On 26 May 2014 Pfizer Inc confirmed that it did not intend to make an offer for AstraZeneca Plc. This followed the AstraZeneca board’s rejection of Pfizer’s “final offer” of £55 a share. Pfizer will not be able to make any further approach for six months (unless there is a material change in circumstances or it is invited to do so by AstraZeneca).

Pfizer’s potential bid provoked strong debate in the UK on the appropriate political oversight of corporate transactions. Some politicians and commentators were concerned that the deal would result in research jobs and R&D investment being lost and called on the Government to seek binding commitments from Pfizer to protect the UK science base.

Without prejudice to the political debate on whether or not the Government ought to take action in such circumstances, this briefing outlines the main legal routes by which the assurances from Pfizer in respect of the UK science base might have been enforced and considers the outlook for possible future Government intervention in takeovers.

STATUS OF COMMITMENTS UNDER THE TAKEOVER CODE

On 2 May 2014 Pfizer wrote to the Prime Minister setting out certain commitments it intended to comply with if the acquisition of AstraZeneca was completed. These included commitments relating to R&D activity and jobs in the UK. Pfizer stated that these commitments were legally binding because they were included in its proposed offer announcement.

Note 3 to Rule 19.1 of the Takeover Code (“Note 3”) deals with statements of intention of this kind in these terms:

“If a party to an offer makes a statement in any document, announcement or other information published in relation to an offer relating to any particular course of action it intends to take, or not take, after the end of the offer period, that party will be regarded as being committed to that course of action for a period of 12 months from the date on which the offer period ends, or such other period of time as is specified in the statement, unless there has been a material change of circumstances.” (Emphasis added)

Note 3 clearly placed an obligation on Pfizer to comply with commitments made in its offer documentation or otherwise published in connection with the offer. Failure to comply with such commitments would have amounted to a breach of the Takeover Code so it is correct to say that they should be regarded as “binding”.

However, Note 3 provides an “escape clause” if there is a material change of circumstances. There is no guidance in the Takeover Code on what would amount to a “material change of circumstances” but it would be for the Takeover Panel to decide whether any particular change in circumstances was sufficiently material to allow the commitment to be avoided.
It appears that the Government may have been content to look to the Takeover Code to ensure the commitments were complied with. However, the scope for the Government to engage in negotiations of the terms of such commitments is not unconstrained. Any commitment seen as arising from a *de jure or de facto* Government requirement could raise EU law considerations of the type outlined below. It would be more difficult to bring an EU law challenge against enforcement of unilateral statements voluntarily offered by the bidder.

**PUBLIC INTEREST INTERVENTION BY THE SECRETARY OF STATE**

The Secretary of State can intervene in mergers on certain public interest grounds by issuing an intervention notice to the Competition and Markets Authority. Where the Secretary of State is able to make such an intervention, he has wide-ranging powers, including the power to make approval of the deal conditional upon commitments from the acquirer. A public interest intervention could therefore have enabled the Secretary to State to obtain direct undertakings from Pfizer which would have been binding over the long term.

As a matter of UK law, currently the Secretary of State is only entitled to intervene in mergers on grounds relating to national security, various media issues and financial stability. It seems unlikely that the concerns around erosion of the UK science base fall clearly within any of these existing public interest considerations.

However, it is open to the Secretary of State to intervene on the basis of a new public interest consideration (for example, scientific research capacity) so long as he obtains the appropriate approval for the introduction of the new public interest consideration. In the Pfizer case the introduction of a new public interest consideration would likely have required:

- Parliament to approve the Secretary of State’s order creating the new public interest consideration; and
- the European Commission to recognise intervention under the new public interest consideration as being consistent with EU law (since scientific research capacity does not fall clearly within the grounds for intervention currently recognised by the EU Merger Regulation).

If there were sufficient political support in the UK to intervene in the deal, obtaining Parliament’s approval for the secondary legislation should have been possible. Obtaining European Commission recognition could have been more challenging.

The European Commission is keen to avoid individual governments introducing national measures that undermine the “one-stop shop” nature of EU merger control, especially if those measures could hinder the cross-border economic activity that underpins the single market. It is rare for the Commission to approve Member State intervention on a new public interest ground.

The Government would have needed to convince the Commission that the new public interest consideration was consistent with EU law. This would have required the Government to demonstrate that its public interest intervention would not, for example, have discriminated in favour of the UK over other EU Member States.

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1 The financial stability ground applies only where the merger is not subject to European Commission jurisdiction. Given the parties’ size, it is likely that the European Commission would have had jurisdiction over the competition aspects of any Pfizer/AstraZeneca deal. While the UK could have sought to have the competition issues “referred back” for review by the UK authorities, this would be unusual in a cross-border deal of this nature.

2 The EU Merger Regulation expressly recognises Member States’ right to intervene in respect of public security, media plurality and financial prudential rules.
without justification. This would have complicated proposals, for example, to require Pfizer to base its European headquarters in the UK or to ensure that a specified percentage of its R&D workforce is based in the UK.

Commitments that were non-UK specific would be less objectionable, but would still have been subject to intense scrutiny as to whether they constituted an unjustified restriction on the free movement of capital.

Therefore, the EU law position means that any commitments required from Pfizer under a public interest intervention may not have been as specific or robust in protecting UK science jobs and investment as some politicians would have liked.

The Secretary of State appeared to allude to these issues in an answer to a Parliamentary question on 6 May 2014 when he stated that “[w]e are operating within serious European legal constraints” as regards a public interest intervention. Nonetheless, it was reported that the Government had preliminary discussions with the Commission and may therefore have been considering what form of commitments could have been secured while remaining compliant with EU law.

FRENCH DEVELOPMENTS

On 14 May 2014 the French government published a decree purporting to extend its jurisdiction to intervene in foreign takeovers in strategic sectors. It has been reported that this move is linked to the political controversy surrounding the potential acquisition of Alstom’s energy assets by General Electric.

It is possible that the French government will argue that its law relates to issues of public security and that, since the EU Merger Regulation expressly recognises the right of Member States to intervene on public security grounds, it does not give rise to any EU law concerns.

Much will depend on the manner in which the French government seeks to implement the law. However, the Commission will be monitoring the situation closely to ensure that public security grounds are not in fact used to pursue economic goals in a way that infringes EU law. Indeed, European Commissioner Michel Barnier has warned against protectionism and said that the French measure will be “examined very thoroughly against the backdrop of European legislation.”

THE OUTLOOK FOR GOVERNMENT INTERVENTION IN TAKEOVERS

The failure of Pfizer’s approach on commercial grounds means it will not be necessary for the Government to consider intervention in this deal in the short term. However, the debate is likely to be revived if Pfizer makes a new offer for AstraZeneca, or if another major UK company is subject to a foreign takeover bid. Developments in France show that these issues are not unique to the UK.

Statements from the key players in the Pfizer/AstraZeneca and General Electric/Alstom transactions have demonstrated the importance of the EU law constraints on national governments. In future much will depend on the attitude of the European Commission to enforcement. In particular, it will be interesting to see whether the results of the recent European elections and the installation of a new group of Commissioners in November 2014 results in the Commission taking a less robust approach to national measures in this area.
Absent a dramatic change in approach from the Commission (and courts), the EU law position means that it may be difficult for the Government to use a public interest intervention to require undertakings from foreign bidders that achieve the objective of those who want specific safeguards in respect of UK jobs and investment.

Given these difficulties the Government may instead prefer to look to Takeover Panel enforcement of the commitments a bidder chooses to make. This would involve less EU law risk but is untested in the courts and for some the material change "escape clause" will be seen as a major weakness in the comfort these commitments provide.