



Department for
Business, Energy
& Industrial Strategy

Enterprise Act 2002: Changes to the public interest grounds for intervention in merger cases

Guidance 2020



OGI

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Contents

Contents	3
Introduction	4
Executive Summary	5
Chapter 1: Why the new provision is required	7
Chapter 2: The new public interest consideration	9
Chapter 3: What you might wish to do as a result of the new provisions	11

Introduction

Context

1. The demands that the COVID-19 pandemic has placed on the United Kingdom (UK) and the resulting economic impact has led the Government to assess whether its powers of intervention under the Enterprise Act 2002 (“the Act”) in respect of mergers and acquisitions are adequate to ensure that the UK is able to respond to public health emergencies.
2. The Government concluded that its powers were not sufficient, and as such the Government has amended the Act to include a new public interest consideration under which it can intervene in qualifying mergers and acquisitions: “The need to maintain in the UK the capability to combat, and to mitigate the effects of, public health emergencies”.

Purpose of this guidance

3. This guidance was produced by the Department for Business, Energy and Industrial Strategy (BEIS) to accompany The Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2020.
4. The Order amends section 58 of the Act to add an additional public interest consideration: “The need to maintain in the UK the capability to combat, and to mitigate the effects, of public health emergencies”. This will enable the Government to address risks arising from mergers and acquisitions in which it would otherwise not be able to intervene.
5. This guidance is not statutory guidance. This guidance explains why the Government amended the Act, describes the practical effect of the amendments, and offers guidance to businesses and others about what they might wish to do as a result of these changes.
6. It should be borne in mind that, whilst the guidance is intended to provide an indication of how the new public interest consideration is likely to be applied, 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-case basis. Businesses and investors should consider their own particular circumstances and, where necessary, seek their own legal advice.
7. The Government will keep this guidance under review, updating it to ensure it remains as relevant and as useful as possible. It welcomes comments about any additions or clarifications that would be helpful.

Executive Summary

8. 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 must ensure that critical UK public health and crisis mitigation capabilities are preserved, in order to safeguard the welfare of the British people.
9. This public interest consideration helps the Government to meet this responsibility by enabling it to scrutinise and to take action in relation to qualifying mergers and acquisitions for the purpose of maintaining UK capability to combat, and to mitigate the effects of, public health emergencies. This could for example involve imposing conditions on a merger prohibiting any diminution of critical capabilities or even blocking the merger, where appropriate.
10. Whilst the vast majority of takeovers are done for genuine business reasons, the Government is attuned to the fact that some critical public health capabilities must be kept in the UK to ensure delivery, self-reliance and self-determination.
11. This guidance focuses on the new public interest consideration that provides a new basis for the Government to intervene in mergers.
12. The new public interest consideration is “the need to maintain in the UK the capability to combat, and to mitigate the effects, of public health emergencies”. This adds to the three existing public interest considerations in the Act. To date, the Government has intervened 12 times under the national security consideration, 7 under media plurality and once under financial stability.
13. The Government considers that this new public interest consideration is a necessary and proportionate measure to address risks mergers and acquisitions may pose to the UK’s ability to respond to the COVID-19 pandemic or future public health emergencies. Firstly, the Government must be able to ensure that companies related to COVID-19 (or any future public health emergency) response are not subject to mergers or acquisitions that are against the public interest. Secondly, when firms that can help mitigate against the effects of COVID-19 or future public health emergencies are taken over, Government must be able to intervene to ensure that the transaction does not undermine this capability. Finally, as a result of the economic uncertainty caused by the pandemic, usually stable businesses may be suffering a short-term impact to their share price or profitability. This could leave UK enterprises with critical capabilities more vulnerable to takeover.
14. The Government does not expect the new provisions to bring about any change in the Competition and Markets Authority’s (“CMA”) approach to the assessment of mergers on competition grounds.
15. The changes to the Act do not require any business or investor to take any direct action. They do not affect the fact that the UK retains a voluntary notification mergers system. The European Commission’s powers are not affected. Parties whose merger meets the

Enterprise Act 2002: Changes to the public interest grounds for intervention in merger cases

jurisdictional thresholds under the EU Merger Regulation are still required to notify (and obtain approval from) the Commission in advance of the transaction being completed.¹

16. The amendments do not change any of the procedural provisions under the Act. As a result, any Government intervention under this new public interest consideration will follow the same clear and transparent process under the Act.
17. The Department for Business, Energy and Industrial Strategy (“BEIS”) welcomes engagement with parties involved in qualifying mergers and acquisitions that could raise concerns. If businesses or investors consider it possible that a transaction might do so, they are encouraged to speak to the department as early as possible, in the manner set out in this guidance.
18. The Government has never blocked a merger under the Act, and this additional public interest consideration is a proportionate measure in light of the COVID-19 pandemic and does not reflect any substantial shift in Government policy.

¹ CMA guidance on the merger regime during the transition period can be found at: <https://www.gov.uk/government/publications/uk-exit-from-the-eu-guidance-on-the-functions-of-the-cma-under-the-withdrawal-agreement>

Chapter 1: Why the new provision is required

Summary

Since 2008, the same three public interest considerations have applied: national security, media plurality, and financial stability.

In light of the COVID-19 pandemic, the Government concluded that this arrangement poses risks to the UK and a fourth public interest consideration needed to be added to ensure that the Government can respond to risks relating to public health emergencies.

19. The UK has always valued the benefits that foreign investment creates. In 2018 alone, over 57,000 jobs were created as a result of foreign direct investment for example.
20. However, Government also has a duty to regularly review risks that the UK faces. In light of the COVID-19 pandemic, Government has assessed that some mergers and acquisitions may pose risks to the UK's ability to respond to and recover from public health emergencies, that it needs to be in a position to address.
21. The Government sees these risks arising in one of two ways. Firstly, risks arising from the takeover of companies that can combat public health emergencies. Secondly, risks arising from the takeover of businesses that can help mitigate the effects of public health emergencies. These risks, whilst not limited to the COVID-19 pandemic, are explored through the prism of the pandemic below.
22. As a result of the economic uncertainty caused by the pandemic, usually stable businesses may be suffering a short-term impact to their share price or profitability. This could leave UK enterprises with critical capabilities more vulnerable to takeover and is another reason why the Government is acting now.

Risks to companies crucial to our COVID-19 response

23. From vaccine researchers and ventilator manufacturers to delivery companies, UK firms have come together to combat COVID-19. As we continue the fight, many of these firms will continue to be crucial.
24. Mergers and acquisitions can be used to take ownership and control of these firms. This would pose a risk if the acquirer were to reduce the firm's critical capabilities in the UK, for example by transferring them abroad, or to assert their influence to render the capabilities less than fully effective. The Government therefore needs to be in a position to intervene to ensure that critical capabilities are protected and remain fully effective. In most cases, the Government would look to accept undertakings from the parties under the Act, that allow the transaction to proceed, whilst protecting the capabilities crucial to the UK's fight against the pandemic.
25. The UK is not alone in ensuring its own capability, and similar measures have been taken throughout Europe and the world.

Example of influence over UK firm that would be detrimental to the fight against COVID-19

A UK research company might create a high-accuracy, easy to administer COVID-19 antibody test. Whilst clearly it would be in the UK's best interest to ensure that this test could be accessed worldwide and by as many people as possible, the Government would have a duty to ensure that UK residents received the test first.

If, however, the research company was taken over by an overseas entity, that entity could assert pressure on the firm to first export its new test to its home country, before UK residents could benefit.

In this instance, the Government might wish to intervene, investigate, and potentially accept undertakings that UK residents would be the first to benefit from the test.

Risks related to the effects of COVID-19

26. As a result of the economic uncertainty caused by the pandemic, usually stable businesses may be suffering a short-term impact to their share price or profitability. This could leave UK enterprises with critical capabilities more vulnerable to takeover.
27. In relation to maintaining the capability to mitigate the effects of the pandemic, the Government may for example need to intervene if an internet service provider or food supply chain company becomes the subject of a takeover, given the potential for increased demand for internet services in a lockdown situation or disruption to food supply.

Chapter 2: The new public interest consideration

Summary

Section 58 of the Act has been amended to include the new public interest consideration of “the need to maintain in the UK the capability to combat, and to mitigate the effects, of public health emergencies”.

The ‘need to maintain... capability’

28. The new consideration is concerned with preserving capability, that already exists in the UK, to combat, and to mitigate the effects of, public health emergencies.
29. For example, if a UK company that produces personal protective equipment has a capability of producing a certain number of facemasks per day, then this would clearly be a relevant capability that already exists in the UK.
30. The Government also considers repurposable capabilities to fall within the scope of the new consideration. So, for example, an engineering company that designs and makes parts for cars might have the engineering know-how and machinery which could be repurposed to design and make ventilators during a public health emergency. In making such a link, the Government would have to act reasonably, and it is not anticipated that intervention on these grounds would be frequent.

The capability to combat public health emergencies

31. The Government expects that the new public interest consideration will most often be used with a view to maintaining UK capability to combat public health emergencies.
32. Relevant capability will be found in firms that are active in the public health sector, such as vaccine researchers, drug manufacturers, and medical supply companies. Other companies may also have relevant capability, for example companies that might help the UK model the spread of a public health emergency.
33. The Government appreciates that in some cases, preservation of capability to combat public health emergencies will amount to a national security issue, for example where the security of supply of a vaccine that is or might be needed to treat a significant section of the population is at risk. The Government does not wish to detract from that.
34. However, in other cases the threshold for action on national security grounds will not be met and the Government considers that intervention on a public health basis should be available. It also considers that some overlap in the public interest considerations is preferable to carving out national security cases from the new public interest consideration. Furthermore, the new public interest consideration provides more certainty to parties that the Government might intervene in takeovers of firms with relevant capabilities.

The capability to mitigate the effects of public health emergencies

35. The Government recognises that the vast majority of investment causes no concern and is overwhelmingly positive for the UK; it creates jobs, allows firms to innovate and improves productivity.
36. However, the Government may need to intervene in the takeover of a company that provides, or could provide, the UK with the ability to mitigate the effects of a present or future public health emergency, for example, an internet service provider or a food supply chain company, given the potential for increased demand for internet services in a lockdown situation or disruption to food supply.

Summary of what the new provisions do not change

37. 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.
38. 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;
 - the turnover test or what constitutes UK turnover;
 - the share of supply test or 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; and
 - the ability for affected parties to pursue a judicial review of all decisions made by the Government under the public interest regime.

Chapter 3: What you might wish to 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 new public interest consideration so as to be well-placed in relation to any relevant merger or acquisition.

Action needed

39. The new provisions do not impose any legal obligations on any business or other private organisation or individual. Therefore, there is no need take any action as a direct consequence of the amendments coming into force.
40. Businesses and investors, or their advisers, may wish to familiarise themselves with the implications of the changes to the Act so as to be well placed in relation to any relevant merger or acquisition that might raise concerns regarding the UK's ability to combat, or to mitigate the effects of, public health emergencies.

Process for any merger or acquisition brought into scope by the new provisions

41. For mergers and acquisition brought into scope of Government intervention as a result of the new consideration, parties may wish to voluntarily notify BEIS of the transaction. The statutory process for Government public interest interventions will remain the same.
42. The Secretary of State will make intervention decisions on a case-by-case basis. To inform the Secretary of State's decisions, central government departments' officials will seek to work as closely as appropriate, as early as appropriate, with the parties. They will communicate directly with parties, recognising takeovers can be fast-moving. They will seek to understand and discuss (where appropriate) any concerns with a takeover, and how these might be mitigated.
43. Whilst the information needed to inform the Secretary of State's intervention decisions will differ from case to case, these are likely to be informed, in part, by the following types of information:
 - which business, or part of a business, will change hands;
 - who is acquiring an interest in the business or division – the individual or business name, and any existing holdings they have in these or other sectors;
 - what influence or control that interest may give rise to – 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;

Enterprise Act 2002: Changes to the public interest grounds for intervention in merger cases

- any proposed mitigations that the parties propose in order to deal with Government's concerns; and
 - with whom Government should engage.
44. The process for public interest interventions has previously been set out by the CMA in its guidance "Mergers - the CMA's jurisdiction and procedure: CMA2"².
45. BEIS welcomes parties' notification of mergers and acquisitions which might raise 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 present public interest concerns with a deal so that parties can choose to proceed subject to any competition assessment that may be relevant and other regulatory processes. However, parties should note that such an indication is subject to change as other information may come to light, or relevant circumstances may change.
46. Businesses and investors who wish to engage with the Government about transactions that they believe may have a public health emergency dimension should contact BEIS in the first instance, using PHEconsideration@beis.gov.uk.

² <https://www.gov.uk/government/publications/mergers-guidance-on-the-cmas-jurisdiction-and-procedure>

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