

Proposals for controls on foreign investment in UK telecoms and energy infrastructure

The UK Conservative Party has pledged that if it wins the upcoming election it will significantly reform its approach to the ownership and control of critical infrastructure – including telecoms, defence and energy assets – to ensure that foreign ownership "does not undermine British security or essential services".

The election manifesto of the Conservative Party states that if the party is elected, it "will ensure that foreign ownership of companies controlling important infrastructure does not undermine British security or essential services" and that there will be strengthened ministerial scrutiny and control in a limited range of sectors, "such as telecoms, defence and energy".

Proposals to control foreign investment in critical infrastructure were announced in September 2016. However, other than nuclear facilities, it was unclear what infrastructure would be regarded as critical. The manifesto now clarifies that telecoms and the wider (non-nuclear) energy sector would also be affected. Mergers involving defence sector businesses have long been covered by the existing regime for national security interventions.

The strengthened scrutiny is likely to come in the form of changes to the merger control regime under the Enterprise Act 2002, but might be complemented by certain other tools, such as "golden share" arrangements,

or powers to prohibit the carrying out of regulated activities in certain circumstances (e.g. through withdrawal of a license or authorisation). For details of these legal tools, and the constraints on their use that are currently imposed by EU law, see our [September 2016 briefing](#).

The manifesto also includes proposals to amend the takeover rules to require bidders to be clear about their intentions from the outset of the bid, to make all promises and undertakings made in the course of takeover bids legally enforceable and to allow the government to require a bid to be "paused" for scrutiny. These proposals – which are not restricted to critical infrastructure – may lead to the Takeover Panel revisiting the existing regime for binding post-offer undertakings and post-offer intention statements under Rules 19.5 and 19.6 of the Takeover Code.

While that regime ostensibly governs commitments made to secure the support of shareholders and other stakeholders in the target, it has also led to bidders offering up commitments to obtain governmental support. Such commitments (e.g. to

maintain jobs or facilities in the UK, as seen with the undertakings given on Softbank's takeover of ARM Holdings) may go beyond those that would be required for a clearance under the Enterprise Act. Strengthening that regime is likely to increase this risk of political pressure, as appears to be implicitly recognised in the manifesto statement which precedes the proposal: that the Conservative party "welcome overseas investment and want investors to succeed here but not when success is driven by aggressive asset-stripping or tax avoidance".

Other developments

The government already has powers to intervene in mergers on national security grounds and is using them more widely than before. Having previously intervened only in mergers between defence businesses, it recently intervened in the acquisition of Sepura plc by the Chinese-owned Hytera Communications Corporation: two civilian suppliers of walkie-talkie equipment to customers that include emergency services such as the police. There are indications that this broader interpretation of national

security is likely to be a continuing policy.

In contrast, the European Commission recently rejected calls from politicians in the European Parliament and some EU countries for more powers under EU law to veto foreign acquisitions of important technologies or strategic businesses. In a "Reflection Paper on Harnessing Globalisation", it indicated that it favours pushing for reciprocal access for European investors to acquire foreign assets instead.

Remaining uncertainties

It remains unclear the extent to which interventions to protect critical infrastructure will go beyond those that are already possible on national security grounds, or whether they will be limited to the telecoms, energy and defence sectors.

In addition, it is unclear what factors the government will apply when assessing whether a foreign takeover of critical infrastructure is liable to "undermine essential services", or what undertakings might be sought to ensure that there is no such impact.

If the Conservative Party wins the election on 8 June, some of these issues may be clarified when details of the proposals are published. However, the government has in the past been reluctant to issue guidance on how it will assess national security concerns, and this is likely to be a particularly sensitive issue, given the government's desire to enter into new trade agreements with countries outside the EU.

Conclusion

The new proposals are explicitly aimed at foreign investors. Whether they deter overseas investment will depend on the details of their implementation. In the past, mergers raising issues of national security have invariably been dealt through behavioural commitments (e.g. information barriers and supply obligations) rather than more intrusive divestment remedies or outright prohibitions. This suggests that, if implemented sensibly, the reforms may have only a limited impact on the value of UK assets that are deemed to be critical infrastructure.

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