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CFIUK? The UK brings heavier scrutiny to its foreign investment



Julien Blanquart and Reid Whitten look at the UK government's stricter approach to foreign direct investment reviews.

The UK government has now made a show of force in its foreign direct investment ('FDI') reviews. For the first time, the UK Secretary of State issued an order to prevent a transaction for raising public interest considerations. Specifically, the UK government blocked the prospective deal on national security grounds. In a 5 September notice,¹ the UK government accepted commitments from Gardner Aerospace Holdings Limited ('Gardner') to not proceed with its proposed acquisition of Impcross Limited ('Impcross'), a UK-based manufacturer of components for the aerospace and military aircraft industry.

While the specific facts of the transaction may explain the UK's blocking decision, the move may also be viewed as a turn toward more stringent reviews of FDI by the UK government.

Background on current UK FDI law

Currently, there are no FDI controls in the UK aside from the antitrust assessments conducted by the Competition and Markets Authority ('CMA'). In those assessments, the UK government may only intervene if a transaction qualifies as a merger and the proposed transaction meets certain UK turnover thresholds or standard share of supply test. (That threshold is met when, as a result of the merger, a share of 25% or more in the supply or consumption of goods or services of a particular description in the UK, or in a substantial part, is created or enhanced.)

However, the Secretary of State may intervene in proposed transactions that raise one or more 'public interest

considerations' such as those relating to national security, plurality of the media, the stability of the UK financial system and, more recently, the ability to fight public health emergencies.

Once the Secretary of State has issued a public interest intervention notice, the CMA must report to the Secretary of State on jurisdiction and antitrust issues, and include a summary of the comments it has received on public interest matters. With regards to defence-related transactions, the UK Ministry of Defence will provide the CMA with its analysis and observations.

CURRENTLY, THERE ARE NO FOREIGN DIRECT INVESTMENT CONTROLS IN THE UK ASIDE FROM THE ANTITRUST ASSESSMENTS CONDUCTED BY THE COMPETITION AND MARKETS AUTHORITY.

Following the review of CMA's report, the Secretary of State will either decide to refer the case for a phase 2 investigation or clear the transaction, either unconditionally or subject to commitments.

If the transaction is referred to phase 2, the CMA must then prepare a report for the Secretary of State within 24 weeks of the reference to phase 2. The report must include a decision on jurisdiction, and recommendations on whether the Secretary of State or others should take action to remedy,



mitigate or prevent any adverse effect on the public interest. Within 30 days of receipt of the CMA's phase 2 report, the Secretary of State must decide: whether to clear the transaction; if the transaction requires remedies; or prohibit the transaction.

The Gardner-Impcross transaction and subsequent review by the authorities

Under the proposed transaction, Gardner would have acquired 100% of the shares of Impcross. Gardner is a manufacturer of parts for the aerospace and military aircraft industry and has been a long-time supplier for Airbus. Gardner is ultimately owned by Ligeance Aerospace Technology Co Ltd, a company listed on the Shenzhen Stock Exchange. Impcross is a UK-based manufacturer of aerospace parts for military applications.

On 5 December 2019, the Secretary of State issued a public interest intervention notice² and an order³ preventing Gardner from proceeding to take over Impcross's activities, including the transfer of information, know-how, or documents. The order also prevented Gardner from taking ownership or control of Impcross pending the outcome of the public interest intervention.

As mentioned previously, this was the first time that

the Secretary of State (rather than the CMA) had issued an order under Schedule 7 of the Enterprise Act 2002 to prevent the continuation of a transaction giving rise to public interest considerations.

On 2 March 2020, the CMA delivered its report⁴ to the Secretary of State. After finding that the transaction between Gardner and Impcross was 'in contemplation' within the meaning of section 26 of the Enterprise Act 2020 and dismissed potential competition concerns of the transaction, the CMA then conducted its national security assessment.

After receiving comments and reports from the Ministry of Defence, the CMA concluded that the proposed transaction would give rise to national security concerns with regards to 'the protection of the UK's aerospace capability and the safeguarding of sensitive information, skills and manufacturing capabilities within Impcross' and 'the UK's operational advantage'.

Subsequently, on 16 March 2020, the Secretary of State informed the parties that he was considering a phase 2 inquiry over the proposed transaction. Gardner notified the Secretary of State that it was not considering further the transaction and offered undertakings confirming this position. These

undertakings were formally accepted by the Secretary of State on 8 September 2020.

The takeaway: A proposed new regime and more stringent enforcement to come

Relevant to that review, it is worth noting that in July 2018, the UK government proposed⁵

an independent FDI control mechanism that would include:

- National infrastructures (such as communications, civil nuclear, defence, energy);
- Some advanced technologies (such as artificial intelligence and nanotechnologies);

- Critical direct supplies to the government and to the emergency services sector; and
- Military and dual-use technologies.

Notification of relevant transactions under that mechanism would be voluntary, and the government would have the option of identifying non-notified transactions for a national security assessment. Any acquisition of more than 25% of shares or voting rights of an entity, more than 50% of assets, or significant influence or control in an entity or assets, or increase of such influence or control, could be subject to review.

While the public consultation on the proposals closed in October 2018, the government confirmed, in the Queen’s Speech in December 2019,⁶ that

it would propose a National Security and Investment Bill. The timing of the draft Bill and the features of the new regime remain uncertain.

Coupled with the pending Bill, the government’s decision to block the Gardner-Improcross deal illustrates the rising interventionist tendency regarding transactions that give rise to national interest issues. That more stringent approach to transactions that may impact national interest in the UK is consistent with recent trends around the world, as seen by multiple governments strengthening current FDI regulations and introducing new regimes.

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LINKS AND NOTES

- ¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915946/gardner-decision-notice.pdf
- ² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/850565/Impcross-Gardner_PII_Notice.pdf
- ³ www.legislation.gov.uk/ukxi/2019/1490/made
- ⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892742/R_-_Report_for_Redaction__005_.pdf
- ⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728310/20180723_-_National_security_and_investment_-_final_version_for_printing__1_.pdf
- ⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853886/Queen_s_Speech_December_2019_-_background_briefing_notes.pdf

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