

## More defence deals to be subject to UK merger review

### At a Glance...

The UK government is introducing changes to merger control rules to extend jurisdiction to review competition and national interest aspects of transactions affecting businesses which have activities in the technology and defence sectors.

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The UK government is introducing changes to merger control rules,<sup>1</sup> extending existing jurisdiction to the review of competition and national interest aspects of transactions affecting businesses which have activities in defence-related sectors.

Deals where the acquired business has a minimum UK turnover of £1 million or 25 per cent share of sales (regardless of whether the transaction increases that share) are caught by the new rules.

For further information on the reduced jurisdictional thresholds see the related client alert here.

The new rules apply to businesses involved with military and dual-use products. This covers the design and production of military items as well as dual-use items which can be used for both military and civil purposes.

A business will fall within the military or dual-use sector if it is involved in the production of goods or provision of services listed on one of the Strategic Export Control Lists. These lists identify goods and services that cannot be exported from the UK without a licence. However, the reduced jurisdictional thresholds do not apply to items subject to export control where the government's interests are not national security-focused. They therefore only apply to goods and services subject to export control in the following lists:

- The UK Military List<sup>2</sup>
- The UK Dual-Use List<sup>3</sup>
- The UK Radioactive Source List<sup>4</sup>
- The EU Dual-Use List<sup>5</sup>

The new provisions extend not only to businesses that develop, produce or provide any of the goods or services on the above lists, but also to businesses that hold information (including information comprised in software and documents) that is capable for use in connection with the development, production or provision of these goods or services and where "the information is responsible for achieving or exceeding the performance levels, characteristics or functions" of the goods or services.

The addition or removal of goods or services on the above lists risk businesses falling inside or outside the scope of the reduced jurisdictional thresholds. Goods or services subject to temporary export controls will therefore not be caught by the new provisions. Furthermore, addition or removal of goods or services on the above lists will not fall within the new jurisdictional thresholds until expressly included in the legislation by way of statutory instrument. The government recommends that businesses unsure as to whether they are covered by the scope of the new provisions make use of the Goods Checker Tool.<sup>6</sup>

Notification of deals is not, however, compulsory. Parties' transactions which do not appear to raise competition or security issues may sensibly take the view that their deals will not concern the authorities and elect not to notify, but they do so at the risk of subsequent action by the authorities.

In addition to the new changes, the Special Public Interest Regime remains in force unchanged, allowing the government to intervene where no turnover or share of supply tests are met, in mergers that involve government contractors who hold or receive confidential defence-related information. Many defence-related deals will therefore be caught by both regimes.

1. The Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018 and the Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018.
2. Schedule 2 to the Export Control Order 2008.
3. Schedule 3 to the Export Control Order 2008.
4. Schedule to the Export of Radioactive Sources (Control) Order 2006.
5. Annex I to Council Regulation (EC) No. 428/2009.
6. <https://www.ecochecker.trade.gov.uk/spirefox5live/fox/spire/>.

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If you have questions or would like additional information on the material covered in this Alert, please contact one of the authors – listed below – or the Reed Smith lawyer with whom you regularly work.



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