

Acquisitions of businesses critical to health emergencies to be subject to control

On 23 June 2020 the UK government brought into force The Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2020 which imposes controls on any acquisitions of UK businesses that are critical to combating public health emergencies.

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Please note: the information contained in this legal update is correct as of the original date of publication.

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The Enterprise Act 2002 contains the principal merger control provisions in the UK. These enable the UK competition regulator, the Competition and Markets Authority (CMA), to investigate any merger above a certain size that affects the UK and to impose conditions on it, or block it outright, on competition grounds. Section 58 of the Enterprise Act sets out very limited powers for the government to intervene in UK mergers on non-competition, public interest grounds including national security, plurality of media and the stability of the UK financial system. The 2020 Order adds to the list of grounds the need to maintain in the UK the capability to combat, and to mitigate the effects of, public health emergencies. The UK government therefore now has the power to impose conditions on, or block, any acquisition of a UK business with capability that is key to responding to a UK health emergency.

The grounds for the emergency legislation appear to be a concern that some UK businesses which have critical capabilities may now be more susceptible to takeovers. The controls are broadly drafted and do not directly limit foreign investment, but the press release announcing the measures states it “will allow the government to scrutinise certain foreign takeovers to ensure they do not threaten the UK’s ability to combat a public health emergency such as coronavirus.” Secretary of State for Business, Alok Sharma commented:

“These powers will send an important signal to those seeking to take advantage of those struggling as a result of the pandemic that the UK government is prepared to act where necessary to protect our national security.”

The new powers conferred by 2020 Order enable the government to intervene in any case where a UK business that is directly involved in a pandemic response, or that contributes to the maintenance of a UK health emergency response where there is no immediate crisis, becomes a takeover target. Examples given in the press release are acquisitions of a vaccine research company or personal protective equipment manufacturer. It is arguable however that it could extend to independent hospitals and care providers whose collaborative role in the response to Covid-19 has been crucial.

These latest changes to the Enterprise Act are intended to mitigate risks in the short term ahead of more comprehensive powers in the forthcoming National Security and Investment (NS&I) Bill.

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