

Government reforms could deter foreign investment

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Proposals to extend the role played by politicians in scrutinising mergers and investments in the UK could discourage foreign investment, according to new research from the University of East Anglia (UEA).

As part of preparations for life after Brexit, the UK government has introduced wide-ranging plans for strengthening its scope to scrutinise mergers, acquisitions and investments that raise national [security](#) concerns in specific sectors.

The proposals, the result of the government's review of the Enterprise Act 2002, seek to extend the powers that the government currently has to intervene in transactions in order to safeguard the national security of the UK, while simultaneously attempting to minimise any adverse effect these reforms may have on predictability and procedural transparency.

However, while the Green Paper on National Security and Infrastructure Investment (NSII) makes "all the right noises" with regard to investor certainty, researcher Dr. David Reader argues that the "resurrection" of ministerial decision-making could yet deter [foreign investment](#) by creating perceptions of an assessment process based on furthering the UK's new Industrial Strategy, rather than protecting national security.

The reforms, which have been consulted on and will be set out in a White Paper later this year, follow a traditionally 'open for business' stance adopted by successive governments in order to aid the UK's recovery in the wake of the 2007-08 global financial crisis. They also

come in the wake of controversial foreign bids for so-called 'crown jewel' firms such as Cadbury, AstraZeneca and ARM Holdings, as well as the all-British tie-up between Melrose and Armed Forces supplier GKN earlier this year.

Published in the journal *Competition Law International*, Dr. Reader's evaluation of the proposals argues for restraining the role of ministerial decision-making under the new regime.

"At a glance, the Green Paper's repeated emphasis of the need to maintain a regime that promotes business certainty and procedural transparency would seem to be music to the ears of potential investors," said Dr. Reader, of UEA's Centre for Competition Policy.

"However, the proposals are also set to resurrect a central role for ministerial decision-making in the UK investment landscape. In the light of a new industrial strategy and the shadow of impending Brexit, this carries the risk of creating a suspicion that politicians will base their decisions on industrial policy grounds under the guise of national security.

"With the implementation of these reforms likely to coincide with the UK's departure from the EU, the true impact of the reforms on the level of foreign investment may not be discernible. But, as attracting foreign investment will play a key role in the government's industrial strategy, understanding the long-term impact of these proposals is paramount."

The government is already pressing ahead with the Green Paper's short-term proposals to amend the turnover threshold and share of supply tests for mergers within the Enterprise Act 2002. This allows the government to examine and potentially intervene in mergers that currently fall outside the thresholds in two areas, namely the dual use (items used for both civil and military applications) and military use sector, and parts of

the advanced technology sector.

The Secretary of State for Business, Energy and Industrial Strategy (BEIS) currently has powers to intervene in merger assessments on national security grounds, but will seek formal advice from the Competition and Markets Authority (CMA), often in consultation with either the Ministry of Defence or the Home Office, before deciding whether to refer the transaction for further in-depth assessment.

Under the proposed 'national security intervention' procedure, however, the Green Paper suggests that—where non-merger specific transactions (such as greenfield investment) raise concerns—the Secretary of State will undertake their evaluation without receiving advice from the CMA or any other independent body.

Dr. Reader said there are doubts as to whether a foreign investment review regime based solely on the assessments and decision-making of politicians or government departments would create an environment that instils confidence in prospective investors.

He also highlights a potential conflict of interest, given that the BEIS Secretary has also been tasked with heading up the government's industrial strategy, a key component of which is to target specific companies to invest in the UK as part of individual sector deals and to ensure that the regulatory process is easier for these companies to navigate.

"This raises the potential for a scenario where the BEIS Secretary is having to rule on the national security implications of a foreign takeover or [investment](#) in the advanced technology sector, while also negotiating to attract a separate foreign company to invest in the same sector," said Dr. Reader.

"The allocation of extensive decision-making powers to politicians and, specifically, the BEIS Secretary, risks undermining the certainty and transparency that the Green Paper's other proposals strive to deliver. It is imperative that the forthcoming White Paper outlines specific safeguards that would remove the risk of industrial policy considerations entering into the decision-making process.

"One option for negating perceptions of political bias during a 'national security intervention' process would be to establish an independent [national security](#) review body, which would—in effect—assume the role that the CMA plays in the context of public interest mergers."

'Extending 'National Security' in Merger Control and Investment: A Good Deal for the UK?', David Reader, is published in *Competition Law International*, volume 14, number 1, June 2018.

Provided by University of East Anglia

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