

What does the UK Government's proposed industrial strategy mean for UK competition policy?

February 2017

The UK's Department for Business, Energy and Industrial Strategy (BEIS) has published its highly anticipated [Green Paper](#)¹ on "Building our Industrial Strategy." The Green Paper does not mention the possibility of increased political intervention in merger control announced by the Government last year - although the Prime Minister has separately suggested that this is still on the agenda - but at least one element of the proposed industrial strategy could have implications for the UK's public procurement regime.

Public interest interventions in mergers

As part of Theresa May's campaign to be Prime Minister last year, she [expressed](#) the desire to formulate an industrial strategy in which the Government could step in to defend domestic firms against foreign takeover: "*It is hard to think of an industry of greater strategic importance to Britain than its pharmaceutical industry [...] [y]et two years ago the Government almost allowed AstraZeneca to be sold to Pfizer [...]. A proper industrial strategy wouldn't automatically stop the sale of British firms to foreign ones, but it should be capable of stepping in to defend a sector that is as important as pharmaceuticals is to Britain.*" In doing so, she suggested that the UK was going to develop a more politically interventionist approach to merger control.

This was followed by a Government [press release](#) in September announcing that "*[t]here will be reforms to the Government's approach to the ownership and control of critical infrastructure to ensure that the full implications of foreign ownership are scrutinised for the purposes of national security. This will include a review of the public interest regime in the Enterprise Act 2002 and the introduction of a cross-cutting national security requirement for continuing Government approval of ownership and control of critical infrastructure.*"

The public interest regime in the Enterprise Act 2002

The current regime allows for the Secretary of State to intervene in the event that the merger affects national (or public) security, media plurality, or the stability of the financial system. The Secretary of State can also specify other grounds for intervention.

¹ Responses to the consultation can be submitted no later than 17th April 2017 [here](#).

SLAUGHTER AND MAY

The UK's Competition and Markets Authority then published a [paper](#) drawing BEIS's attention to a number of factors that it thought should be taken into account when considering any changes to the current arrangements for allowing public interest intervention in mergers. In particular that it could be detrimental to the UK's reputation as an *"open and competitive place to do business"* and its ability to *"attract investment from overseas."*

It is not yet clear in which direction the Government has decided to go, as the Green Paper does not directly mention an interventionist approach to merger control. Rather, it encourages a pro-trade stance emphasising that one of the aims of the new industrial strategy is to create *"a great, global trading nation,"* drawing upon the UK's position as *"the leading location for Foreign Direct Investment"* in Europe and noting its aim to pursue a free trade agreement with the EU post-Brexit. The [White Paper](#) on Brexit² also praises the EU's *"common competition and consumer protection framework [which] deals with mergers, monopolies and anti-competitive activity and unfair trading within the EU on a consistent basis"* and notes that when the UK leaves the EU the Government wants to *"make the UK the best place in the world to do business"* which means *"fostering a high quality, stable and predictable regulatory environment."*

This does not, however, appear to be the end of the story, at least in relation to critical national infrastructure; Theresa May maintained to the [Financial Times](#) just prior to publication of the Green Paper that *"[The Government] will be looking at how we develop ideas I've already talked about on national security and critical national infrastructure"* and *"Is there more we should be doing in relation to that issue of takeovers? In due course we will come up with some proposals we will consult on."*

Public Procurement

The Green Paper promotes the notion of taking a strategic approach to government procurement that will ensure that *"all major government procurement projects are structured in a way that supports productivity improvements, so that UK-based suppliers are in the best position to compete for contracts throughout the supply chain."* To do this, the Government wants to *"encourage those buying the goods and services to take account of social and economic factors when designing their procurements"* and use a *"balanced scorecard approach."*

The promotion of a *"UK supply chain"* seems to be at odds with: (1) the current UK public procurement regime (based on the EU procurement directives) which is intended to ensure that contracts are awarded without discrimination on the grounds of nationality; and to a lesser extent (2) the World Trade Organisation's Government Procurement Agreement (GPA) which aims to open government procurement markets (the UK is currently a party to the GPA as part of the EU, but post-Brexit would arguably need to accede to the GPA in its own right).

Granted, if the UK does not re-join the EEA (or the GPA) following Brexit, UK procurement rules could become more flexible, allowing (or even requiring) contracting authorities to take certain factors into account when making procurement decisions to the benefit of the UK supply chain.

² *The United Kingdom's exit from and new partnership with the European Union* (2 February 2017).

SLAUGHTER AND MAY

However, restricting procurement markets in a manner which would work to disadvantage foreign bidders for contracts may prompt retaliation from trading partners, preventing UK suppliers from bidding for public procurement jobs in such jurisdictions. The EU, for example, has made clear in its [proposal](#) for a regulation on public procurement and third countries, that it is considering applying ‘price adjustment measures’ to bids from those countries which apply barriers to EU participation in procurement. As such, the effect of the UK attempting to restrict the procurement markets could result in UK bidders being unable to be competitive on the EU stage - in direct tension with the Green Paper’s aim to increase exports by, among other things “*creating a more active approach to winning overseas contracts*”. Helping UK businesses bid for foreign contracts whilst promoting a UK supply-chain at home also seems contrary to the Government’s stated intentions in the White Paper on Brexit, which notes that the Government will prioritise “*securing the freest and most frictionless trade possible in goods and services between the UK and the EU*” which “*may take in elements of Single Market arrangements in certain areas [...] on a fully reciprocal basis and in our mutual interests.*”

Conclusions

The formation of an industrial policy is still at the very early stages. As is a recurring theme since the Brexit referendum, the detail and mechanics will necessarily have to vary depending upon the outcome of Brexit negotiations. The Green Paper as drafted does not propose anything substantially at odds with the current UK merger control regime, although we await news on the Government’s plans on public interest interventions. Its suggestion with regards to public procurement does, however, seem to depart from the rationale of existing EU rules. The Government’s ability to implement this policy framework may be constrained if it wishes to preserve trade relations with the EU (or indeed with other countries). It will have to strike a careful balance between crafting a policy which promotes British industry along the lines of that set out in the Green Paper and maintaining an economy that other countries are happy to trade with and that remains open to foreign investment.



Lisa Wright
T +44 (0)20 7090 3548
E Lisa.wright@slaughterandmay.com



Lauren Dingsdale
T +44 (0)20 7090 4219
E Lauren.Dingsdale@slaughterandmay.com

© Slaughter and May 2017

This material is for general information only and is not intended to provide legal advice.
For further information, please speak to your usual Slaughter and May contact.

Dated February 2017

542060054