

The right to bear ARMs

Blog post by Adviser Leo Ringer, 19 July 2016

Take one “jewel in the crown” of British industry - something export-heavy, research-intensive, tech-driven. Combine with a hard-talking new Prime Minister and a fresh commitment to review and defend foreign acquisitions in the “national interest”. Add in a surprise swoop from one such foreign acquirer, a dash of financial and political opportunism, and you have a recipe for fireworks. We can debate the precise justification of ARM’s status as a national icon, but it nevertheless stands in political terms as one of the UK’s biggest home-grown success stories in tech. So the apparent ease with which SoftBank’s acquisition is beginning its formal life is something of a puzzle.

The answer lies in reminding ourselves of the policy framework that underpins such transactions, and the reality that, whatever the rhetoric, under current UK and EU legislation, policymakers have very little scope to intervene. The Times reports that, on the basis of conversations with SoftBank over the weekend, Theresa May “personally approved the deal”. Number 10 argued that “if you look at the facts of this [deal], it is very much in the national interest”. All of this relies on the hidden premise that May could have stopped the transaction had she wanted to - the policy framework says otherwise.

The only power to intervene lies with the Secretary of State for Business, Greg Clark, who can step-in on three specific grounds, defined in the Enterprise Act 2002, namely to safeguard national security, media quality, plurality and standards, and financial stability. The ARM transaction seems unconnected to each of these. While May’s approbation may have caused SoftBank to pause for thought, this would have been derived from her personal influence, not her legislative power. The same challenge faced Vince Cable, Clark’s predecessor-but-one on his misgivings over the Pfizer bid for AstraZeneca in 2014: the will, but not the way, as GC argued then.

There is one other tool in the kit, beyond the Secretary of State’s veto. Politicians can press acquirers for commitments to do - or not do - certain things once the deal has been completed. In this case, SoftBank has committed to four main things: to “at least double the employee headcount in the UK over the next five years”, to leave the senior management team in place, to retain the ARM brand, and to keep the HQ in Cambridge. They have learned the lesson of Pfizer’s unsuccessful struggle to convince policymakers that, despite the tax motivation of that particular deal, they had the best interests of the UK’s science base at heart.

Less known is that the Takeover Code, the document that regulates the process of transactions, was updated last year to distinguish between two types of commitment: non-binding “intention statements” and binding “undertakings”. This was done to ensure that bidders could not simply make vague commitments to assuage policymakers’ concerns, only to renege on them later (see Cadbury-Kraft) - where deemed an “undertaking”, commitments will be formally monitored by the Takeover Panel.

In SoftBank's case, the small-print of the announcement makes it clear that the commitment to double the UK headcount of ARM will indeed be taken forward as a formal "undertaking", in discussion with the Takeover Panel. But there is no such confirmation for the other commitments - to the ARM brand, to Cambridge, and to the existing senior management team. In fact, a long disclaimer sets out that anything the acquirer says it "intends" to do, it reserves the right to not do.

So the reality is that SoftBank's headcount commitment will, it intends, become a binding one. The others are unambiguously not binding on it - they have zero formal status within the UK's takeover regime. Their worth is only a function of SoftBank's future judgment about the political and reputational cost of renegeing on them.

This leaves the government in a potentially tricky place. The commitments have been spun by some as May's "price" for "approving" the SoftBank deal. In reality, the "price" may be smaller than anticipated and the "approval" toothless in policy terms, albeit not political or reputational terms. To avoid this, the Prime Minister could use her influence to insist that SoftBank presents the additional commitments, in particular the Cambridge HQ guarantee, as binding "undertakings". Failing to do this would set the dangerous precedent that loading an announcement with non-binding commitments can help to get a deal through.

One thing is clear: to have real traction in future takeover situations, policymakers will need to look again at the toolkit. The mechanism by which the new Prime Minister and Business Secretary will review foreign takeovers, and seek to weed out those they disapprove of, will need serious policy attention, as will their definition of the "national interest". One more job for a busy Cabinet.