Crisis Prompts European Countries To Step Up Protections Against Foreign M&A

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The coronavirus pandemic has weakened European economies and companies. EU and national governments have expressed concern that foreign investors may opportunistically take advantage of the crisis to acquire domestic companies regarded as strategic.

Acquirers should anticipate the risk that governments may review and challenge acquisitions of companies perceived as strategic national assets. Potential for foreign investment review should be considered in advance, in terms of both current legislative measures and prospects for future political intervention, by means of, for example, committee inquiries by national legislatures, state defensive stake-building or even nationalisation of vulnerable domestic companies. These concerns can extend well beyond companies with security-related businesses. They can impact acquisitions of companies important to national employment or perceived to be unfair because the acquirer's home country has better weathered the coronavirus crisis.

Recent EU developments include the following:

- The U.K. has sought to challenge control, and the alleged relocation of technology, by a Chinese company of Imagination Technologies (Imagination), a U.K. supplier of security technology and high-end semiconductors. In parallel, the U.K. is consulting on potential further legislative intervention measures, in addition to a planned expansion of the UK's foreign investment review regime.
- EU countries are contemplating national measures to protect domestic industry, including foreign investment controls, strategic stake-building and, potentially, nationalisation.
- The European Commission has issued new guidance, urging member states to "use all options to protect critical European companies from foreign takeovers or influence that could undermine our security and public order".[1]

Imagination Technologies

Imagination produces semiconductors for mobile handsets and other consumer appliances. The company is considered strategically important to U.K. national security, as its technology is able to identify network vulnerabilities.[2] U.S.-based private-equity firm Canyon Bridge, whose majority investor is the state-owned Chinese company China Reform Holdings (CRH), acquired Imagination in 2017. At that time, Canyon Bridge assured the U.K. government that "it was an American firm, not under the control of the

[1] Guy Chazan, Jim Brunsden, "Coronavirus Crisis Pushes Europe Into Nationalist Economic Turn", *FT* (26 March 2020).

[2] Joel Khalili, "Imagination Technologies To Be Grilled Over China Security Issues", *Tech Radar*, (14 April 2020, accessed 15 April 2020).

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Chinese government, with CRH remaining a passive investor".[3] CRH reportedly sought to take control of the Imagination board at an emergency meeting on 7 April 2020, a meeting which was postponed when the U.K. Culture Secretary demanded an explanation.[4] The chief executive and chief technology officers of Imagination subsequently resigned and expressed concern that Imagination's technologies might be transferred out of the U.K.,[5] prompting the U.K. Foreign Affairs Committee to investigate.[6]

UK Foreign Investment Developments

In parallel, the Foreign Affairs Committee of the U.K. Parliament has launched an inquiry into the U.K. Foreign & Commonwealth Office's (FCO) role in blocking foreign asset-stripping of U.K. companies, especially where national security risks may arise. An initial consultation period is open until the end of May. The inquiry will consider (i) in what circumstances the FCO should intervene to prevent a hostile party seeking to secure significant influence over a U.K. company and (ii) what role the FCO should play in guiding government decisions to intervene in foreign takeovers involving a national security risk.[7]

Tom Tugendhat MP, chair of the Foreign Affairs Committee, has stressed the importance of protecting technology companies in particular: "The world has changed and companies — particularly tech companies — are on the front line".[8] Welcoming the inquiry into the FCO's potential role in blocking asset-stripping foreign takeovers, he noted that while the government's main concern at present is dealing with the COVID-19 pandemic, "We must not allow those who would seek to benefit financially or politically from this grave distraction the means to do so".[9]

The U.K. has powers to intervene in acquisitions on national security grounds under the Enterprise Act 2002 (the Act). The ambit of the Act was increased in 2018 to cover technology transactions where certain IT products or quantum technologies are concerned. Relevant technology transactions can be reviewed where the target has a turnover of £1 million or more or where either party has a 25% share of supply of the relevant goods or services in the U.K. A lower threshold applies for designated defence contractors. The government can issue a notice to intervene in any acquisition falling within the scope of the Act and can hold separate the companies pending investigation.[10] Typically, interventions lead to binding commitments given by the acquirer concerning protection of strategic interests, security safeguards and governance of the target.[11] If appropriate safeguards are not forthcoming, the government has the power to block or unwind the acquisition. In October 2019, following a consultation in July 2018,[12] the U.K. proposed new legislation to review acquisitions on national security grounds across a far wider range of strategic industries.[13]

EU Encourages Stake-Building and Golden Shares To Protect Potentially Vulnerable EU Companies From Acquisition

European Commission Vice President Margrethe Vestager warned of "the real risk" in light of the pandemic "that businesses that are vulnerable can be the object of a takeover". She made clear that the Commission would not have "any issues of states acting as market participants if need be — if they provide shares in a company, if they want to prevent a takeover of this kind".

On 23 March 2020, amid reports that a U.S. company was going to bid for CureVac, a German company working on a cure for coronavirus, the German economy minister, Peter Altmaier, launched a €750 billion stabilisation fund, €100 billion[14] of which may be used to take equity stakes in German companies such as CureVac.[15] Bavarian Prime Minister Markus Söder has suggested that measures should go further, to ban foreign takeovers all together: "If at the end of this crisis the whole Bavarian and German economy ends up in foreign hands ... then it's not only a medical crisis — it's a complete change of the global economic order, and we have to guard against that".[16]

[3] Foreign Affairs Committee, "Correspondence to the Prime Minister on Imagination Technologies" (11 April 2020, accessed 15 April 2020).

[4] Nic Fildes, "Chinese Move To Take Control of Imagination Technologies Stalls", *FT* (7 April 2020).

[5] Nic Fildes, "Chinese Move To Take Control of Imagination Technologies Stalls", *FT* (7 April 2020).

[6] Phoebe Magdirila, "UK Committee To Question Imagination Technologies Over China Ownership — BBC", *S&P Global*, (14 April 2020, accessed 15 April 2020). Normally, undertakings to preserve strategic assets within the U.K. and to preempt foreign control of the company or changes to board composition would be given by way of binding commitments as part of the public interest review. It appears the assurances given to the U.K. in 2017 at the time of the Canyon Bridge acquisition were not binding.

[7] UK Parliament, "Red light: The FCO's Role in Blocking Foreign Asset Stripping in the UK Inquiry" (8 April 2020, accessed 15 April 2020).

[8] https://www.bbc.com/news/business-52275201.

[9] UK Parliament, "Red light: The FCO's Role in Blocking Foreign Asset Stripping in the UK Inquiry" (8 April 2020, accessed 15 April 2020).

[10] See, *e.g.*, Public Interest Intervention Notice and Public Interest Merger Reference (Mettis Aerospace Ltd.) (Preemptive Action) Order 2019 Order in *Aerostar/Mattis Aerospace* (20 December 2019).

[11] See, *e.g.*, Undertakings in the Proposed Acquisition of Inmarsat plc by Connect Bidco Limited (29 October 2019).

[12] U.K. government "National Security and Investment: A Consultation on Proposed Legislative Reforms", *White Paper* (July 2018, accessed 14 April 2020).

[13] "The Queen's Speech and Associated Background Briefing, on the Occasion of the Opening of Parliament on Monday 14 October 2019" (14 October 2019, accessed 15 April 2020). The U.K. has legacy legislation that also confers wide-reaching powers to block foreign acquisitions as part of the U.K.'s industrial planning strategy under the Industry Act 1975. The Act has not been used, as the Enterprise Act 2002 is the modern public interest intervention regime.

[14] Michael Nienaber, "Germany Launches 750 Billion Euro Package to Fight Coronavirus", *Reuters* 23 March 2020 (accessed 15 April 2020).

[15] Srinivas Mazumdaru, "Coronavirus: EU Fears Arise in Hostile Takeovers", *DW* (7 April 2020, accessed 14 April 2020).

[16] Guy Chazan, Jim Brunsden, "Coronavirus Crisis Pushes Europe Into Nationalist Economic Turn", *FT* (26 March 2020).

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France has followed suit, announcing a fund of €20 billion to protect the 70 listed companies in which the state agency Agence des participations de l'etat (APE) holds stakes amounting to around €75 billion. The French economic minister, Bruno Le Maire, has stated that the money will assist "vulnerable companies through either direct aid, increased state participation or temporary nationalizations".[17] Le Maire also has been clear that the government will use its veto powers for foreign acquisitions in sectors such as energy, telecoms and public health to protect France's strategic assets.[18] It has been reported that the government will use this power to block the takeover of night-vision start-up Photonis by US defence manufacturing company Teledyne. Le Maire stressed that "a large French industrial player should acquire Photonis to guarantee France's technological sovereignty".[19]

Spain was one of the first countries to pass legislation[20] in response to the outbreak requiring government approval for any foreign investment exceeding 10% in domestic assets in strategic industries. Further restrictions were placed on foreign direct investment by investors controlled by the government of a non-EU member state and that already have invested in the strategic industries of another member state. Likewise, in Italy, the prime minister has announced a protectionist stance expanding the government's "golden power" to block foreign takeovers from other EU nations and in additional sectors, such as finance and insurance.[21] Law Decree 8 April 2020 no. 23, which entered into force on 9 April, enables the government to screen acquisitions by entities based in other EU member states of controlling interests in assets with strategic relevance until 31 December 2020 and consequently veto or impose restrictions on the transaction.

The European Commission issued guidance to protect critical European assets in response to the COVID-19 outbreak. The guidance provides that member states are entitled to use national screening measures, "golden shares" or nationalisation to block or set limits to the "predatory buying" of strategic assets by foreign investors on the grounds of public security or public policy.[22] The guidance further states that member states may lawfully act as market participants to prevent a predatory takeover in these circumstances.[23]

The European Commission does not at present have foreign investment review powers. These are the responsibility of member states. However, national foreign investment reviews can be coordinated between EU states and the European Commission under the EU Foreign Direct Investment Screening Regulation (Regulation (EU) 2019/452). *Inter alia* this enables one state to block foreign investments at the request of another (for example, if the target company's state does not have a foreign investment review regime or if the acquisition is occurring outside the jurisdiction).

The European Commission will issue a consultation on further legislation in June 2020. The proposals will allow authorities "to deal with the harm that foreign subsidies and state ownership can do to competition in Europe" and ensure that foreign direct investment does not undermine security and public order.[24] For now, the lines are clear — the emphasis is on rebalance and not elimination: "People are more than welcome to do business in Europe but not to do that with unfair competitive means".[25]

Keshara Hallock contributed to this article.

[17] Arezki Yaiche, "France Ready To Protect Strategic Industrial, Tech Assets Amid Covid-19 Crisis, Says Le Maire", *MLEX* (15 April 2020, accessed 15 April 2020).

[18] Arezki Yaiche, "France Could Block Foreign Takeovers Including Photonis, LeMaire Says", *MLEX* (5 March 2020, accessed 15 April 2020).

[19] Arezki Yaiche, "France Could Block Foreign Takeovers Including Photonis, LeMaire Says", *MLEX* (5 March 2020, accessed 15 April 2020).

[20] Spanish Royal Decree-Law 08/2020 published 18 March 2020.

[21] Simon Clark, Benn Dummet, "Coronavirus Accelerates European Efforts To Block Foreign Takeovers", *Wall Street Journal* (10 April 2020).

[22] Guidance to the member states concerning foreign direct investment and free movement of capital from third countries as well as the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) C(2020), 1981 final.

[23] Javier Espinoza, "Vestager Urges Stakebuilding To Block UK Takeovers", *FT* (13 April 2020).

[24] Margrethe Vestager, "Keeping the EU Competitive in a Green and Digital World", (2 March 2020, accessed 15 April 2020).

[25] Javier Espinoza, "Vestager Urges Stakebuilding To Block UK Takeovers", *FT* (13 April 2020).