Invested in a better future

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6 March 2025

Re: BVCA response to the Government's draft strategic steer to the Competition and Markets Authority (CMA)

The private capital industry is an indispensable partner for UK economic growth, standing as it does at the unique intersection of deploying capital, investing for the long term and helping to shape the strategy of the British businesses it invests in. In 2023 alone, it directly supported 12,000 businesses, accounting for 2.2 million jobs and contributing 6% to GDP across all sectors.

The BVCA welcomes the opportunity to respond to this consultation on the strategic steer and agrees with the Government about the role the CMA can play to support and contribute to economic growth. In summary, we think that the following points should be considered when finalising the strategic steer:

- **Competition and Growth:** The Government must ensure its competition policy maintains the UK's ability to attract international investors and its position as a global hub for private capital, helping the Industrial Strategy to leverage private capital investment across growth-driving sectors.
- **Interventions:** The CMA's interventions should be proportionate and evidence-based, focusing on clear market failures.
- **Investigations:** The CMA should take great care when deciding whether to conduct a market investigation and not be swayed by political or commercial pressure in making these decisions.
- **Mergers regime:** The CMA should provide guidance on when it will intervene in non-notified mergers, the factors it will consider in reaching such a decision, the timelines involved and the practical thresholds that the CMA applies in deciding to intervene or not. There has been an increase in investigations and complexity in the mergers regime in recent years, which are potential barriers to economic growth. Navigating the regime is taking additional time, raising costs, and creating uncertainty for our members when they are investing (or considering investing) in the UK through M&A activity.
- **Targeted engagement:** The CMA should directly engage with parties in sectors before any announcement about them.
- **Open dialogue:** The CMA should continue its increased dialogue with industry. Open dialogue from regulators can enhance the understanding of the industry to inform policy and regulatory developments. External engagement and hearing directly from the CMA also helps industry to understand the action the CMA is taking.

- **Reporting approach:** The CMA should adopt a more engaged and responsive approach in its reporting, particularly through updates on enforcement trends and the impact of regulatory decisions on business, which would help industry participants stay informed and aligned with CMA's priorities.

Key considerations for policy priorities

The BVCA aligns with the Government's ambition for the CMA to reflect the need to enhance the attractiveness of the UK as a destination for international investment. Through engagement with members of the private capital industry, and the CMA, we have been able to identify both legislative and regulatory challenges which are hindering investment in the UK.

In 2024, the BVCA and Public First set up the Investment Commission, bringing together a range of experts representing investors, business leaders, academics, think tanks and business groups, to recommend changes that would result in a greater share of investment from private capital funds in the UK.

To support its work, the Investment Commission conducted two surveys of BVCA members, held one-to-one interviews with senior investment professionals, and convened expert roundtable discussions on specific themes. It identified seven barriers to investing in the UK, three of which relate to competition policy and regulation, which we outline below. These barriers cut across growth-driving sectors and industries and should be considered in the Government's strategic steer for the CMA.

Barrier 1: Policy uncertainty

Uncertainty and unpredictable implementation of competition policy can damage the confidence of investors and create problems for the UK businesses they invest in. Capital is mobile. The CMA needs to think more about the messages it is sending to investors, including in the media and via the themes of market studies. These investors are often considering making large, long-term investments in the UK, and could instead look at businesses based elsewhere.

Barrier 2: Complexity around regulation

Members told us that complex competition regulation in the UK and uncertainty about competition policy can make other nations a more appealing destination for investment. A simple message about predictability of competition concerns, along with clarity about who to engage with, really matters.

Barrier 3: Lack of regulatory agility in innovative sectors

The CMA's regulatory approach for tech startups, working with innovative technologies – from AI to medical devices and quantum technology – is unclear. This is largely because the CMA is reluctant to give guidance on their likely approach to market definition and their assessment of competitive constraints, which has a direct impact on the CMA approach to transactions/investments and the conduct in these sectors more broadly. This makes it much more difficult for investors to understand what their return on investment is likely to be, whether a product has a path to market, what the likely route to exit could be and indeed whether a business is viable at all, given the uncertainty.

We have set out our views on the areas of the strategic steer as set out in the consultation document, below.

Using CMA tools proportionately, with growth and investment in mind

We think that the CMA should ensure that interventions are proportionate and evidence-based, focusing on clear market failures. A key challenge for members of our industry is the lack of transparency, predictability and timely access to evidence in proceedings we note below. The key areas identified in the Government's steer for the CMA, in terms of how it conducts and approaches reviews, studies or investigations, align with our views set out below.

CMA markets work

The CMA should take great care when deciding whether to conduct a market study or investigation and not be swayed by political or commercial pressure in making these decisions. Direct engagement with parties in sectors before any decisions are taken would be a positive development.

We have in recent years seen more market studies and investigations, for example, in social care, energy and food, which can negatively highlight perceived issues with competition in the UK and drive policy uncertainty. There are two negative effects of market studies and investigations.

The first is the burden on the businesses that operate in the sector being investigated or studied. Market investigations, in particular, require a very significant level of input from relevant businesses, in terms of market and financial data, and other analysis. Significant management and other resources normally need to be deployed merely to respond to the CMA's questions and information requests. Given the potentially far-reaching consequences of such investigations, companies are required to devote sufficient internal resources to ensure that the legal team is appropriately supported, both in terms of gathering the necessary information and formulating the company's position on the issues being considered. The result is increased cost for the company and the diverting of resources away from the normal activity of the business, which can therefore impact the ability of the business to grow.

The adverse impact is not solely on the businesses themselves but on the investors in those companies (such as private capital funds). This can have a direct impact on investment and therefore growth, with some BVCA members reconsidering investment in a sector once an investigation has started, due to the uncertainty around the actions the CMA will take.

Merger control

In our response to the CMA's draft Annual Plan, we outline three areas which relate to competition policy in the UK: (1) Policy uncertainty, (2) Complexity around regulation and (3) Lack of regulatory agility in innovative sectors. It is in these three areas that the UK's merger control regime is adversely affecting growth.

The merger regime is well-respected and viewed positively in some respects. However, there has been an increase in investigations and complexity in the regime in recent years which are potential barriers to economic growth. Navigating the regime is taking additional time, raising costs, and creating uncertainty for our members when they are investing (or considering investing) in the UK through M&A activity.

The following points hinder growth and investment:

- The CMA has had a larger role since Brexit and has become more interventionist in prohibiting or approving deals with conditions. This is giving the perception to our members that the CMA is not focused on growth and risks having a negative effect on investment in the UK. It is vital that that the UK does not develop this reputation and the focus on growth included in the strategic steer will help, as well as more visibility and engagement.
- Unlike other major jurisdictions such as the EU, which provides full access to case files, the UK system currently limits parties' ability to review and respond to key evidence. This results in a lack of visibility and certainty as they have no sight of the evidence being relied upon in a decision which may have far-reaching effects on their UK business. The UK should and indeed is, looking at these topics under its 4Ps approach (pace, predictability, proportionality and process).
- The lack of alignment between major jurisdictions has resulted in uncertainty, increased compliance costs, and can lead to situations where businesses face contradictory obligations in different markets, ultimately having an impact on UK growth. The CMA should look to engage further with its peers in Europe and the US.
- The CMA has an increasing tendency to make judgements on future competition, increasingly basing its decisions less on the state of market competition now and more on what the market could look like within a five-year timeframe, which is partly a reflection of underlying sectoral changes to the economy. Inherently, this creates much more uncertainty in terms of the outcomes of CMA merger reviews. The CMA should make judgements based on the facts of the specific case and current competition, and should engage with the parties to do so.
- There is a limited scope for appeal within the UK process compared to the EU and US, which allows the CMA to take more radical decisions, extending the range of possible outcomes. This results in greater uncertainty which can deter investment in the UK and demonstrates a lack of regulatory agility.
- The Digital Markets, Competition and Consumer Act (DMCC Act) has introduced new powers for the CMA. The revised merger rules could have a real impact in practice if the CMA starts off with an interventionist strategy of making enquiries about transactions where competition issues seem tenuous. The CMA often takes a number of weeks asking questions about transactions before reaching the conclusion of "no further questions at this time". Moreover, even where such a conclusion is eventually reached, there remains a risk that the CMA may nonetheless decide to call in the transaction for review at a later date (as seen in a number of recent cases). This is enough to inject real deal uncertainty in fast-paced transactions such as venture investments in young, fast-growing, pre-revenue companies where capital is needed urgently and is put to use straightaway. It is important that the CMA continues to review its strategy to ensure it is not interventionist, given these new powers.
- The new 'killer acquisition' thresholds, included in the DMCC Act, have the potential to catch more M&A activity, again increasing the number of deals reviewed by the CMA. It appears that these thresholds are targeted more at the technology and pharmaceutical sectors, which will affect some of our members and potentially prevent/dampen investment in these areas and see start-ups fail due to lack of exit opportunities. The new acquirer focused jurisdictional test introduced under the Act is aimed at vertical and conglomerate mergers, where the theories of harm are much less clear and therefore there is a much

greater uncertainty of outcome in merger investigations. There is a growing perception that any company with UK turnover over £350m (a threshold easily surpassed by many of the companies BVCA member firms invest in) that makes any acquisition in the UK, could see that transaction called in for review (if not notified), even if there is no obvious competition issue. This could hinder growth and investment as more UK companies consider whether they will be required to go through a review.

The above points, taken together, can result in a dampening of investment where there is a concern that the CMA will unnecessarily intervene, causing delay, uncertainty and additional cost.

However, it is important to note that we welcome recent comments from the CMA on its growth objectives and the positive developments in its engagement with the industry in recent months. We also welcome the Growth and Investment Council, to which the BVCA's Chief Executive has been appointed.

Minimise uncertainty by engaging with those affected by the CMA's work and report on impact of work

The BVCA welcomed the acknowledgement in Section 6 of the CMA's Annual Plan of the importance of the CMA working with partners and external stakeholders. The efforts made over the past year by the CMA to establish a dialogue with the private capital industry have been received positively. Where the CMA finds a model of engagement or feedback to be effective in one sector, it should learn from this and apply the learning to its external engagement more widely.

This type of open dialogue can enhance the understanding of the industry to inform policy and regulatory developments. External engagement and hearing directly from the CMA also helps industry to understand the action the CMA is taking, rather than relying on perceptions being formed from media reports. The progress described in Section 6 of the Annual Plan is a good starting point. As engagement progresses, businesses will be keen to see evidence that their feedback has been taken on board by the CMA. The BVCA looks forward to continuing its engagement on policy and regulatory issues.

Guidance

It would be beneficial for the CMA to provide guidance on when it will intervene (in respect of non-notified mergers), the factors it will consider in reaching such a decision, the expected timelines and details on those timelines, and the practical thresholds that the CMA applies in deciding to intervene or not.

The CMA's guidance could also be clearer and stricter in identifying frameworks that the CMA uses to reach decisions on filings. This would give investors greater certainty on whether to proceed with different transactions or not.

The CMA should use its information-gathering powers in a more targeted fashion (clearer and more closed questions) to ease the burden on companies that are involved in CMA investigations.

Engagement with the Government

The BVCA would like to see enhanced coordination between regulators and legislators. We welcomed, for example, the FCA's secondary international competitiveness and growth objective, and its acknowledgement that it will consider how to attract international businesses to the UK and enable UK-based firms to compete effectively in international markets. As the impact of the implementation of this secondary objective is realised, the CMA and other regulators need to be aligned to ensure the UK's regulatory regime remains effective and competitive.

We agree the CMA should continue to engage with the Government on key policy issues, and in the BVCA's response to the draft CMA Annual Plan, we set out the key policy areas and trends identified by members of the private capital industry. These came out of discussions between the CMA, BVCA and our members last year and were as follows:

- The global nature of private capital investment: As the UK competes with other regions for investment, the CMA needs to take into account the competitive landscape globally. Some jurisdictions can be more pragmatic and structured in their approach to competition law enforcement, allowing for greater regulatory certainty. This can make the UK a comparatively less attractive place for global capital firms to invest, which risks less investment in UK companies.
- Digitalisation: The growing role of technology in shaping markets requires the CMA to consider how its regulations and approaches affect the technology sector, which is increasingly becoming a key area for private capital investment.
- The need for scale: As industries and businesses increasingly require larger platforms to remain competitive in a global economy, the CMA should further consider the role of consolidation in enhancing productivity, employment and competitiveness in key sectors of the UK economy (rather than as an inherent threat to consumer interests).

<u>The Industrial Strategy</u>

In order for the Government's Industrial Strategy to successfully leverage private capital investment across growth-driving sectors, the Government must ensure its competition policy maintains the UK's ability to attract international investors and its position as a global hub for private capital. Regulation for each growth-driving sector must work to encourage investment in businesses of all sizes. As private capital-backed businesses contribute 10% of all UK private sector GDP, it is essential the UK's regulatory environment continues to encourage private capital investment. This should be reflected in the strategic steer to the CMA.

As outlined in the proposed CMA Draft Annual Plan 2025 to 2026, "the core objective of the engagement between regulators and industry is to propel the growth, economic opportunity and long-term prosperity for the UK". This can be achieved through effective competition and appropriate consumer protection which drives demand, delivers well-functioning markets and investment in innovative, growing businesses across the UK.

For the UK to retain its global position as a home for investment, Government policy and regulation must be guided by four key principles: (i) ensuring a stable economy; (ii) world class regulatory standards proportionally applied; (iii) competitive advantages to maintain scale and breadth of talent; and (iv) predictable policy frameworks for growth sectors. Through an investment ecosystem which abides by these principles, global capital will remain attracted to the UK, meaning UK firms will be able to seize productive investment opportunities. This submission is focussed on merger control policy and the role of the CMA, but we wish to emphasise in this regard the importance of proportionality and predictability of regulation more widely, including in the application of the investment screening regime contained in the National Security and Investment Act

The BVCA echoes the recent comments from the CMA's CEO, Sarah Cardell, that competition is an engine for growth and an essential lever in the Industrial Strategy, while also acknowledging that, in pursuing growth, competition must be balanced alongside other policy objectives.

Accountability

We welcome the approach set out by the Government on accountability. Our view is that more reporting from the CMA would be helpful. We also agree that the requirement for the CMA to gather regular feedback from CMA stakeholders would be positive.

The BVCA and its members have suggested that the CMA should adopt a more engaged and responsive approach in its reporting, particularly through:

- More regular updates on enforcement trends and the impact of regulatory decisions on business, which would help industry participants stay informed and aligned with CMA's priorities.
- Providing more industry-specific insights and evidence of positive economic outcomes resulting from CMA interventions that promote long-term growth and investment.
- Continuing dialogues with stakeholders, including private capital firms, to measure the effectiveness of its policies and ensure that they are not inadvertently stifling growth in key sectors.
- Progressing with the proposed CMA Merger Outreach Series, forming a practitioners forum and an investors forum, which, taken together would be a welcome opportunity for the CMA to directly engage with business representatives and investors to discuss the subject of mergers. There could also be an opportunity for broader forum or roundtable-style events, to help industry stakeholders become more accustomed to the CMA, how it operates and to highlight to the regulator the industry's dynamics.
- Providing a clearer sense of market definitions (and the related assessment of competitive constraints) and where their tolerances are for scaled up businesses, including where there could be issues around competitiveness emerging.

We welcome continued engagement from the Government as they finalise their strategic steer. Please do not hesitate to get in touch (please contact Ciaran Harris at charris@bvca.co.uk) if you have any comments or questions.