

New Foreign Investment Control of UK Critical Infrastructure Projects

Changes will align the UK's policy framework for ownership and control of critical infrastructure with other major economies.

On 15 September 2016, the UK Government announced its delayed approval of the proposed construction of the Hinkley Point C nuclear power station in southwest England with an agreement in principle with French company, EDF, the principal investor of the project. The project has also received significant investment from Chinese state-owned investors, who have indicated an interest in investing in other nuclear projects in the UK. The project is anticipated to cost £18 billion, and once operational will receive a guaranteed price of £92.50 for every megawatt of electricity produced.

The key condition imposed under this agreement is the exchange of letters between the UK government and EDF, which will ensure that significant stakes in the Hinkley plant cannot be sold prior to the completion of construction without the Government's consent. This consent requirement supplements the requirement under existing laws for EDF to obtain the UK Government's consent for any such share transfers during the operational phase of the plant, and therefore plugs a perceived gap in regulatory control during that phase. The Government stated that these new arrangements are to protect national security.

Broadening out to future projects, the announcement proposed a new legal framework under which the UK Government would take a "special share" or impose a similar condition in "all future nuclear new build" projects in the UK, so that where it has national security concerns these mechanisms will ensure that significant stakes cannot be sold without the consent of the UK Government. The structure of these arrangements would appear analogous to the "golden share" arrangements that were introduced from the 1980s onwards to protect certain newly privatised companies from foreign takeovers, such as companies with a strategic role in the UK defence industry. Whether the share arrangement is aimed solely at bridging a perceived "legislative gap" in terms of the UK Government's control over the ownership of nuclear projects during construction, or is intended to be a continuing right, is unclear. Further, in a tightening of the existing site licensing regime, the UK Office of Nuclear Regulation will require notice of any proposed change of ownership of nuclear sites. The UK Government will then advise or direct the Office of Nuclear Regulation as to whether approval for any change of control will be granted or what (if any) conditions would be attached to such approval.

Of much wider application, the announcement stated that there will be a review of the current public interest regime under the UK Enterprise Act 2002, and the introduction of a cross-cutting national security requirement for continuing UK Government approval of the ownership and control of "critical infrastructure". The type of infrastructure projects that will come within the scope of the new framework is

unclear at this stage. Under the UK Enterprise Act 2002, the Government may already intervene in a merger or acquisition on public interest grounds where the Government has concerns relating to national or public security, media plurality or the stability of the UK financial system. The procedure is administered by the UK Competition and Markets Authority in conjunction with the Secretary of State who has the power to intervene on specified public interest grounds and to make the final decision on whether the proposed merger is in the public interest. Presumably the aim of the review will be to ensure that the existing powers in relation to “national security” grounds are clearly applicable to infrastructure.

The UK Government has said these changes will bring the UK’s policy framework for the ownership and control of “critical infrastructure” into line with other major economies such as Australia, Canada and the United States, which have regimes for the approval of foreign investments in national infrastructure. However, successive UK Governments have encouraged foreign investment in infrastructure projects and assets (such as major utility companies, airports and telecommunications), and it is expected that significant foreign investment will be required to realise many of the large-scale infrastructure projects that are being planned for the country. Whilst nuclear new build is a clearly sensitive matter in any country, wider legislation could be perceived as an impediment to the liquidity of infrastructure investment and as such needs careful thought. Therefore, how these new powers (details of which are likely to emerge in the coming months) will impact on the level of foreign investment in UK infrastructure, and whether this latest announcement will be part of a broader shift in UK Government policy towards such investment, remains to be seen.

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