a public interest consideration, national security is also the most common ground for public intervention in merger control.⁵² By the end of 2019, the Secretary of State issued 2 SPINs, 2 PIINs, and 5 EINs to assess and remedy any adverse effects on national security. As table 1 illustrates, these cases include *General Dynamics/Alvis*, *Finmeccanica/AgustaWestland*, *Finmeccanica/BAE Systems*, *Lockheed Martin/Insys* and *General Electric/Smiths Aerospace*.⁵³ While most of these public interest cases involve defense companies, it is worth noting that they also represent most of all mergers in the defense industry.

Table 1. Public Interest Notices (PIIN/SPIN/EIN) 2002–2019

Date of Intervention	Case (PIIN/SPIN/EIN)	Sector	Concern	Outcome
11 March 2004	General Dynamics / Alvis (EIN)	Defence	National Security	Phase 1 Clearance / UILs
26 August 2004	Finmeccanica / Agusta Westland (EIN)	Defence	National Security	Phase 1 Clearance / UILs
7 February 2005	Finmeccanica / BAE (EIN)	Defence	National Security	Phase 1 Clearance / UILs
17 August 2005	Lockheed Martin / Insys (SPIN)	Defence	National Security	Phase 1 Clearance / UILs
20 March 2007	General Electric / Smiths Aerospace (EIN)	Defence	National Security	Phase 1 Clearance / UILs
15 May 2009	Atlas Elektronik / Qinetiq (SPIN)	Defence	National Security	Phase 1 Clearance / UILs
10 April 2017	Hytera / Sepura (PIIN)	Communications	National Security	Phase 1 Clearance Accepted
17 June 2018	Gardner Aerospace / Northern Aerospace (PIIN)	Defence	National Security	Phase 1 Clearance Accepted
20 December 2019	Advent / Cobham (EIN)	Defence	National Security	Phase 1 Clearance Accepted

Source: Author.

Given their number and increasingly frequent use—which is likely to become even more common following the lowered jurisdictional thresholds and the proposed reform discussed below –, public interest interventions on national security grounds deserve a closer look as they can give a better idea about how to understand national security and the application of such a concept in practice. Indeed, unlike the statutory definition which equates national security with the EU concept of public security, the decisional practice so far suggests that the interpretation of this public interest is narrow, encompassing concerns that are directly related to the UK’s national defense.

The earliest decision regarding national security aspects as a public interest consideration under the 2002 Act relates to *General*

Dynamics/Alvis case.⁵⁴ The case concerned the acquisition of *Alvis* that operated in the design, development, and production of armored fighting vehicles and military land systems business by a US-based *General Dynamics* which operated in aerospace, combat systems, information systems and technology and marine systems. The MoD, in this case, expressed two concerns: The maintenance of UK's strategic capabilities and the protection of classified information. The Ministry firstly said that *Alvis* was the design authority for the British Army's armored fighting vehicles. In that regard, the MoD said that it was unable to update the involved equipment without *Alvis*'s expertise. Secondly, the Ministry indicated that some of these capabilities related to highly classified technology and information. The SoS allowed the merger to proceed upon UIL's from *General Dynamics*. The company undertook that it would continue to manage military programs which it is a contractor or sub-contractor. It also committed that it would ensure the continuity and development of its UK operations. Moreover, it agreed to operate in line with the UK National Security Regulations as regards the information security aspects of the classified information. The MoD stipulated that the company must appoint a compliance and a security officer and hold inspection powers that its representatives can use.

The *Finmeccanica/AgustaWestland* case related to an acquisition by an Italian holding company, *Finmeccanica*, of a Dutch company, *AgustaWestland*, a joint venture comprising KN and *Finmeccanica*.⁵⁵ The MoD put forward the same concerns as it did in *General Dynamics/Alvis* case. The decision stated that *AgustaWestland* was the design authority for the UK Armed Forces helicopter fleet, and it has unique skills and knowledge regarding the said equipment. The parties had to give UILs, which were like those in *General Dynamics/Alvis*, to proceed with the merger. In a subsequent decision, there were similar concerns - *Finmeccanica/BAE*.⁵⁶

In the *Lockheed Martin Corporation/Insys Ltd.* case, the MoD stated that after the merger *Lockheed Martin Corporation* (LMC) there was an incentive to sell or transfer abroad the essential UK capabilities.⁵⁷ Moreover, MoD said that the transaction could raise concerns because LMC could have the incentives to complement and improve their own capabilities with *Insys*'s unique capabilities. The Ministry argued that combining information and technology without UK approval could have constituted a significant risk to UK security of supply due to the

US International Traffic in Arms Regulations. In *Gardner Aerospace Holdings/Northern Aerospace*, in its advice to the SoS, CMA stated that the parties had undertaken to implement certain measures in cooperation with the MoD to satisfy the national security concerns raised by the Government in a related merger that took place before the proposed transaction. The SoS approved the case on those grounds.⁵⁸

In the *General Electric Company/Smiths Aerospace* case, the MoD identified a third concern: The transfer of ownership.⁵⁹ The case involved the acquisition of a British company, Smiths Aerospace (SA), by a US-based company, General Electric (GE). The MoD stated that the said acquisition could enable GE to influence SA in a way that could affect the national security. This concern was also raised in Atlas Elektronik GmbH UK/Qinetiq's UWs Winfrith Division merger.⁶⁰ In the OFT's report, it was stated that the transaction could have compromised the independence and impartiality of research outputs and advice.⁶¹ The MoD's confidence in the independence and impartiality of such outputs and advice was based on three factors:

1. The fact that *Qinetiq* is not a major manufacturer or supplier of weapons systems
2. Rigid compliance regime
3. Government's share in the company which offsets potential conflicts of interest. In that connection, MoD called the independence and impartiality of the merged entity into question as the company would favor its own products post-merger.

To address these specific concerns, the MoD stipulated that there should be firewalls between business compartments and that the merged entity must handle conflicts of interest that would conform with the published MoD commercial policy.

Hytera/Sepura was the CMA's first case raising national security concerns.⁶² This is the first intervention notice under Section 42 of the Enterprise Act that the Secretary of State has issued on national security grounds. The case concerned an acquisition by a Chinese company, *Hytera*, of the United Kingdom (UK-based *Sepura*). *Sepura* operated in the market for digital radios and related products for public sector and commercial customers. The Home Office put forward two concerns, namely protection of sensitive information and technology and maintenance of UK capabilities in servicing and maintaining radio

devices used by emergency services and other agencies in the UK. Of particular significance, the Home Office directly presented to the SoS some of the national security concerns relating to the acquisition. In that respect, CMA left any decision to propose remedies to the Home Office. The CMA's competitive assessment focused on the products the parties currently produce, supply, distribute or service and on new devices in the parties' pipelines or under consideration.⁶³ Consistent with its phase 1 role, CMA did not provide any recommendations on the national security public interest consideration.⁶⁴ The SoS referred the transaction to the CMA for a detailed Phase 2 investigation and the transaction was cleared with undertakings providing assurance that sensitive information and technology is protected and to ensure the repair and maintenance of the radio devices used by the emergency services in the UK.⁶⁵

Finally, in a recent acquisition which led to an EIN, *Advent/Cobham*, a private equity investor (Advent) was acquiring Cobham a provider of technology and services for the defense, aerospace, and space industries.⁶⁶ The European Commission approved the transaction based on a simplified procedure and the SoS issued an EIN to allow for a full assessment for national security concerns. The CMA report to the SoS included a summary of the concerns the CMA received in relation to national security. According to MoD there were two main areas of national security concern arising. First, the potential for the parties to have access to information, either held on, or passing through, Cobham's systems, which would allow unauthorized persons to understand either the detail of MoD capabilities or activity. Second, the extent to which the transaction posed a risk to existing MoD programs if the merged entity took decisions to exit from, underinvest in, or move offshore, the associate capability. According to the Home Office national security related to physical security in relation to company processes and premises, system security in IT systems, and personnel security in relation to employees and company management. Prior to approval, the SoS accepted undertakings to address the national security concerns.

As the analysis of the above caselaw illustrates, a balancing exercise between national security considerations and competition considerations, would illustrate those competitive concerns could not overrule national security concerns. Therefore, there would be no balancing exercise with respect to these aspects as national security would always supersede competition law concerns. The challenge

would therefore be to determine the procedural and substantial procedure of national security in a way that would create a sufficiently transparent, predictable, and certain environment for the businesses. The next part examines what the Government attempts to achieve in the recent legislative reforms.

The Proposed Approach to National Security in UK Merger Control

The UK's traditionally strict approach to considering national security in merger control has gone through a major overhaul in recent years, arguably as a response to the rapid technological development which has enabled new, complex, and hard-to-detect threats. While this claim seems reasonable and in line with similar reforms in other developed countries, there is still a risk of overshooting the mark and winding up with a hidden industrial policy agenda, especially in the aftermath of Brexit. This section will critically assess the proposed shift in approach to national security in UK merger control by successively examining the rationale and scope of the reform, the extended merger jurisdiction and proposed remedies, and how this new approach would coexist within the existing legislation.

Rationale and Scope (call in) of the Reform

In 2017, the Government started a new consultation with the aim to broaden the concept of national security. Foreign direct investments (FDIs) were at the core of the Green Paper which the Government published in 2017. The Green Paper revealed that the Government was mainly concerned with espionage, sabotage and exerting of inappropriate leverage through such investments. In its White Paper, the Government stated that it intended to introduce a voluntary notification regime for national security concerns.⁶⁷ It considered that there will be around 200 notifications each year within that framework.⁶⁸ Within that framework, it designated a call-in power for the types of mergers which raise national security concerns.⁶⁹ Of particular significance, the Government considered to remove national security grounds from the 2002 Act, detaching the CMA from the assessment process to make it more efficient.⁷⁰ The Government stated that it further aimed to preserve the independence of the CMA.⁷¹

Considering the current proposals, that national security is not only about the core defense sector anymore.⁷² It also includes now restricted goods and advanced technology. The *Hinkley Point C* and *Softbank/ARM* cases were illustrative of that point.⁷³ In *Hinkley Point C*, the Government allowed the development of a nuclear power station by a partly French state-owned *EDF* and fully state-owned *CGN*.⁷⁴ In *Softbank/ARM*, the chip-maker's acquisition by the Japanese company was approved by the Government along with commitments.⁷⁵ It is worth noting that both cases would be scrutinized under the proposed national security regime.

The scope of national security is explained in a draft statutory statement of policy intent (the Policy Statement) published together with the White Paper,⁷⁶ which states that the mechanisms described in the White Paper are limited to national security as distinct from either the national or public interest but acknowledges that the Government does not attempt to define the term precisely. According to the Policy Statement, national security risks may be raised by entities due to the nature of their activities and by assets due to their nature (and in the case of land, due to the nature or location of the land). National security threats may include acts of terrorism or actions of hostile states related to cyber-warfare, supply chain disruption of certain goods or services, disruptive or destructive actions or sabotage of sensitive sites and espionage or leverage.

Extended Jurisdiction and Proposed Remedies

The Government proposed short-term and long-term reforms to address these issues. In short term, it proposed to lower the turnover thresholds for:

1. Dual use and military use sector
2. Parts of the advanced technology sector.⁷⁷

In 2018, by an Order which is still before the Parliament, the Government proposed changes in these respective areas.⁷⁸ The Order focuses on two respective areas:

1. Restricted goods
2. Advanced computing.

For the longer term, the Government proposed an expanded scrutiny of FDIs by putting in place a notification regime that would cover a broader range of FDIs.⁷⁹

The new regime would allow the review of a far wider range of transactions than existing legislations. There are a number of trigger events that may be reviewed on national security grounds (for example the acquisition of significant influence or control over an entity or asset).⁸⁰ If a trigger event is either contemplated or in progress, the parties to the transaction may make a voluntary notification to the Government. Parties may enter into informal discussion with the Government about specific trigger events. Where a trigger event is notified, the Government will ask for detailed information about the trigger event (including its purpose and expected date) and the acquirer (including details of other investments). The Government would undertake a preliminary screening review lasting 15 working days, which may be extended for an additional 15 days for complex cases. It would then decide whether to call in the trigger event and the decision to call in a trigger event would be made public.⁸¹ Completed transactions could be called in within six months.⁸²

The Government has the power to call in a trigger event if the parties choose not to notify it, provided the statutory call-in test is met. This test has two limbs which are based on reasonable grounds to suspect that a trigger event has occurred or is in progress or contemplation; and that the trigger event may give rise to a risk to national security. The factors the Government may consider when exercising the call-in power include the target risk (areas of the economy where the Government considers national security risks are more likely to arise), the risk for the trigger event to give rise to national security risks; and the risk that the acquirers may raise national security concerns.⁸³

In the event that the Government is assessing a trigger event that has already taken place, once it has been called in, parties must not take any further measures that increase the acquirer's control, nor take steps that would make it more difficult for the trigger event to be unwound. The Government may impose additional interim restrictions (limited to the prohibition of either the sharing of specific information or access to specified sites) where relevant.⁸⁴ The Government would have up to 30 days to assess any trigger event. If it is determined that there is a risk to national security and that further consideration is

necessary, the period may be extended by up to an additional 45 days.⁸⁵ The Government may impose conditions for the approval of a transaction if it believes a national security risk is posed and the respective remedy is proportionate to that risk, and there is no other more adequate and proportionate power available for the Government to exercise.⁸⁶

The White Paper describes the new criminal offences and civil sanctions for breaches of requirements to be introduced by the Government, which may be in addition to more flexible administrative penalties (such as director disqualification).⁸⁷ A maximum custodial sentence of five years will be available for most offences. Breaches of information-gathering powers will attract lesser sanctions. Civil fines could also be imposed (up to 10 percent of worldwide turnover for a business, or up to 10 percent of total income (or £500,000, whichever is higher for an individual). Finally, judicial scrutiny of substantive decisions would be limited to strict judicial review grounds in which case courts cannot supplant ministers' decisions, considering that they are directly accountable to Parliament.⁸⁸

Under the proposed changes to the UK national security regime, decisions on the national security review of foreign investments would be separate from competition assessment and would not involve the CMA as is the structure now. Decisions would instead be taken by a Cabinet-level minister (Secretaries of State, the Chancellor, or the Prime Minister). The proposed new regime is similar in many ways to the CFIUS regime in the United States. The CFIUS, established by an Executive Order in 1975, is an interagency body, which consists of nine Cabinet members, comprising the Departments of the Treasury (chair), Justice, Homeland Security, Commerce, Defense, State, Energy, and the Offices of the US Trade Representative, and Science & Technology Policy.⁸⁹ The Secretary of Labor and the Director of National Intelligence serve as ex officio members, with roles as defined by statute and regulation.⁹⁰ The official notification and review process starts with the filing of a voluntary notice by the parties to a proposed transaction.⁹¹ CFIUS, based on a risk-based analysis of the national security threat posed by a transaction, has the authority to negotiate, impose, or enforce any agreement or condition with the parties in order to mitigate any threat to US national security.⁹² CFIUS may initiate a 45-days-investigation of the transaction, that could be extended for an additional 15 day period under extraordinary circumstances.⁹³ If a

CFIUS member recommends that the transaction be prohibited, or CFIUS believes that a Presidential determination is appropriate, it may refer the matter to the US President, who has 15 days to decide. The President is under no obligation to follow the recommendation of CFIUS to suspend or prohibit the transaction. The President must conclude that other US laws are inadequate or inappropriate to protect the national security, and he/she must have credible evidence that the foreign investment will impair the national security.⁹⁴

Aspects of the UK economy that are particularly likely to give rise to national security risks, include core national infrastructure sectors (the civil nuclear, communications, defense, energy, and transport sectors); certain advanced technologies (including computing, networking and data communication, and quantum technologies) are similar to the critical industries that fall within the scope of the CFIUS regime as discussed above. The type of trigger events that may be reviewed on national security grounds is similar to the concept of covered transaction defined by the US FINSA.⁹⁵ Finally, the judicial scrutiny of substantive decisions is a welcome feature as it contributes to accountability and a similar one to the CFIUS process.

Conclusion

The article established when deciding on national security concerns and M&A transactions raise, the UK Secretary of State seems to enjoy unlimited discretion. In this sense, if a transaction potentially creates national security concerns, it is crucial that the parties have the ability to predict the outcomes of the competent authorities' and decision makers' assessments based on the analysis of transparent factors. Otherwise, it is very likely that the process becomes uncertain and unpredictable.

This article discussed how national security concerns have been addressed in the assessment of transactions by the CMA and other competent authorities. Unsurprisingly, concerns that relate to national security have usually arisen in transactions that relate to the military/defense sector. By the end of 2019, the Secretary of State issued 2 SPINs, 2 PIINs, and 5 EINs to assess and remedy any adverse effects on national security. However, the focus has changed in the recent years, and the types of sectors where transactions can induce national security concerns has expanded. This is exemplified in the

recent legislative initiative by the UK Government to extend national security grounds reflects a new approach towards FDI in various sectors. It also shows that the concept of national security is broadened to include critical infrastructure and advanced technologies. As the proposals in that respect would potentially affect a wide range of markets where dual-use of the facilities or technologies are involved, transparency and effective judicial review are of utmost importance to provide certainty and safety.

It also seems to be a positive step to remove CMA from the aforementioned process of assessment of national security concerns since the sole ministerial decision-making could decrease the level of bureaucracy. It is noteworthy that the CMA has itself outlined its role in the assessment of transactions raising national security concerns. It has stated repeatedly that the CMA is not expert in national security matters and therefore, in Phase 1, it only summarizes the representations made to it.⁹⁶ Nonetheless, the CMA does provide advice on features which might, in general, strengthen the effectiveness of any suitable remedies.

In the longer term, the UK government intends to follow the example of other developed countries and make more substantive changes to how it scrutinizes the national security implications of foreign investment. The reforms have a particular focus on ensuring adequate scrutiny of whether significant foreign investment in critical businesses raises any national security concerns and providing the ability to act in circumstances where this might be the case. The expectation is that the need to act would be relatively rare, but the risk that this can turn into a tool to implement industrial policy considerations does exist.

The initiatives by many jurisdictions to extend national security focus reflects a suspicion towards FDIs masking other geopolitical interests. These concerns, in part, are covered by the UK governments by their aforementioned steps to implement a new national security framework.⁹⁷ It is important to emphasize that as Stephan has suggested, retaking broader political interference based on public interest grounds might undermine the consistency and certainty of the merger control process.⁹⁸ To conclude, the national security assessment process will benefit from transparency, well defined concepts, clear structure of the reviews, accountability and speed.

Otherwise, the adverse income on incoming FDI can be significant and unwelcome.

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