

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

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BACKGROUND

- In October 2017, the UK government published a Green Paper which outlined short- and long-term proposals for strengthening its powers to scrutinise mergers and investments raising national security concerns in specific sectors.
- The proposals aim to broaden the types of transactions the Secretary of State can review on national security grounds, while minimising any adverse effect on the predictability and transparency of the UK investment regime.
- While the Green Paper champions investor certainty, the resurrection of ministerial decision-making in the proposals risks deterring foreign direct investment (FDI) by creating perceptions of subjective and politically-driven decision-making.

METHODOLOGY

- The paper offers a critical legal evaluation of the key features of the National Security and Infrastructure Investment (NSII) Green Paper, its potential pitfalls and possible solutions.
- It frames the evaluation within the broader rhetoric surrounding Brexit, the UK's industrial strategy, its traditionally 'open for business' stance and the rise of public scepticism surrounding FDI. It argues for restrictions on the role of ministerial decision-making under the proposed national security regime.

KEY FINDINGS

- The NSII Green Paper is generally closer to the Conservative Party's traditional 'open for business' stance, than the defensive "proper industrial strategy" of the Prime Minister's 2016 leadership campaign speech.
- However, the Green Paper proposals resurrect a larger role for ministerial decision-making in the UK investment regime, which (in light of Brexit and the UK's industrial strategy) may risk a suspicion that politicians will base their decisions on industrial policy grounds under the guise of national security.
- This suspicion is aggravated by the proposal to assign FDI screening powers to the Secretary of State for Business, Energy and Industrial Strategy (BEIS), which would create a potential conflict of interest between the BEIS Secretary's national security role and their

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task of targeting FDI from specific companies as part of the sector deals forming the government's industrial strategy.

- Despite being cited as examples of the need for reform, neither the Kraft/Cadbury nor Pfizer/AstraZeneca transactions would have fallen within the scope of the new powers proposed by the Green Paper. However, it is likely both the SoftBank/ARM merger and the Hinkley Point C investment would have qualified for formal review.

POLICY ISSUES

- To avoid perceptions of political bias under the revised regime, the government should consider:
 - ✦ (a) Reassigning the power to make 'national security interventions' to either the Defence Secretary or the Home Secretary, thereby bypassing the potential conflict of interest facing the BEIS Secretary; *and*
 - ✦ (b) Establishing an independent national security review body to advise the Secretary of State on matters of national security and public safety (analogous to the Competition and Market Authority's advisory role in public interest mergers).
- Assuming a Secretary of State's decision would be subject to judicial review and appeal, the revisions above represent a significant step towards improving transparency and minimising the uncertainty inherent in political decision-making.

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ABOUT THE AUTHOR

David Reader holds a PhD in Law and is a Senior Research Associate at the Centre for Competition Policy.

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