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However, these initial reforms were only intended to be a "stop gap" measure, pending implementation of more wide-ranging reforms. A White Paper outlining the government's proposals was issued in summer 2018, with the consultation closing later in the year. A decision is now awaited on how the government intends to proceed. If implemented, these reforms will give the government substantially broader powers to intervene in mergers on national security grounds, particularly in relation to businesses considered to be relevant to the UK's critical national infrastructure. Indeed, the government's current estimate is that these proposed wider reforms will give rise to about 200 notifications per year.

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Whilst this number is in our view likely to be exaggerated, it nonetheless seems clear that under the new regime there will be a significantly greater number of reviews on national security grounds than is the case under the current regime.

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In both these cases, the Secretary of State for Business, Energy and Industrial Strategy can "call in" the merger, enabling him or her to take the final decision on whether it should be allowed to proceed. The short term reforms have expanded this call-in power so that mergers involving certain military/dual use and advanced technology businesses (see further below) can be scrutinised where the target business has:

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We note that the government's push to amend the law in this area does not appear to be connected with (or dependent on) the UK leaving the EU. EU member states already have the ability under the EU Merger Regulation to apply national rules to mergers based on "public security" grounds (among others), even where the European Commission has sole jurisdiction to review the transaction on competition grounds.

How the proposed new system will work

The relevant Minister will be able to "call in" a merger for scrutiny under the new national security regime if he/she has:

- reasonable grounds for suspecting that a "trigger event" has occurred, is in progress or is in contemplation; and

- a reasonable suspicion that the trigger event may give rise to a risk to national security (see below).

The concept of a trigger event and the proposed approach to assessment of risk are discussed in more detail below.

In a worst case scenario, obtaining clearance could take over 5 months.

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Remedies

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Possible conditions

- limiting access to sensitive information or sites or to certain staff (e.g. personnel with security clearances)
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However, save for this extension to bare assets, we think that the influence/control concept proposed is likely to be interpreted similarly to the "material influence" standard under current UK merger control. It is also worth noting that the current material influence standard can apply to relatively low levels of shareholding e.g. 15% plus.

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Prudence or protectionism?

There is certainly potential for these proposals to be perceived as a sign of the UK adopting a more protectionist approach. However, these proposals are probably better viewed in the context of a wider trend to broaden the scope of national security scrutiny powers internationally. For example, as the government points out, authorities in many other developed Western economies (including the US, Australia, France, Germany and Canada) are already able to scrutinise mergers on grounds of national security with a broader scope to do so than the UK. In response to pressure from some Member States, the European Commission has also tabled proposals for an EU-wide framework for screening of foreign direct investment. This involves a certain level of harmonisation and coordination of EU Member State regimes, as well as provision for screening by the European Commission on the grounds of security or public order in certain cases.

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There is certainly potential for these proposals to be perceived as a sign of the UK adopting a more protectionist approach. However, these proposals are probably better viewed in the context of a wider trend to broaden the scope of national security scrutiny powers internationally. For example, as the government points out, authorities in many other developed Western economies (including the US, Australia, France, Germany and Canada) are already able to scrutinise mergers on grounds of national security with a broader scope to do so than the UK. In response to pressure from some Member States, the European Commission has also tabled proposals for an EU-wide framework for screening of foreign direct investment. This involves a certain level of harmonisation and coordination of EU Member State regimes, as well as provision for screening by the European Commission on the grounds of security or public order in certain cases.

Beware the US experience

This is not to say that businesses/investors can afford to be entirely relaxed about the UK proposals, as demonstrated by experience of the CFIUS regime in the US. CFIUS allows certain acquisitions by "foreign persons" to be scrutinised on national security grounds. In one recent case, Chinese investors were forced to divest their interest in a wind farm close to a naval weapons training facility in Oregon. CFIUS has also been used to block a Chinese-owned firm taking over an equipment supplier to the semi-conductor industry. Whilst such cases are still limited, there is some evidence that an increasing number of transactions relating to the US are being abandoned in the face of security concerns.

What does the Huawei affair tell us?

Concerns have recently been expressed over the future involvement of Chinese firm Huawei in the roll-out of 5G telecoms infrastructure in the UK. However, no merger is involved and any action taken to block Huawei's role would be based on powers that the government already has under UK telecoms legislation (rather than the merger regime). Nevertheless, the controversy highlights the potential for national security concerns to be raised in the context of acquisitions of businesses involved with key UK infrastructure – and in certain cases, the conditions already imposed on Huawei in relation to its *existing involvement* in *non-5G* UK telecoms infrastructure could provide a model for remedies imposed under the proposed reforms.

What happens next

Once the government has considered responses to its consultation, it will then likely move to table draft legislation. However, with Brexit consuming most of the government's attention and a considerable amount of Parliamentary time, we would not expect draft legislation to be put before Parliament until later this year. The new regime is therefore unlikely to be brought into effect until 2020 at the earliest.

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