ALL FOREIGN TAKEOVERS OF UK COMPANIES TO BE REVIEWED FOLLOWING BREXIT?

Date: 29 July 2016

Brexit/Antitrust, Competition & Trade Regulation Alert

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Recent statements by Theresa May and her staff uncover the first potential significant change to UK competition law as a result of Brexit. A Downing Street spokesperson has indicated that all "foreign takeovers" of UK companies should be reviewed by the UK government to ensure they are in the "national interest". Such action would require more transactions to be subject to some form of merger control review, potentially under a mandatory national interest regime operating in parallel to the UK's existing voluntary merger control regime. This would not only increase the regulatory burden on numerous transactions but would, in all likelihood, also lead to less predictable enforcement action.

WHAT IS PROPOSED?

In her leadership campaign speech on 10th July, Prime Minister May had alluded to the unsuccessful bid by drugmaker Pfizer to take over London-based rival AstraZeneca in 2014. She commented that, "A proper industrial strategy wouldn't automatically stop the sale of British firms to foreign ones, but it should be capable of stepping in to defend a sector that is as important as pharmaceuticals is to Britain."

The most recent comments came following the announcement by Japanese telecoms group Softbank of its proposed acquisition of UK technology company Arm. The Downing Street spokesperson said that Prime Minister May intends to take a "case by case" approach to foreign takeovers and that the Arm transaction "is very much in the national interest". The key point apparently being that Softbank has indicated its intention to keep Arm's base in Cambridge and to create more jobs in the UK. The spokesperson is reported as saying that all such foreign takeovers should be reviewed to ensure this is the case.

WHAT IS THE NATIONAL INTEREST?

The current system of UK merger control does not require mandatory notification but the Competition and Markets Authority ("CMA") can intervene on competition grounds where certain turnover or share of supply thresholds are met. In addition, the government can intervene on the basis of certain limited public interest grounds: national security; media plurality; and stability of the financial system.

It seems that Prime Minister May would be keen to enable intervention beyond the defence, media and financial services sectors but on what basis? To assess national strategic importance (possibly akin to review by the Committee on Foreign Investment in the U.S.)? To assess the impact on job security or whether tax revenue will leave the UK (an approachpreviously rejected by most developed merger control regimes)? To protect cultural

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identity or specific national brands? Perhaps an intervention could even be made on any basis which the government considered to be relevant at the time.

WHAT IS A "FOREIGN" TAKEOVER?

There is not as yet any clarity as to how "foreign" takeovers requiring national interest assessment should be identified. Is a company which is headquartered outside the UK "foreign"? What if the majority of its employees and operations are in the UK? Is the location of a company's shareholders relevant? What about the nationality of its management? What nexus should the target have with the UK before the UK government would want to intervene? Would it be a question of the number of UK employees regardless of whether the target was in fact more closely connected with another jurisdiction? Would only direct acquisitions of UK companies be considered or would acquisitions of foreign companies with UK subsidiaries also be caught?

MANDATORY NOTIFICATION

Until now, the UK has consistently rejected any form of mandatory merger notification whether on competition or public interest grounds. This would be a major change and would discriminate against foreign acquirers. The resulting regime may bear some resemblance to the Australian regime where a voluntary competition regime sits alongside a mandatory foreign investment review.

WHAT FORM WOULD THE INTERVENTION TAKE?

It is also unclear what kind of intervention is envisaged. At present, in cases involving government intervention on the grounds of public interest, the CMA reports to the Secretary of State on the relevant public interest concern and the Secretary of State reaches the final decision as to what action, if any, is appropriate on that basis. Is such a formal process envisaged across all foreign takeovers or merely a cursory government check? Will a new body be created to carry out national interest assessments and report to the Secretary of State in parallel with the CMA process? Would it become standard practice to require acquirers to give undertakings that UK jobs are protected? How would such undertakings be enforced?

CONCLUSION

Alex Chisholm, former Chief Executive of the CMA commented in 2014: "A 're-politicisation' by adding more exceptions to competitive-based merger controls, or introducing criteria in foreign investment control that have previously been abandoned in merger control by successive governments, could undermine business confidence and the credibility of any merger regime."[1] It seems that following Brexit, the UK may be about to embark on a course in its merger control far out of step with the international community and potentially creating a regulatory environment so uncertain and so biased against foreign acquirers that it could deter significant foreign investment.

These concerns highlight the key importance of including merger control issues in the strategic planning of a transaction at the earliest stages. In addition, if transactions are proposed for the medium or long term, prospective acquirers should consider a lobbying strategy regarding potential changes to UK merger control.

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Notes

[1] https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-public-interest-and-competition-based-merger-control

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