

## Changes to UK merger control thresholds to address national security concerns will come into force next week

### In summary

The UK Government's changes to the UK's merger control thresholds, aimed at ensuring it can intervene in transactions that threaten the UK's national security, will enter into force on 11 June 2018. The changes apply only to transactions in the military and dual-use, multi-purpose computing hardware, and quantum technology sectors. For such transactions, jurisdiction will be determined by a lower target UK turnover threshold (£1 million per year, reduced from £70 million) and an amended share of supply test (25 per cent share of supply, with no increase requirement). The Government expects only an additional five to 29 transactions a year would be reviewable as a result of the changes, and, on recent trends, it expects only a small minority of these (one to six) may warrant intervention. The changes mark the first significant reform of the UK's merger control thresholds since the rules were introduced some 15 years ago.

### Background

On 17 October 2017, the Department for Business, Energy & Industrial Strategy ("BEIS") published a Green Paper detailing short- and long-term proposals to give the Government greater scope to intervene in takeovers that raise national security concerns. The Green Paper set out the Government's concerns that, for certain sectors of the UK economy, the jurisdictional thresholds under the UK's current merger regime are no longer working effectively as a threshold for intervention on national security grounds. Following a public consultation, the BEIS announced on 15 March 2018 that the Government would amend the merger control thresholds for transactions in these sectors.

The Government is still reviewing the responses to the consultation on the long-term reforms in the Green Paper. These long-term reforms are expected to be far more significant and wide-reaching, and the Government is expected to lay out its plans in a White Paper to be published later this year.

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## Current powers

The Government's current powers to intervene in transactions for national security and other public interest concerns are contained in the Enterprise Act 2002 (the "**Enterprise Act**") as part of the UK merger control regime. Under the UK's voluntary system, the Competition and Markets Authority ("**CMA**") may review a takeover if the jurisdictional thresholds are satisfied, i.e. if the target business has annual turnover in the UK exceeding £70 million, or if the share of UK supply increases to 25 per cent or over as a result of the transaction.

For transactions where the merger control thresholds are satisfied, the Government can intervene where a strictly defined public interest ground is at stake – currently, either national security, the plurality of the media or press freedom, or the stability of the UK financial system.<sup>1</sup> The Government has intervened on national security grounds on only seven occasions, most recently in Hytera Communications Corporation's acquisition of Sepura plc in 2017.

If a transaction does not satisfy these thresholds, the Government's powers to intervene are limited to takeovers involving certain newspaper and broadcasting companies, or certain government contractors (holding confidential defence-related information).

## Amended thresholds

The Government has announced it is amending both the existing target turnover threshold and the share of supply tests for transactions in the affected sectors by:

- > lowering the target UK turnover threshold from £70 million to £1 million per annum; and
- > removing the current requirement for the transaction to create an *increase* in the share of supply of a service or product in the UK to at least 25 per cent, so that the test will be satisfied by acquiring an existing share of supply of 25 per cent (without an increment or overlap between the parties).

As a result, transactions involving a target active in the military or dual-use, multi-purpose computing hardware, or quantum technology sectors in the UK will fall within the scope of the amended thresholds if either (i) the target has turnover in the UK of at least £1 million, and/or (ii) the target has a share of supply of at least 25 per cent of particular goods or services in one of the affected sectors in the UK.

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<sup>1</sup> The Secretary of State can add new public interest grounds subject to parliamentary approval, while similar public interest provisions exist under the European Union Merger Regulation which, if applicable, allow Government intervention in takeovers reviewed by the European Commission.

## The affected sectors

The changes to the jurisdictional thresholds will apply only to transactions involving a target in the following sectors in the UK:

### *Military and dual-use item technologies*

Military and dual-use item technologies cover the design and production of military items (such as arms, military and paramilitary equipment) and “dual-use” items which can be used for both military and civilian purposes. The definitions of military and dual-use items are based on goods and technologies covered by the existing **UK Strategic Export Control Lists** (the “**Control Lists**”). The amended thresholds will apply to businesses that develop or produce items included on the Control Lists, or hold related software, technology or information that can be used in connection with the development or production of such items.

### *Quantum technology*

Quantum technology has been defined broadly, referring to quantum computing or simulation; quantum imaging, sensing, timing or navigation; quantum communications, and quantum resistant cryptography. The amended thresholds apply to businesses which research, develop, design or manufacture goods for use in, or supply services based on, these quantum technologies. This would include the creation of relevant intellectual property (even if not yet put to commercial use).

### *Multi-purpose computing hardware*

Multi-purpose computing hardware covers businesses that own, supply or create intellectual property rights in the functional capability of multi-purpose computing hardware, and/or those that design, maintain or support the secure provisioning or management of roots of trust of multi-purpose computing hardware. UK businesses that own, create or supply intellectual property in relation to the way that computer processing units function may be in scope.

For further information on the sectors affected by the changes, the **Government** and the **CMA** have both published draft guidance and the CMA has announced it will issue final guidance when the changes enter into force on 11 June 2018.

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