



Department for
Business, Energy
& Industrial Strategy

ENTERPRISE ACT 2002: changes to the turnover and share of supply tests for mergers

Guidance 2020

June 2020



OGL

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Introduction

The Government published a Green Paper, 'National Security and Infrastructure Investment Review'¹, 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.

The first consultation, which closed on 14 November 2017, focused on the proposals that resulted in the changes to the Enterprise Act 2002. A summary of those changes is set out at the start of this guidance.

The second consultation, which closed on 9 January 2018, set out broad options for longer-term, more far-reaching reforms. It was followed by a White Paper in July 2018, which set out more detailed proposals. The National Security and Investment Bill making far-reaching reforms will be brought forward by the Government when Parliamentary time allows.

This guidance focuses on further changes made to the Enterprise Act 2002 to extend the Government's powers in intervening in mergers for public interest reasons. In particular, the Government has legislated in this area for the intention of tackling risks to our national security.

Purpose of this guidance

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 2020 and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2020 ('the Orders'). It also consolidates guidance on previous amendments to the Act, the Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018 and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018.

The Orders amend the Enterprise Act 2002 ('the Act') to deal with the protection of critical sectors mergers in which it would otherwise not be able to intervene.

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 how they may be affected by the changes.

This guidance is not statutory guidance. It 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.

Whilst the guidance is intended to provide an indication of how the 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-case basis. Businesses should consider their own particular circumstances and, where necessary, seek their own legal advice.

¹ 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>

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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.

Executive summary

The Government is committed to fostering innovation in areas of advanced technology, not only for the economic benefits it brings, but also the potential of emerging technologies to enhance the lives of British citizens. The Government prides itself on advanced technology being one of the fastest growing sectors in the United Kingdom and welcomes the increase in research, development and investment. 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 Enterprise Act 2002 to make targeted changes to ensure it has sufficient powers to act when necessary. The guidance focuses on the tests in the Act that determine whether the Government can intervene in mergers.

In 2018 the Government amended the tests in the Act that determine whether it can intervene in specific mergers. The Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018 and the Enterprise Act 2002 (Turnover Test) (Amendment) 2018², which came into force on 11 June 2018, amended the thresholds for the turnover and share of supply tests within the Act for three sectors: military and dual-use technologies, quantum technology and computing hardware.

For mergers which involve the takeover of businesses covered by section 23A, the two tests were amended as follows:

- the business being taken over must have a UK turnover of over £1 million, rather than £70 million; and,
- the requirement in the share of supply test to increase the share of supply was removed.

In 2020, the Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2020 and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2020 were made to add three more categories of enterprises, to which the lower share of supply and turnover thresholds applies. The three categories are: artificial intelligence, advanced materials and cryptographic authentication.

The Orders do not require any business to take any direct action. The UK operates a voluntary notification mergers system, both for competition and public interest, including national security considerations. The changes made by the Orders will also only relate to mergers that take place after they come into force.

² Guidance to accompany the amendments <https://www.gov.uk/government/publications/enterprise-act-2002-guidance-on-changes-to-the-turnover-and-share-of-supply-tests-for-mergers>

Chapter 1: Changes to Government intervention 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 four specific public interest issues – national security, financial stability, media plurality, or to combat a public health emergency.

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

Introduction

The tests for when and how Government can intervene in mergers are set out in the Enterprise Act 2002. As the Act’s explanatory notes³ 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 authorities⁴ rather than by the Secretary of State”.

As a result, the Act deliberately limited the Secretary of State’s ability to intervene in mergers to cases where they raised “public interest considerations”. The Act ensured that the Secretary of State could only intervene in mergers that met certain turnover and/or share of supply tests⁵. These same thresholds permit the competition authorities to intervene in order to prevent a merger from substantially lessening competition.

As described in the next chapter, the Government concluded that the thresholds as set in 2002 were no longer working effectively as a threshold for intervention on national security grounds in certain areas of the economy. In 2018, the Government amended the turnover threshold and share of supply jurisdictional tests within the Enterprise Act 2002 in three sectors of the economy: the military and dual-use technologies; quantum technology; and computing hardware.

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

⁴ 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.

⁵ 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

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The Government assessed the impact of pursuing further secondary legislation to amend the jurisdictional tests for mergers for additional areas of advanced technology against the risk of not taking any action. Following this assessment, the Government made further secondary legislation in relation to the following sectors: artificial intelligence (AI); cryptographic authentication; and advanced materials. Chapter 3 and 4 respectively describe in more detail the areas of the economy concerned and the amendments to the thresholds for intervention.

The tests set out in the Enterprise Act 2002

Under the Enterprise Act 2002, there are a number of steps that must be met before the Government⁶ can intervene:

- there must be a relevant merger situation; and
- the intervention can only be on ‘public interest’ grounds as described in Section 58 of the Act.

The Government can also intervene in a merger subject to the European Commission’s jurisdiction.

a) a relevant merger situation

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.

The CMA has published statutory guidance⁷ describing and explaining these, and other issues, in more detail – including the meaning of “enterprise”.

Before the 2018 Orders came into force, the second limb of the definition of a relevant merger situation under the Act was 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.

The 2018 provisions amended the two tests mentioned in paragraph 1.9 in relation to specific areas of the economy, 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

⁶ The Act actually permits a ‘Secretary of State’, a Government minister, to intervene in mergers.

⁷ 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>

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no longer a requirement that the merger must lead to an increase in the merging parties' share of supply to, or over, 25%.

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 'public interests' grounds

At present, under the Enterprise Act 2002, Ministers can only intervene in domestic and EU merger cases that raise the following public interest considerations⁸:

- national security (including public security);
- financial stability;
- media plurality; and
- to combat a public health emergency.

The Orders do 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.

⁸ 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.

Chapter 2: Why the provisions are required

Summary

From 2002 to 2018, 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.

Since 2002, there have been considerable technological advances, developments in local, national and global economic structures, and changes in the national security threat facing the UK. These mean that the thresholds in the Act were no longer effectively safeguarding our national security in all areas of the economy. The Government therefore concluded in 2018 that the thresholds needed to be amended for three sectors of the economy. Since then the Government has monitored the evolving situation and concluded that three further sectors should be subject to the amended thresholds.

Technological advances

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.

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.

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 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.

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

The last eighteen years have also seen significant change in the global economic market which, while bringing enormous benefits, raise national security challenges for all countries. Since the Enterprise Act 2002 was introduced, the global market has become more connected and industries now have deeper, broader and more complicated supply chains.

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As a result of this change, essential goods and services are provided by increasingly more diverse networks of businesses, including those 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

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^{9 10}. It is especially important that Government maintain the UK's capability to act as a sovereign nation with its own capabilities in light of such developments.

⁹ 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>

¹⁰ HM Government (2019), 'NSS and SDSR 2015: Third Annual Report', <https://www.gov.uk/government/publications/nss-and-sdsr-2015-third-annual-report--2>

Chapter 3: The relevant enterprises to which the amended thresholds apply

Summary

The 2018 amendments to the Act related 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.

The 2020 amendments to the Act relate to businesses active in three additional areas of the economy:

- artificial intelligence,
- cryptographic authentication, and
- advanced materials.

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.

The 2018 amendments: military and dual-use technologies, computing hardware and quantum technology

In light of the developments and national security concerns described in Chapter 2, 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.

The thresholds, which were amended in 2018, apply to "relevant enterprises" as defined in section 23A of the Act. Section 23A provides definitions of business activities which raise the clearest risks to national security.

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.

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

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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

The 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.

Example of how the 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 tests.

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 when a merger involves a change in material influence or control over that particular activity.

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

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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 million¹¹.

Military and dual-use item technologies

Government's national security interests

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.

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.

Export control

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 applications 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.

The items subject to strategic export control are set out in a number of lists, collectively known as Strategic Export Control Lists (SECLs).

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 provisions

Section 23A refers to the following lists which have national security aspects:

- the UK Military List (Schedule 2, last amended by SI 2019/989 (ECO 2008));
- the UK Dual-Use List (Schedule 3, last amended by S1 2019/1159) ECO 2008));
- the UK Radioactive Source List (Schedule to the Export of Radioactive Sources (Control) Order 2006); and,
- the EU Dual-Use List (Annexes I and IV of Council Regulation (EC) No. 428/2009, last amended by Regulation (EU) No. 2199/2019).

¹¹ 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 in chapter 1 of this document

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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 provisions brought 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 this chapter.

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 of what is 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 2018 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, were unaffected by the changes made by the 2018 provisions.

How to check whether a business in this sector comes into scope of the provisions

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).

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.

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

If a party would like assistance with this, the Government advises parties to use the Goods Checker Tool¹². Guidance is also available about how parties should best use the tool^{13 14}.

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 nsiireview@beis.gov.uk 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

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.

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 regimes¹⁵. 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 Exporters¹⁶ in order to keep updated about these or other related changes.

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.

The Special Public Interest Regime

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

¹² <https://www.ecochecker.trade.gov.uk/spirefox5live/fox/spire/>

¹³ <https://www.spire.trade.gov.uk/docs/guidance/Goods%20Checker%20Guidance.pdf>

¹⁴ 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.

¹⁵ The regimes are the Wassenaar Arrangement (WA); Nuclear Suppliers Group (NSG); Missile Technology Control Regime (MTCR) and Australia Group (AG).

¹⁶ See <https://www.gov.uk/government/collections/notices-to-exporters> for further details.

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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.

However, due to the 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 provisions.

Given the thresholds also apply to determine which mergers are subject to scrutiny on competition grounds, businesses which are in scope of the thresholds may wish to consider whether a merger they are contemplating raises competition issues.

Computing hardware

Government's national security concerns

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, for instance, 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 provisions

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:
 - computer processing units;
 - the instruction set architecture for such units;
 - computer code that provides low level control for such units
- the design, maintenance or provision of support for the secure provisioning or management of:
 - roots of trust of computer processing units;
 - 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).

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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.

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 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.

Quantum technology

What is quantum technology?

Quantum theory arose in the first quarter of the 20th Century to explain how light and matter behave on a fundamental level.

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.

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 technologies¹⁷.

Government's national security concerns

The Government strongly supports the quantum technology sector in the UK. The Blackett review published in November 2016¹⁸ highlighted the significant potential offered by new post-digital quantum technologies.

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

¹⁷ See the National Strategy for Quantum Technologies (<https://www.gov.uk/government/publications/national-strategy-for-quantum-technologies>) for further information

¹⁸ Government Office for Science (2016), 'The Quantum Age: technological opportunities', <https://www.gov.uk/government/publications/quantum-technologies-blackett-review>

currently secure computer and telecommunications systems. It could also transform military power – giving vehicles and weapons systems substantial additional abilities.

Quantum technology – the areas covered by the changes made by the 2018 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.

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.

Because B is in scope of the 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?

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.

The 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.

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.

The definitions for these activities come, in part, from the National Strategy for Quantum Technologies and have been informed by the Government's consultation in 2017. 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 provisions.

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

Companies using quantum technology

The 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 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%.

The 2020 amendments: artificial intelligence, cryptographic authentication and advanced materials

Artificial intelligence

Government's national security interests

Artificial intelligence (AI) technologies are transforming the global economy. They can be seen as new industries in their own right, but they are also transforming business models across many sectors. They deploy vast datasets to identify better ways of doing complex tasks.

AI devices or software have the potential to be directed remotely or in ways that raise national security concerns should, for instance, a hostile actor obtain access or control over them.

The opportunity to use AI positively across the UK economy can only be harnessed if sensitive and critical applications of AI, especially in defence and security and national infrastructure, can be protected from, for instance, the risk of hostile actors intending to do harm to the UK and its interests.

What is artificial intelligence?

'Artificial intelligence' refers to technology enabling the programming, or execution of a computational process capable of undertaking complex tasks commonly associated with human intelligence. These tasks are often data intensive, including but not restricted to analysis, decision making, image processing and recognition, natural language understanding, autonomous operation in complex domains, reflection or introspection.

AI can employ, for example, machine learning algorithms (algorithms with the ability to learn without being explicitly programmed) in order to deploy adaptable, automated decision-making

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models for complex tasks. This implies interaction with the digital and in some cases the physical environment.

Which AI firms are covered by the new provisions?

The Government intends to cover all businesses that produce, develop and design AI technologies, including components and service providers and all relevant intellectual property, where these products are reasonably expected to be used in systems critical for national security. This also includes technology which enables the training of a device or software to use or process external data (independent of any further input or programming). The Government does not intend to intervene in mergers or takeovers where enterprises whose goods and services that utilise AI which are generally available to the public and for use by the consumer, for example, virtual AI assistants that are capable of undertaking certain actions by voice commands. Other examples of widely available functions include traffic routing, SPAM removal, social networking applications, facial recognition for security and shopping recommendations.

AI is integral to the Government's Industrial Strategy and embedding AI across the UK will create thousands of good quality jobs and drive economic growth. This legislation is not intended to undermine the Government's commitment to fostering research, development and investment in AI; it is designed to strike the right balance between the priorities of championing economic prosperity and protecting national security. It is anticipated that only a small minority of mergers will raise national security concerns.

Cryptographic authentication

Government's national security interests

Cryptographic technology enables information to be protected whilst in storage or in transit by making it inaccessible or unreadable by everyone except those who have the information needed to access or read it. The technology is integral to a well-functioning economy, for example, by enabling businesses to go about their work, secure in the knowledge that their important information is safe. The Government recognises the importance of these technologies to the UK and promotes research and innovation in cyber security through research grants and supporting the development of new cyber innovation centres.

A risk that may arise in this area is, for instance, a hostile actor being able to access critical systems and undermine national security by acquiring a business that produces, develops, designs, or provides services for technologies which are used to control access to these critical systems. Significant damage to the UK could result if authentication systems are compromised or bypassed, including through sabotage and espionage, to allow a hostile actor to gain unauthorised access to systems critical for national security.

Which firms are covered by the provisions?

The Government intends the proposed legislation will apply to businesses that develop products whose primary function is authentication using cryptographic means, where these products are reasonably expected to be used in systems critical for national security. This includes IT systems in critical infrastructure sectors. Such products may be used in the verification of the identity of an individual or user. The legislation also applies to include companies that provide services relating to cryptographic authentication.

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Examples of technologies within scope of the proposed new amendments are systems that authenticate:

- the identity of a physical person using an access token to gain entrance to a civil nuclear site;
- the identity of a user to gain electronic access to the computer network of a power station;
- a biometric property of an individual to allow access to a restricted area of an industrial site;
- a credit/debit chip-and-pin card at an ATM or retail point of sale;
- facial recognition technology used in conjunction with CCTV footage; and
- the digital information held on an e-passport to determine whether to allow the holder into the country.

The Government does not intend to use its powers to intervene where authentication products and systems that are generally available to the public and for use by the consumer. The Government does not intend to intervene in businesses that develop products which have a primary function of encryption and not authentication.

Examples of technology firms which are unlikely to be subject to Government intervention:

- (a) username and password access to log on locally to computers running consumer operating systems;
- (b) username and password access to online services
- (c) multi-factor authentication technologies used to access online services
- (d) fingerprint and other biometric verification devices built into smart phones; and
- (e) chip-and-pin card readers used for access to online banking accounts.

Cryptographic technology – example of what is, and what is not, covered

Cryptographic authentication

University A has been undertaking innovative research aimed at applying cryptographic authentication to products in IT 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 cryptographic technology. Party C, with no role in the UK technology sector, is interested in acquiring B. The Government believes that this acquisition would raise national security concerns.

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.

Advanced materials

Government's national security interests

Materials science encompasses the discovery and development for example, of new classes of two-dimensional materials like graphene and new functional materials like metamaterials. However, advances in traditional classes of advanced materials science remain a dominant and important contribution.

Breakthroughs in advanced materials science are fundamental enablers across all areas of societal and economic development. They have underpinned and continue to underpin advances in the physical and digital world. These all stem from understanding, manipulating and exploiting the composition, arrangement and properties of matter.

The Government will act to maintain advantage in its defence and security capability and there may be a risk of loss in this advantage if UK companies (and the Intellectual Property that they generate) in this area are controlled by hostile actors.

An enterprise falls within this subsection if its activities consist in or include –

- (a) research into;
- (b) developing or producing;
- (c) developing or producing anything designed as an enabler for use in;
- (d) developing or producing anything designed to be used to make;
- (e) owning, creating, supplying or exploiting intellectual property relating to, or
- (f) provide know-how or services of enablers for use in –

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- (a) any materials that are capable of modifying (including in real time) the appearance, detectability, traceability or identification of any object to a human or to sensors within the range 1.5e13 Hz up to and including ultraviolet;
- (b) any alloys that are formed by chemical or electrochemical reduction of feedstocks in the solid state;
- (c) any manufacturing processes that are involved in the solid state formation of alloys in or into crude or semi-fabricated forms, or powders for additive manufacturing, where “additive manufacturing” means a process of joining materials to make parts from three-dimensional model data; or,
- (d) any metamaterial that does not include-
- fibre-reinforced plastics in structural components, products or coatings with completely random dispersion of pigment or other filler; or
 - any packaged device components that are designed for civil application.

Advanced materials – relevant definitions included in the 2020 Orders

“metamaterial” means a composite material in which the constituents are designed and spatially arranged through a rational design-led approach to change the manner in which electromagnetic, acoustic or vibrational energy interacts with the material, in order to achieve a property or performance that is not possible naturally and includes a metasurface; and for this purpose “composite material” means a solid material formed from two or more constituents and “constituent” includes a region containing a vacuum, gas or liquid;

“metasurface” means a two-dimensional form of metamaterial which includes one or more layers of material that are intentionally patterned or textured (irrespective of whether they are periodic or not) through a rational design-led approach.

Business operating in more than one area covered by the provisions

Businesses may operate in more than one area of the economy covered by new section 23A of the Act. This does not affect the 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 provisions.

Chapter 4: The turnover and share of supply tests

Summary

For mergers in relation to the relevant enterprises as set out in Chapter 3, the 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

For those businesses active in the areas set out in Chapter 3 and 4, the 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.

The 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.

The CMA's guidance¹⁹ 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

The 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

¹⁹ 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>

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merger if those carrying on the relevant enterprise had an existing share of supply of at least 25% before the merger.

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.

The 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 provisions take effect

The provisions do not apply retrospectively. The Government cannot rely on the new provisions to intervene in mergers where the parties ceased to be distinct before the relevant order came 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 provisions

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 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

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;
- media plurality; and

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- maintaining capability to combat a public health emergency.

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 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 provisions do not undermine this wider commitment. The UK will remain the strongest advocate for free trade.

National security

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.

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.

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 thresholds.

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

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 six areas of the economy, even those that meet the 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.

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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.

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.

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.

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.

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.

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.

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 investigation²⁰. 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.

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.

²⁰ As described in more detail in chapter 5, the CMA can also refer cases to Phase 2 investigation on competition grounds.

The provisions' interaction with the competition regime

The provisions were introduced for these areas of business in order to permit the Government to intervene effectively in mergers, if necessary, on national security grounds. The provisions, and thus the 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.

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 concerns²¹. Neither the Government nor the CMA itself expects that there will be a consequential material change in the CMA's approach to competition scrutiny.

For further guidance on the impact of the provisions on the CMA's merger review function see the CMA's published 'Guidance on changes to the jurisdictional thresholds for UK merger control'.

Summary of what the provisions do not change

The provisions made 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.

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; or
- the ability for affected parties to pursue a judicial review of all actions and decisions made by the Government under the public interest regime.

²¹ See sections 3.1 to 3.6 of the CMA guidance 'Guidance on changes to the jurisdictional thresholds for UK merger control'

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

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.²² This section of the guidance seeks only to summarise the process.²³

The Public Intervention Notice

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

²² 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>

²³ 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.

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merger situation has 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.

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

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.

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 '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.

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.

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.

Phase 2

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.

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.

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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

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

The Secretary of State's decisions at each stage of the process may be challenged by a judicial review²⁴. 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.

Information sharing

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.

²⁴ For applications to the CAT for review see section 120 of the Enterprise Act.

Chapter 6: 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

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.

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 national security concerns.

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

For mergers and acquisition brought into scope of Government intervention as a result of the Orders, parties may wish to voluntarily notify BEIS of the transaction (publicinterestandmergers@beis.gov.uk). The statutory process for Government public interest interventions will remain the same.

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.

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;

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- how could that influence or control be manifested;
- any proposed mitigations that the parties propose in order to deal with Government's concerns; and,
- with whom Government should engage.

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"²⁵.

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.

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. These parties should contact their existing government contact or the department that has responsibility for their area of the economy.

If businesses or investors wish to discuss the Orders they should contact NSIIReview@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.

²⁵ <https://www.gov.uk/government/publications/mergers-guidance-on-the-cmas-jurisdiction-and-procedure>

Annex A – contact details

Area(s)	Contact
Military	NSII-Defence@mod.gov.uk
Dual-use, Computing hardware, Quantum technologies, Artificial Intelligence, cryptographic authentication technology, advanced materials	Parties should contact their existing Government contact. Where there is not a clear email contact publicinterestandmergers@beis.gov.uk
Public interest and Mergers generally	publicinterestandmergers@beis.gov.uk
General queries	nsiireview@beis.gov.uk

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