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31 January 2025

## Re: BVCA Response to the CMA's Draft Annual Plan consultation 2025 to 2026: Promoting Competition and Protecting Consumers to Drive Growth, Opportunity, and Prosperity for the UK

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 and applauds the CMA for its recent openness and willingness to engage with the private capital industry. We further welcome the CMA's new wider outreach programme with investors and start-ups, as well as the launch of the CMA's Growth and Investment Council. We look forward to continuing to help increase understanding of how regulators can support innovation and investment in the UK's most promising businesses. In recent months the BVCA, alongside senior members from venture capital and private equity firms, have met with senior CMA officials and these conversations have been positive, allowing for direct dialogue and fostering a more constructive relationship between the regulator and the industry. We encourage the CMA to continue this engagement and are confident that future meetings, with more targeted agendas and clearer desired outcomes, can help create stronger foundations for UK growth and investment.

The BVCA supports the direction of travel for the CMA as set out in this consultation. The stated ambitions of the CMA, for businesses to be able to thrive and innovate, and for the UK economy to grow productively and sustainably, are welcome. Achieving these will require competition regulation that takes a common-sense approach, is applied consistently and effectively balances growth with upholding world-class standards. Regulatory frameworks must be flexible, proportionate and clear enough to allow capital to flow efficiently and predictably. It is vital that the CMA considers the wider positive impact that private capital investment can have on UK businesses as it scales and grows them.

While we generally welcome the approach as set out in this consultation, we would ask that the CMA allow more than two weeks for consideration, engagement and drafting in future consultations, to allow for a fuller response. We have set out our views on regulatory barriers in the UK, before setting out our high-level responses to the consultation questions. We look forward to further engagement on these topics.

### Key considerations for policy priorities

To drive economic growth in the UK, we must bring that capital here, both by encouraging global investors to put their capital in UK funds and by ensuring that investors have the confidence to invest in UK businesses. Currently, UK-based private capital investors have £178 billion of funds to invest, which they expect to deploy in the next three to five years (this is known in the industry as 'dry powder'). Historically, around half of the funds managed in or advised from the UK are put to work here.

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.

*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*

Investors 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, 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.

## Competition and Consumer Protection to drive economic growth, opportunity, and prosperity for the UK

1. In which sectors or markets are pro-competitive interventions most needed to unlock long-term growth and prosperity

BVCA members invest in sectors across the UK economy, ranging from heavy infrastructure to emerging technologies. Following engagement with our members, we think that the technology, energy and life sciences sectors are the areas where pro-competitive interventions are most needed to unlock long-term growth and prosperity. These sectors have the potential to drive growth and prosperity across the UK and private capital firms are ready to invest substantial amounts of capital to grow these businesses. Businesses in these sectors, and in particular the smaller startups, require the quick deployment of our members' investment. Heavy-handed interventions and the associated delays can kill off the investment, resulting in the startup failing.

Any pro-competitive interventions by the CMA will need to be well thought through following engagement with the relevant industry parties.

| 2. How could the CMA use our statutory functions most effectively to help realise these opportunities |
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CMA markets work

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.

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

Merger control

In our opening statement above, we mention 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:

- 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 that the CMA is anti-growth and risks having a negative effect on investment in the UK.
- 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. An example of this approach is the CMA's findings in the Microsoft/Activision case.
- 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". 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.

- 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 <u>any</u> company with turnover over £350m (a threshold easily surpassed by many of the companies BVCA member firms invest in) that makes <u>any</u> acquisition in the UK, could see that transaction called in for review (if not notified), even if there is no obvious competition issue.

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.

A key comparator in this area is the EU, in relation to which the UK needs to ensure it remains competitive and there are key points to make in relation to competition policy frameworks in the EU:
- The jurisdictional thresholds in the EU are much clearer, providing parties with greater certainty on whether their transactions are in or out of scope for a merger review.
- Substantively the EU/UK approach to merger control is broadly similar but it can produce different outcomes e.g. Microsoft/Activision.
- The grounds for appeal in the CMA's process are far more limited than with the FTC (US) and DG COMP (EU), though the latter has a much slower process.
- Lengthy pre-notification periods, combined with onerous internal document disclosure, makes the UK Phase 1 one of the longest, most intensive and expensive regulatory reviews processes globally.

UK inward investment would be supported if the UK were to simplify the rules and approaches the CMA follows, to ensure the UK merger control regime is not seen as overly complex. The BVCA makes the following recommendations in this regard:
- Provide more certainty for investors with further guidance indicating when the CMA is likely to review a transaction or investment.
- Consider offering the possibility of a short-form filing for investors to secure certainty that a transaction will not be called in, where the deal timing permits this.
- If the CMA does wish to review a non-notified transaction, intervention as early as possible would be appreciated.
- In completed transactions, compliance with the standard "hold separate" order can be very onerous and could be simplified if the CMA could facilitate standardised carve-outs for each transaction that place the burdens on the acquiring party at a proportionate level within their corporate group.
- Reconsider grounds for appeal processes to increase the options for merging parties.

3. How can the power of competition, and the work of the CMA, be most effectively applied in support of the UK government's Industrial Strategy

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.

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.

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.

## Updating our Strategic and Annual Plan

1. Do you agree with the CMA's proposed Medium-Term Priorities and Areas of Focus for 2025 to 2026

We generally agree with the proposals.

2. Are there any other areas that we should prioritise during 2025 to 2026

The BVCA welcomes 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.

3. What medium to long-term trends or forces should we consider as we review our strategy

Following the roundtable discussion between the CMA and members of the industry last year, several key long-term trends emerge from the feedback by attendees:

- 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).

As the CMA reviews its strategy going forward, the BVCA would like to see enhanced coordination between regulators and legislators. The BVCA 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.

## Evolving the way we work

1. What aspects of the CMA's processes do you believe work well? What areas do you believe need improving, and how

Several aspects of the CMA's processes were viewed positively in recent feedback by BVCA members:

- The direct engagement with businesses, particularly through roundtable sessions, was appreciated. There is a recognition that a more open dialogue between businesses and the CMA can lead to better understanding of industry dynamics and help shape future regulatory decisions.
- The commitment to transparency and willingness to listen to concerns was praised, especially in relation to improving the CMA's approach to large-scale transactions.

However, members outlined areas for improvement:

- Speed of decision-making: CMA processes are often seen as lengthy, leading to delays in transactions. A more efficient and quicker decision-making process would help foster greater confidence and unlock more investment.
- Proportionality in enforcement: The CMA needs to be more mindful of proportionality in its investigations, especially as regards smaller investments/companies which may warrant less scrutiny.
- Clarity and predictability: The feedback highlighted the need for more guidance on the CMA's standards and expectations, especially in relation to M&A and the changing regulatory environment.
- Media handling: Feedback from BVCA members indicates that statements made by the CMA to media during the course of its work can have a material impact on business and investor sentiment. The CMA should be clear and transparent about how and when it communicates with media and consider language carefully to ensure its views are not open to unduly sensational reporting.

2. Do you see opportunities for the CMA to further strengthen the proportionality, predictability, procedural effectiveness, and pace of our work, consistent with meeting our statutory obligations

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, 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.

3. What relevant examples of international best practice in merger control, competition enforcement or other areas could we learn from (bearing in mind legal and operational differences in regimes around the world)

BVCA member feedback draws comparisons with other jurisdictions, noting that:

- The US and Europe are introducing new competition regulations, but the UK could learn from the more voluntary schemes in place in other countries (such as Australia and Singapore), which are perceived as more business-friendly.
- There is a strong desire for the UK to adopt a more balanced approach, similar to other competitive markets that are not as bureaucratic and are more supportive of investment and growth, especially for private capital firms.

4. What options should we consider as we monitor, evidence, and report on our positive impact on economic growth, including in our Annual Report and Accounts

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 where their tolerances are for scaled up businesses, including where there could be issues around competitiveness emerging.

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