

EXPLANATORY MEMORANDUM TO

THE PUBLIC INTEREST MERGER REFERENCE (GARDNER AEROSPACE HOLDINGS LTD. AND IMPCROSS LTD.) (PRE-EMPTIVE ACTION) ORDER 2019

2019 No. 1490

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 On 5th December 2019, the Secretary of State for Business, Energy and Industrial Strategy intervened in the merger of Impcross Limited (“Impcross”) and Gardner Aerospace Holdings Limited (“Gardner”) on the grounds of national security under section 42 of the Enterprise Act 2002. This Order is made to prevent actions by the parties to the merger that might impede the Secretary of State’s ability to protect national security. The Order prevents any step being taken to integrate Impcross’ business with Gardner’s business (including the transfer of information, know-how and documents to the acquirer) and also prevents Gardner from taking ownership or control of Impcross’ business pending the outcome of the public interest intervention. For national security reasons, it would not be appropriate to provide any further detailed information regarding the grounds for the intervention, nor the specific actions which are prevented by the making of this Order.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Order was made at 12:05pm and came into force at 12:10pm on 5th December 2019 and, therefore, came into force before it was laid and breached the convention that statutory instruments should not come into force until a minimum of 21 calendar days after laying. It also came into force after Parliament was dissolved and before the new Parliament is summoned following the 2019 General Election. This was necessary in order to protect national security by preventing the parties to the merger from undertaking any actions that might prejudice a reference of the matter to the Competition and Markets Authority (“CMA”) under the Enterprise Act 2002 or impede any action which may be justified by the Secretary of State’s decision on such a reference.
- 3.2 It was not possible to avoid this course of action. A delay between the publication of the public interest intervention notice given by the Secretary of State and the coming into force of the Order might have undermined the purpose and effectiveness of the Order and allowed action by the parties which the Order is designed to prevent.
- 3.3 Notification was sent to the Lord Speaker on 5th December 2019 drawing attention to the fact that copies of the Order had yet to be laid before Parliament and explaining

why this was the case. The Speaker of the House of Commons will be notified as soon as they are elected after Parliament returns.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.4 As the Order is subject to the negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this Order is the entirety of the United Kingdom.
4.2 The territorial application of this Order is the entirety of the United Kingdom.

5. European Convention on Human Rights

- 5.1 As the Order is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 The Secretary of State has the power under section 42 of the Enterprise Act 2002 to issue a notice intervening in certain merger transactions where (amongst other things) she believes that it is or may be the case that a specified public interest consideration is relevant to a consideration of the merger. National security is a specified public interest consideration. Following the issue of an intervention notice, the CMA must report to the Secretary of State, who is then required to decide whether to refer the transaction to a more detailed phase 2 assessment by the CMA. The report will include the CMA's assessment of whether a "relevant merger situation" has been created, or would be created by the proposed transactions, its assessment of the competition issues relevant to the decision and a summary of the representations it has received on the national security considerations arising. Government Departments and agencies will support the CMA. Taken together this information will enable the Secretary of State to make a decision on whether, if the grounds are made out, to refer the case for the more detailed Phase 2 investigation by the CMA, or in lieu of such a reference, to accept any undertakings the parties may decide to offer to mitigate national security risks.
- 6.2 Under paragraph 2 of Schedule 7 to the Enterprise Act 2002, the Secretary of State also has the power, where an intervention notice is in force, to make an order prohibiting or restricting the doing of things which the Secretary of State considers would constitute "pre-emptive action" and imposing obligations regarding the carrying on of activities or the safeguarding of assets. Pre-emptive action is defined in paragraph 2(12) of Schedule 7 as "action which might prejudice the reference or possible reference concerned under section 45 ... or impede the taking of any action ... which may be justified by the Secretary of State's decisions on the reference".
- 6.3 Although similar orders were made previously by statutory instrument under the Fair Trading Act 1973, this is the first time the power has been exercised by the Secretary of State in a merger case under the Enterprise Act 2002. However, during the public interest intervention into the takeover of Northern Aerospace by Gardner Aerospace, an order was made by the CMA under paragraph 2 of Schedule 7 on 19th June 2018.

- 6.4 Such an order may apply to: conduct in the United Kingdom, but also to conduct outside the United Kingdom if the person concerned is a United Kingdom national; a body incorporated under the law of the United Kingdom or of any part of the United Kingdom; or a person carrying on business in the United Kingdom (section 86 of the Enterprise Act 2002).
- 6.5 A person to whom a such an order applies may seek a derogation from its terms; if the Secretary of State consents, the person may take action which would otherwise constitute a contravention of the order (paragraph 2(2C) of Schedule 7 to the Enterprise Act 2002).

7. Policy background

What is being done and why?

- 7.1 Under the Enterprise Act 2002, the Secretary of State has the power to intervene in certain mergers on public interest grounds covering national security, media plurality and financial stability. The Secretary of State determines whether to intervene in any individual case on a case-by-case basis following consultation with the relevant Government departments and agencies.
- 7.2 The Government has been monitoring the proposed merger between Impross, a small British aerospace company based in Stroud that supplies parts into the UK, US and wider NATO defence supply chains and Gardner Aerospace, a British aerospace company that is owned by Ligeance Aerospace Technology, a Chinese company. As a result, the Secretary of State for Defence wrote to the Secretary of State for Business, Energy and Industrial Strategy to advise her on the national security implications of the merger and to recommend a public interest intervention under the Enterprise Act 2002. Following a consideration of all the evidence provided to her, including the representations of the Secretary of State for Defence, the Secretary of State for Business, Energy and Industrial Strategy initiated a public interest intervention on 5th December 2019.
- 7.3 In accordance with the public interest intervention notice issued by the Secretary of State, the CMA is required to report to the Secretary of State on the merger by 2nd March 2020 after which the Secretary of State will make a decision whether to clear the merger, including by accepting undertakings from the merger parties designed to mitigate public interest concerns, or refer the merger to a more in-depth review by the CMA. This Order is required to prevent actions by the parties to the merger between Impross and Gardner that might prejudice a reference of the matter to the CMA under the Enterprise Act 2002 or impede any action which may be justified by the Secretary of State's decision on such a reference. For example, the replacement of the target business' staff by staff that previously worked at the acquiring business could lead to the disclosure of confidential information.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 The Order does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 This is the first order dealing with this issue and so the need for consolidation does not arise.

10. Consultation outcome

- 10.1 The Order has not been subject to any consultation. The purpose of this Order is to prevent actions by the parties to the merger between Impcross and Gardner that might impede the Secretary of State's ability to take steps to protect national security. As such, it was not appropriate to contact any of the parties or make others aware of the intention to lay this Order before it was brought into force.

11. Guidance

- 11.1 The Department for Business, Energy and Industrial Strategy contacted Impcross and Gardner immediately after the Order came into force to make them aware of this instrument and their obligations under it. Although Gardner's Chinese parent company could not be contacted directly, the Department for Business, Energy and Industrial Strategy requested that Gardner ensure that their parent company was aware of the terms of the Order.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies is limited to those parties to the merger between Impcross and Gardner, and their affiliates, and any third person that is a party to an existing or potential joint agreement involving the merger parties.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this Order because it only affects a single merger and transactions related to or contingent upon it, whilst a public interest intervention under the Enterprise Act 2002 is in progress. These interventions are time limited.

13. Regulating small business

- 13.1 The Order does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The Order will only remain in force as long as the public interest intervention, which is time limited, is in progress.
- 14.2 At any stage, the parties may request a derogation from the Order. If this derogation request is refused by the Secretary of State, the parties have a right to appeal the decision to the Competition Appeal Tribunal.
- 14.3 The Order does not include a statutory review clause.

15. Contact

- 15.1 Thomas Weaver at the Department for Business, Energy and Industrial Strategy Telephone: 02072158060 or email: thomas.weaver@beis.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Chris Blairs, Deputy Director for Competition Policy at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Secretary of State for Business, Energy and Industrial Strategy at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.