

## **Submission from the Competition and Markets Authority to the Business, Innovation and Skills Committee's inquiry into the Government's industrial strategy**

28 September 2016

### **Introduction**

1. The CMA provides this submission to the Business, Innovation and Skills Committee to assist it with its inquiry into the Government's industrial strategy.
2. The CMA's focus is on making markets work well for consumers, businesses and the economy by promoting competition. Competitive markets and an effective competition policy can play a major role in delivering productivity and growth in the UK economy. The CMA considers that any industrial strategy, and any specific policy proposals relating to it, for example, to refine the existing merger control rules in the UK, should take this into account. The CMA is willing to assist the Government in such an assessment.
3. This submission:
  - (a) Explains the importance of an effective competition policy to any industrial strategy.
  - (b) Describes the relevance of competition based merger control in such a strategy.
  - (c) Explains the UK's current regime for public intervention in mergers on non-competition grounds.
  - (d) Identifies some policy considerations relevant to review of this regime.
4. Some additional information concerning the CMA and current UK merger control is provided in **Annex A**.

## ***Industrial strategy and competition policy***

5. Industrial strategy potentially includes a wide variety of policies aimed at stimulating economic activity, from those focussed on the general development of skills and necessary infrastructure and basic research, through to financial or other support for specific enterprises or geographic areas of the UK.
6. One key element of any effective industrial strategy is an effective competition policy. That is, a collection of laws and policies that preserve or promote effective competition among businesses and enable a competitive environment to develop.<sup>1</sup>
7. It has been consistently found that an effective competition policy:
  - (a) improves productivity and growth in the economy.<sup>2</sup> Competition generally drives firms to improve their internal efficiencies and reduce costs, incentivises firms to invest in innovation, and reduce managerial inefficiency.<sup>3</sup> Competition also rewards more efficient firms and leads to the exit of less efficient firms thereby increasing the overall productivity of the economy.
  - (b) benefits consumers. When markets work well, firms only thrive if they provide what consumers want better and more cost-effectively than their competitors; through greater choice, lower prices, and better quality goods and services.
  - (c) provides the conditions for a stable environment for business and investment, including overseas investment.
8. Competitive markets are characterised by many firms competing vigorously to attract active and alert customers. Competition policy can encourage the formation and maintenance of competitive markets by:

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<sup>1</sup> The relationship between competition and industrial policies in promoting economic development, Study by the UNCTAD secretariat, UNCTAD, 27 April 2009, page 3.

<sup>2</sup> See CMA, *Productivity and competition: A summary of the evidence*, 9 July 2015.

<sup>3</sup> For example, Bloom and Van Reenen (2010) find that strong product market competition appears to boost average management practices through a combination of eliminating the tail of badly managed firms and pushing incumbents to improve their practices. Based on a cross-country survey of management practices covering more than 6,000 firms, they find a positive relationship between the strength of management practices which improve performance and a range of competition measures: Bloom, Nick and John Van Reenen (2010), 'Why do management practices differ across firms and countries', Centre for Economic Performance, Occasional paper n°26. See also Aghion et al (2009) who find that reforms introduced by the UK government throughout the 1990s aimed at reducing entry barriers, such as market liberalisation and interventions by competition authorities, had a positive impact on innovation and productivity in the UK: Aghion, P., Blundell, R., Griffith, R., Howitt, P., and Prantl, S. (2009), 'The Effects of Entry on Incumbent Innovation and Productivity', *Review of Economics and Statistics*, 91, 1, 20-32.

- (a) preventing anticompetitive arrangements and market abuse by dominant firms. The CMA's enforcement powers allow it to take action against companies that breach competition law and in doing so, to deter businesses from future infringements.<sup>4</sup>
  - (b) merger control, i.e. scrutinising mergers and acquisitions so as to prevent those that would substantially lessen competition or where necessary require remedial action.<sup>5</sup>
  - (c) intervening, or encouraging government and regulators to do so, where laws and regulations inhibit competition.<sup>6</sup>
  - (d) ensuring consumers can exercise choice and are motivated to do so. For example, the CMA recently used its powers to investigate retail banking, and decided to impose a range of reforms to ensure banks compete harder for customers' business.<sup>7</sup> The CMA has also taken action to ensure consumers can trade safely on-line.<sup>8</sup>
9. Industrial strategy and competition policy are linked. They can have common objectives, including encouraging economic growth and increasing consumer welfare. Appropriately designed industrial strategy can complement competition policy in a number of ways.
- (a) Free markets can produce too much or too little of a good or service from a societal point of view. This can happen when the costs of production to an individual firm, or the costs of consumption to an individual consumer,

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<sup>4</sup> In 2015-16, the CMA announced fines in three cases under the Competition Act 1998 and ended the year with 13 live cases in industries such as cleaning services, real estate agency services, online sales of consumer products and pharmaceuticals. In one of those cases, the CMA obtained a fine of £2.6 million from three suppliers of galvanised steel water tanks for their involvement in a cartel to divide up customers and agree prices for galvanised steel tanks with the aim of maintaining or increasing prices.

<sup>5</sup> In 2015-16, the CMA referred 11 cases to a Phase 2 investigation and obtained undertakings to remedy competition concerns in 10 merger cases. The CMA also publishes guidance and gives clear reasons for its conclusions which provides the certainty and predictability companies need when considering merger proposals.

<sup>6</sup> The CMA has been active in advocating that government bodies and regulators consider the competition implications of proposed policies and regulations. A recent example is the advice provided by the CMA to Transport for London (TfL) in 2015 in relation to TfL's proposals to change private vehicle hire regulations. There, the CMA advised that a number of TfL's proposals would harm competition between private hire vehicles (and thereby consumers) through regulation which was disproportionate and/or reduced incentives for new entry, expansion or innovation. See:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/481450/CMA\\_response\\_to\\_TfL.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/481450/CMA_response_to_TfL.pdf).

<sup>7</sup> The reforms include requiring banks to enable personal customers and small businesses to share their data securely so they have more control of their funds and can compare services, publish trustworthy and objective information on quality of service, and send out periodic and event-based prompts to remind customer to review whether they can get better value in switching banks [www.gov.uk/government/news/cma-paves-the-way-for-open-banking-revolution](http://www.gov.uk/government/news/cma-paves-the-way-for-open-banking-revolution).

<sup>8</sup> For example, taking action against fake reviews being posted onto review sites, negative reviews not being published and businesses paying for endorsements in blogs and online articles without making this known to consumers. See: <https://www.gov.uk/cma-cases/online-reviews-and-endorsements>.

do not include the wider costs or benefits to society (“externalities”). Industrial strategy can help tackle externalities such as the under provision of skills, infrastructure, R&D, capital and advice to start-up business, which might otherwise jeopardise growth.

- (b) A well designed industrial strategy can remove or reduce distortions in markets which harm consumers, for example, in tax and regulatory systems which impede competition, tilt the playing field or act as barriers to entry, growth or innovation.<sup>9</sup>
10. When intervening to address externalities, distortions to competition can easily be overlooked as policy makers concentrate on potential benefits and direct costs<sup>10</sup>, particularly as it will commonly take some time for the consequences of restrictions to competition to manifest. In the context of designing an industrial strategy, the risks are reduced where governments and policymakers:
- (a) have a clear rationale for any market interventions (e.g. achieve particular economic benefits); and
  - (b) seek to limit distortions of competition resulting from such interventions to the minimum necessary to achieving the policy objective in question.
11. It is also important that Government does not introduce measures which directly or indirectly encourage anticompetitive conduct or collusion<sup>11</sup>, or which create conditions in which anticompetitive conduct can thrive.
12. By intervening in a way that works “with the grain” of markets, and only where necessary, government can minimise distortions to competitive markets whilst still achieving their industrial strategy policy goals.

### ***Merger control and competition analysis***

13. As mentioned above, one key area where public scrutiny is necessary for competition to work effectively, is that of mergers between businesses.
14. In recent years, there has been a developing convergence of view in major trading economies on the desirability of operating a system of merger control

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<sup>9</sup> An example of an intervention to change regulation was when in 2003 the Office of Fair Trading (OFT) found that restrictions on entry to the retail pharmacy sector were restricting consumer choice and competition such that consumers were paying £25-30m more for over the counter medicines than necessary. In response the Government eased the restrictions, prompting more pharmacies to enter the market and to be open for longer.

<sup>10</sup> For example, ensuring that polluters meet the costs they impose on communities so they are not tempted to reduce cost at the expense of their neighbours.

<sup>11</sup> For example, policies that encourage sharing of commercially sensitive information.

primarily based on a transparent competition based assessment by a specialist body with independence from government. However, some national regimes also allow for the possibility of intervention for certain other reasons in the public interest.<sup>12</sup> Further details are provided below.

15. Mergers review in the UK is primarily the responsibility of the CMA and mergers are assessed by the CMA on competition grounds. In exceptional cases, the Secretary of State may intervene if the merger affects national security, media plurality, or the stability of the financial system. The European Commission examines mergers of businesses with EU and global turnover above a certain size, including those that may have an impact in the UK. The EC system also provides for intervention of Member States, including the UK, on specified public interest grounds.
16. This section firstly briefly outlines the history and development of the merger control regime in the UK and in other jurisdictions. Secondly, it briefly outlines the scope of the competition analysis that is generally conducted by the CMA.

## **Evolution of merger control assessment**

17. Before 2003, UK law required mergers to be reviewed against a public interest test.<sup>13</sup> The impact of a merger on competition has, however, always played an important role in merger control assessment.
18. Competition as a key factor in the assessment of mergers was given particular prominence from 1984 when the then Secretary of State, announced that “references to the Monopolies and Mergers Commission (MMC) would be made primarily, but not exclusively, on competition grounds, taking into account the international dimension of competition.”<sup>14</sup> This policy was refined in October 1991 when the UK Government stated that: “the fact that a company is state-owned or directed by a state will not per se justify a referral to the MMC; unless, exceptionally, other public interest issues (such

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<sup>12</sup> Organisation for Economic Co-operation and Development, Working Party No. 3 on Co-operation and Enforcement, “Public interest considerations in merger control”, 14-15 June 2016, available at [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2016\)30/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2016)30/en/pdf).

<sup>13</sup> Under section 84 of the Fair Trading Act 1973, the Competition Commission (CC), and its predecessor, the Monopolies & Mergers Commission, were required to take into account “all matters which appear to them in the particular circumstances to be relevant and among other things” have regard in particular to the desirability of (a) maintaining and promoting effective competition between persons supplying goods and services in the UK; (b) promoting the interests of consumers, purchasers and other users of goods and services in the UK in respect of the prices charged for them and in respect of their quality and the variety of goods and services supplied; (c) promoting through to competition, the reduction of costs and development and use of new techniques and new products, and of facilitating the entry of new competitors into existing markets; (d) maintaining and promoting the balanced distribution of industry and employment in the UK; and (e) maintaining and promoting competitive activity in markets outside the UK on the part of producers of goods, and of suppliers of goods and services, in the UK.

<sup>14</sup> First report: Takeovers and mergers, 27 November 1991 HC 1991-2 ¶ 223.

as security interests) arise, a referral would only be envisaged insofar as competition aspects were at stake.”<sup>15</sup>

19. In 2002, the primacy of a competition-based test was codified in the Enterprise Act 2002 (the Act), which provided that all qualifying mergers would be assessed against a competition test. It allowed for the possibility of assessment by reference to certain other “public interest” criteria, but only where those criteria were specified in legislation and a specific and transparent intervention was made by the Secretary of State to allow for assessment of a particular merger by reference to those criteria.
20. The 2002 reforms also altered the institutional arrangements, moving the decision taking role on competition related issues and the identification and implementation of appropriate remedies for competition problems to independent competition authorities.
21. Since 1989, UK law has also accommodated a European Union (EU) regime for control of mergers (“concentrations”) with a “Community dimension” over which the European Commission has exclusive jurisdiction.<sup>16</sup> Mergers at the EU level are assessed on competition grounds by the Directorate General for Competition of the European Commission (EC).
22. The European Union Merger Regulation (EUMR) prohibits concentrations which significantly impede effective competition in the European Economic Area (EEA) or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.<sup>17</sup>

#### Other jurisdictions

23. The UK has been recognised as having a world class merger control regime which, while ensuring UK interests, has contributed to the development and remains in line with many of our international major trading partners on merger control policy. This fosters consistency and predictability for business including inward investment and enables us to advocate predictable rules for UK businesses investing and doing business abroad.
24. Specifically, focussing merger control on an assessment of the effects on competition of a merger, which is conducted by an independent authority, has

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<sup>15</sup> See Antony Seely, *Takeovers: the public interest*, House of Commons Library, 3 June 3, 2014.

<sup>16</sup> A merger has a Community dimension if it meets one of the two sets of jurisdictional thresholds as set out in article 1(2) and 1(3) of the EU Merger Regulation, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EUMR).

<sup>17</sup> Article 2(3) of the EUMR.

kept the UK in line with international evolution of merger control policy. For example:

- (a) the US has long conducted a competition assessment of mergers. Among other relevant legislation, the Clayton Act 1914 prohibits acquisitions where “the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly”. The two US federal competition enforcement agencies with primary responsibility for enforcing the federal competition laws are the Federal Trade Commission and the Antitrust Division of the US Department of Justice.
- (b) Australia prohibits firms from acquiring, directly or indirectly, shares or assets where the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market in Australia.<sup>18</sup> The competition assessment is undertaken by an independent body, the Australian Competition and Consumer Commission, which has the power to prohibit mergers and impose fines on companies that have merged in breach of the competition laws.
- (c) Canada has a merger control regime in which the Canadian Competition Bureau, an independent law enforcement agency, reviews relevant mergers to determine whether they are likely to lessen or prevent competition substantially in a relevant market.<sup>19</sup>

## **The nature and benefits of a competition based approach to merger control**

25. The CMA is required to assess whether a merger has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the UK for goods or services. This involves deciding whether a merger may result in worse outcomes for consumers and businesses, such as, higher prices, reduced quality or choice. The CMA conducts an investigation which includes factors such as market concentration, intensity of competition, ability of customers to switch and the likelihood and sufficiency of new entry or expansion. The analytical approaches followed are broadly consistent with those conducted in other major trading jurisdictions around the world, giving business an important degree of comfort and predictability as to what transactions are likely to be regarded as potentially problematic.<sup>20</sup>

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<sup>18</sup> Section 50 of the Competition and Consumer Act 2010 (Aus).

<sup>19</sup> Part VIII of the Competition Act.

<sup>20</sup> It is important to note that merger control, although it may involve the frequent use of obscure economic terms, is actually a highly practical exercise, of immediate relevance to the daily life, and price and quality of services

26. The analysis focuses principally on whether any reduction in competition between firms resulting from a proposed or completed merger is expected to result in higher prices or reduced quality goods or services. However, the substantial lessening of competition test is a flexible one, which also allows the CMA to consider a range of further possible non-price effects that might manifest from a loss of competition, for example, whether a merger is likely to lead to a loss of innovation, a loss of research and development effort or investment, a reduction in product range or quality<sup>21</sup> or a reduction in quantities of goods produced (and therefore an increase in prices).
27. The Act also makes specific provision for the CMA to remedy the adverse effects of mergers by remedying the concerns identified (through divestments of assets or businesses or other measures). In addition, merger efficiencies and customer benefits to be taken into account. Regarding the latter, it gives the CMA discretion not to refer a merger to a Phase 2 investigation if it believes that any relevant customer benefits outweigh any adverse effects of the substantial lessening of competition.<sup>22</sup> Relevant customer benefits include lower prices, higher quality or greater choice of goods or services in any market in the UK (whether or not such benefits arise in relation to separate markets from those where the substantial lessening of competition will take place) or greater innovation in relation to those goods or services.<sup>23</sup>
28. The benefits of the merger control regime include acting as a deterrent to mergers which may obviously harm competition, or reduce quality and innovation. In addition, there is evidence that a sound merger control regime based on competition assessment can have wider positive effects, such as, making companies more efficient and, in turn, fostering the creation of jobs and economic growth.<sup>24</sup>

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provided to consumers. To take a recent example, the CMA recently conducted an in-depth investigation into the merger of Ladbrokes and Coral, the second and third largest retail bookmakers in the UK. The CMA identified 642 local areas where the merger could lead to a worsening of the offer made to customers, and as a result Ladbrokes and Coral must divest between 350-400 betting shops. See: <https://www.gov.uk/cma-cases/ladbrokes-coral-group-merger-inquiry>.

<sup>21</sup> An example of a recent merger where the CMA was concerned about competition on grounds other than price was the acquisition by Celesio AG (trading as Lloyds) of 277 pharmacies from Sainsbury's Supermarkets Limited UK Pharmacy. The CMA identified 12 areas in England and Wales where the merging companies' pharmacies are such close competitors that the merger would lead to a substantial lessening of competition and as a result Celesio will have to sell a Lloyds pharmacy in each of these areas to a new owner, approved by CMA. Although the price of prescription medicines is fixed and some features of quality, range and service are specified by regulation, by selling the Lloyds pharmacy in those areas to a new owner, the CMA will ensure consumers can access pharmacies with the relevant expertise and the incentive to attract customers through their service quality. See: <https://www.gov.uk/cma-cases/celesio-sainsbury-s-pharmacy-business-merger-inquiry>.

<sup>22</sup> Section 22(2)(b) of the Act.

<sup>23</sup> Section 30(1) of the Act.

<sup>24</sup> Girgenson Geradin, Industrial Policy and European Merger Control – A Reassessment, TILEC Discussion Paper No. 2011-053 (October 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1937586](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937586).



## ***Arrangements for assessing non-competition based implications of mergers***

29. The CMA recognises that certain non-competition based factors may require consideration in exceptional cases. The Act allows the Secretary of State to intervene in merger control cases on specified public interest grounds. Currently, the specified considerations are (i) national security (including public security, within the meaning given to that term in EU law), (ii) media plurality, and (iii) the interest of maintaining the stability of the UK financial system. Very few interventions have been made since the Act was passed. The majority of those that have been made have been in respect of national security considerations.<sup>25</sup>
30. The legislation recognises the possibility that these grounds for intervention that are specified could be supplemented. Any proposal to do so, however, is governed by a procedure ensuring careful scrutiny.<sup>26</sup> The Secretary of State can only add a public interest consideration by way of adopting a statutory instrument if it is approved by Parliament through an affirmative procedure.<sup>27</sup>
31. The regime under the EUMR is broadly similar to that under the Act in that it contemplates the assessment of concentrations on competition grounds by the competition authorities<sup>28</sup>, while also allowing Member States to take appropriate measures to protect other public interests that are compatible with the general principles and other provisions of Community law. Public security, plurality of the media and prudential rules are specified as public interests for this purpose; other public interests that a Member State may wish to rely on need to be notified to the EC for an assessment of their compatibility with the general principles and other provisions of Community law (e.g. the provisions on freedom of establishment and free movement of capital) before an intervention relying upon them is made.<sup>29</sup>

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<sup>25</sup> Under the Act, the Secretary of State has issued: (i) six intervention notices based on national security grounds, including Alvis Plc/General Dynamics Corporation (2004), Finmeccanica/AgustaWestland 2004, Finmeccanica/BAE Systems 2005, Lockheed Martin UK Holdings Limited/Insys Group Limited 2005, General Electric/Smiths Aerospace Division 2007, and Atlas Elektronik/QinetiQ 2009; (ii) three intervention notices on media plurality grounds, including BSkyB/ITV 2007, Global/GMG Radio 2012, NewsCorp/BSkyB 2010; and (iii) one intervention notice in the interest of maintaining the stability of UK financial system: Lloyds/HBOS, 2008.

<sup>26</sup> The Government stated it would only exercise these powers in exceptional circumstances during debates on what became the Act.

<sup>27</sup> The only additional public interest consideration added since 2002 is the stability of the UK financial system, during the financial crisis and in the context of the Lloyds/HBOS merger.

<sup>28</sup> The European Commission or the national competition authority, depending on a process of allocation provided for under the relevant regulations: Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, replaced in 2004 by the EUMR.

<sup>29</sup> See Annex A and in particular footnote 46, which gives an example of the recognition by the EC of an additional public interest ground for intervention in the UK, relating to the regulation of the water and sewerage sector in the UK.

32. In some other jurisdictions (both in and outside the EU) there are arrangements for taking into account public interest considerations in the assessment of mergers by non-competition authorities. In the EU France, Germany, Italy, Netherlands, Spain, and Portugal all have legislation which allows for the government to intervene in merger control on various non-competition grounds, subject in cases falling within the EUMR to the same restrictions as above. Any such intervention would generally follow the relevant competition authority's assessment. In other jurisdictions, like the US, while most mergers are only reviewed by the competition authorities, some are also subject to a separate review by other regulatory and governmental bodies by reference to particular regulatory or national security considerations.<sup>30</sup>

### **Considerations when reviewing the scope for public interest interventions**

33. As explained above, competition policy – and a competition based assessment of mergers - can complement, and sit at the heart of, an effective strategy to boost UK investment, productivity and growth.
34. UK law recognises that there are a few cases where other considerations may also be relevant to assessing the desirability of mergers in the overall public interest.
35. The CMA notes that the Government has indicated it is reviewing the legal framework for future foreign investment in Britain's critical infrastructure, and is considering the introduction of a cross-cutting national security requirement for continuing Government approval of the ownership and control of critical infrastructure.<sup>31</sup> In this submission, the CMA does not intend to comment on this specific proposal.
36. However, from a general point of view, the CMA draws the Committee's attention to a number of considerations that it considers should be taken into account when considering any changes to the current arrangements for governmental intervention in mergers in the UK:

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<sup>30</sup> See a description of whether and how public interest considerations are taken into account in various OECD countries at: [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2016\)30/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2016)30/en/pdf), and at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2016\)3&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)3&docLanguage=En).

<sup>31</sup> BEIS press release at <https://www.gov.uk/government/news/government-confirms-hinkley-point-c-project-following-new-agreement-in-principle-with-edf>.

- (a) The breadth of the considerations currently specified under the existing legislation: for example, the CMA notes the extended meaning of the term “national security” (see paragraph 29 above).
- (b) The need for clarity. It is desirable that any public interest consideration is defined in a way that ensures it can, so far as possible, be objectively assessed, and is not of unintended or uncertain breadth.<sup>32</sup> It is important that any merger control regime operates on the basis of clear, consistently applied rules that provide legal certainty and thereby inspires business confidence. In defining a public interest consideration, there is a risk of either (i) creating a wide exemption, operating as a catch-all, or (ii) piecemeal changes creating a fragmented system, in either event, creating uncertainty for businesses.
- (c) Effects on transparency of the decision making process. It is important to avoid encouraging a belief that decisions on mergers could be influenced by political/lobbying considerations and remove the transparency, certainty of analysis and independence associated with the current decision making processes.
- (d) Risks to competitiveness. It is important that changes to the merger control process do not dilute the overall message that competitive businesses are critical to the UK economic well-being.
- (e) Effects on investment and trade. Consideration would need to be given to the impact on the UK’s reputation internationally as an open, competitive place to do business and on the UK’s ability to attract investment from overseas through mergers and acquisitions. It might also risk encouraging other states to introduce or exercise similar controls to the possible detriment of UK businesses seeking to do business there.

## Conclusion

37. Competition policy, and, as part of that, competition-focussed assessment of mergers, can complement, and sit at the heart of, an effective industrial strategy to boost UK investment, productivity and growth. The CMA believes it is important that consideration is given to the impact on competition and consumers of any specific proposals for policies to include in an industrial strategy, including any proposals to amend existing merger control rules.

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<sup>32</sup> This is of importance to the CMA to enable it to assess cases that are referred to it by the Secretary of State for consideration of whether a merger operates or may be expected to operate against the public interest, taking account of the relevant public interest consideration or considerations concerned (see section 47 of the Act).



## Annex A

### **The CMA**

1. The Competition and Markets Authority (**CMA**) is an independent non-ministerial department, established by the Enterprise and Regulatory Reform Act 2013 (**ERRA13**), to carry out certain functions on behalf of the Crown.<sup>33</sup> The CMA's stated mission is to make markets work well for consumers, businesses and the economy. The primary statutory duty of the CMA is to promote competition, both within and outside the United Kingdom (**UK**), for the benefit of consumers.<sup>34</sup> The CMA has various functions; in addition to merger review:
  - (a) conducting market studies and investigations in markets where there may be competition and consumer problems;
  - (b) investigating where there may be breaches of UK or EU prohibitions against anti-competitive agreements and abuses of dominant position;
  - (c) bringing criminal proceedings against individuals who commit the cartel offence;
  - (d) enforcing consumer protection legislation to tackle practices and market conditions that make it difficult for consumers to exercise choice;
  - (e) co-operating with sector regulators and encouraging them to use their competition powers;
  - (f) considering regulatory references and appeals; and
  - (g) making proposals and give information or advice on matters relating to any of its functions to any Minister or public authority and, more broadly, to the public.<sup>35</sup> The CMA can make and publish recommendations to ministers on the impact on competition of any proposals for Westminster legislation.<sup>36 37</sup>

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<sup>33</sup> On 1 April 2014 the CMA brought together the Competition Commission (CC) and the competition and certain consumer functions of the Office of Fair Trading (OFT) in a single body.

<sup>34</sup> Section 25 of the ERRA13.

<sup>35</sup> Sections 6(1) and 7(1) of the Act.

<sup>36</sup> Section 7(1A) and 1B of the Act.

<sup>37</sup> See further: <https://www.gov.uk/government/organisations/competition-and-markets-authority/about>.

## **Merger control**

2. The CMA has primary responsibility for the administration of merger control in the UK.<sup>38</sup> Where the relevant jurisdictional thresholds are met,<sup>39</sup> and the transaction is not subject to the EU Merger Regulation, the CMA has the power to investigate mergers irrespective of the (corporate) nationality of the acquirer. The CMA is responsible for enforcing the UK merger control regime under the Act, including obtaining and reviewing information relating to merger situations.
3. The CMA has a duty to refer for an in-depth “Phase 2” investigation any relevant merger situation over which it has jurisdiction, where it believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition in a UK market. Following a reference for a Phase 2 investigation, the CMA conducts a detailed analysis to determine whether: (i) there is a relevant merger situation falling within the UK merger control regime, (ii) that relevant merger situation has resulted, or may be expected to result, in a substantial lessening of competition, and (iii) it should take action to remedy any substantial lessening of competition.
4. The CMA has published a short summary of the UK merger regime process, available at <https://www.gov.uk/government/publications/quick-guide-to-uk-merger-assessment>. Further detail on the substantive assessment undertaken by the CMA can be found in the CMA’s published Merger Assessment Guidelines, available at <https://www.gov.uk/government/publications/mergers-guidance-on-the-cmas-jurisdiction-and-procedure>.
5. In addition to merger review by the CMA, certain mergers are subject to scrutiny from other regulatory bodies. Firstly, to protect investors in companies, specific rules apply to takeovers and mergers of UK companies listed on the London Stock Exchange, including rules related to statements made by parties in relation to offers, which are monitored and enforced by the Panel on Takeovers and Mergers.

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<sup>38</sup> The UK operates a voluntary notification regime, meaning merger parties are not required under the Act to notify the CMA of a merger. The fact that a merger has not been voluntarily notified to the CMA does not, however, mean that the CMA will not review it. The CMA has a market intelligence function to monitor merger activity in the UK and has powers under the Act to initiate investigations that have not been notified where it believes it has jurisdiction to do so.

<sup>39</sup> The Act applies to relevant merger situations. A relevant merger situation arises where (i) two or more enterprises cease to be distinct, or have arrangements in progress or contemplation which, if carried into effect, will lead to the enterprises being distinct, and (ii) the value of the turnover of the enterprises which is being acquired exceeds £70 million, or the enterprises which cease to be distinct supply or acquire goods or services of any description and will together supply or acquire at least 25% of those goods or services.

6. Secondly, sector-specific regulators may have a role in the review of mergers in the sectors they regulate, such as Ofcom in relation to mergers of communications and media mergers, Ofwat in relation to water and sewerage mergers, Ofgem in relation to energy mergers, the Office of Rail Regulation in relation to rail franchise awards and the Civil Aviation Authority in relation to aviation and airport mergers. Depending on the case, the sector-specific regulator may have a role either (a) in assessing the ability of the merged entity to operate under its rules, and/or (b) advising the CMA on issues or concerns relating to the merger.

### ***Public interest interventions***

7. As noted above, while the default position under the Act is that the CMA decides on whether mergers give rise to competition issues and whether any remedies are required<sup>40</sup> based purely on whether the merger has caused or may cause a substantial lessening of competition, the Act also allows for the Secretary of State to intervene in the merger control process when defined public interest considerations are potentially relevant.
8. Specifically, section 42 of the Act provides that the Secretary of State may issue a public interest intervention notice (**PIIN**) in the case of mergers that meet the Act's jurisdictional thresholds, that have public interest implications and that the CMA has not referred for a Phase 2 investigation. If the Secretary of State has referred a merger on such public interest grounds, he or she also takes the final decision on whether the merger operates or may be expected to operate against the public interest, and on any remedies for identified public interest concerns.
9. The public interest considerations on which the Secretary of State may issue a PIIN are currently limited to:
  - (a) national security (including public security);
  - (b) plurality and other considerations relating to newspapers and other media;  
and
  - (c) the stability of the UK financial system.<sup>41</sup>
10. In addition to the specified considerations, section 42(3) of the Act also allows the Secretary of State to intervene on the basis of a consideration which is not specified but which the Secretary of State believes ought to be specified. To

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<sup>40</sup> With the assistance of sector-specific regulators, where relevant.

<sup>41</sup> Section 58 of the Act.

the extent that the Secretary of State intervenes on the basis of a consideration that he or she believes ought to be specified, he or she is required by section 42 of the Act to seek to have that consideration subsequently inserted into section 58 by means of an order approved by both Houses of Parliament.

11. The Act also allows the Secretary of State to intervene in a very limited number of cases that do not qualify under the Act's general merger regime but where a specified consideration is relevant to the merger. These special merger situations may arise in defence industry mergers if at least one of the enterprises concerned is carried on in the UK by, or under the control of, a body corporate incorporated in the UK and where one or more of the enterprises concerned is a relevant government contractor. In addition, following the Communications Act 2003, a special merger situation may also arise where the merger involves a supplier or suppliers of at least 25% of any description of newspapers or broadcasting in the UK. There will be no competition assessment in such cases.

*Process for intervention based on public interest considerations in the UK merger control regime*

12. CMA has an obligation to inform the Secretary of State where it is investigating a merger that it believes raises material public interest considerations. The Secretary of State may then decide to issue an intervention notice.
13. If the Secretary of State issues a public intervention notice to the CMA based on specified public interest considerations, the CMA must then make a report to the Secretary of State advising whether a relevant merger situation has been or will be created and whether that has resulted or may be expected to result in a substantial lessening of competition. The CMA's report also contains a summary of any representations received by the CMA relating to any public interest consideration mentioned in the intervention notice. The CMA does not, however, advise on whether or the extent to which public interests considerations are relevant. It is then for the Secretary of State (and not the CMA) to take a decision on whether to refer the merger for a more in-depth Phase 2 investigation by the CMA based on public interest considerations.
14. If a merger is referred to a Phase 2 investigation on public interest grounds, the CMA will report to the Secretary of State about whether the merger operates or may be expected to operate against the public interest. Under the Act, an anti-competitive outcome is to be treated as being adverse to the public interest unless it is justified by one or more public interest. The Secretary of State will then make the final decision as to whether the merger



has an adverse effect on the public interest and the Secretary of State may take the enforcement action considered reasonable and practicable to remedy any adverse effects identified, including prohibiting the merger.

### ***Public interest interventions in cases under the EU Merger Regulation***

15. Under the EU Merger Regulation (**EUMR**),<sup>42</sup> the European Commission (**EC**) has jurisdiction over “concentrations” with a “community dimension” (as defined in Articles 1 and 3 of the EUMR). National competition authorities (**NCA**s) may not apply their own competition laws to these mergers, except in certain limited circumstances.
16. The starting point for the allocation of jurisdiction between the EC and the CMA is that mergers that fall within the jurisdictional provisions of Article 1 of the EUMR are not subject to review under the Act. This is because mergers reviewed by the Commission under the EU Merger Regulation benefit from the “one-stop shop” principle such that national competition filings are not required in the EU.<sup>43</sup> However, the EU Merger Regulation allows for the transfer of cases between NCAs and the Commission in a number of ways.
17. In terms of the substantive assessment carried out by the EC, similar to the UK’s substantial lessening of competition test, the “significant impediment of effective competition” (**SIEC**) test applied by the EC under the EUMR is based on an economic assessment: that assessment allows for consideration of consumer benefits and efficiencies, but not directly other considerations of industrial policy such as the protection of jobs.
18. However, Article 21(4) EUMR specifically recognises certain defined legitimate public interests other than competition that can justify intervention, specifically public security, plurality of the media, and prudential rules.<sup>44</sup> These three public interest exceptions enshrined in the EUMR have been interpreted narrowly.<sup>45</sup> It also allows for the possibility of specifying other grounds (see paragraph 10 above).

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<sup>42</sup> Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004 L24/1.

<sup>43</sup> Regardless of whether or not a transaction falls to be considered under the EUMR, measures preventing cross-border transactions in the European Union may be caught by the free movement rules.

<sup>44</sup> See discussion of cases involving the interpretation of these provisions in M. Furse, *The Law of Merger Control in the EC and the UK*, 58-61(2007) and C.M. Borges, *The Legitimate Interests of Member States in EC Merger Law*, 9 Eur. Public L. 345 (2003).

<sup>45</sup> There have been only a few cases in which Member States have intervened in transactions under Article 21(4) EUMR. Although Member States are not required to seek formal approval, there have been cases where the Commission has specifically stated that Article 21(4) applies. See for example: M.423 *Newspaper Publishing*, M.759 *Sun Alliance/Royal Insurance*, M.1858 *Thomson/Racal* (II). Any intervention on these grounds must be no more than is necessary and proportionate to achieve these goals. It is also worth noting that any intervention

19. Article 21 is invoked by means of the Secretary of State giving the CMA a European Intervention Notice under section 67 of the Act. In this situation, the Commission will examine, or continue to examine, the merger on competition grounds in the normal way, but the Secretary of State is able to make a decision on public interest grounds.
20. To intervene on grounds which have not been specified, the UK would need to make an application to the European Commission under Article 21(4) to have a new ground recognised. The European Commission has previously recognised new public interest grounds in only a limited number of cases.<sup>46</sup> It has also successfully challenged in the EU courts attempts by other Member States to rely on considerations that the Commission does not consider consistent with principles of EU law.<sup>47</sup>

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must be specifically justified on these grounds: thus, for example, an intervention cannot be made on one ground for a collateral reason, e.g. to preserve a media outlet because of the employment opportunities it offers.

<sup>46</sup> See the Decision of the European Commission M.567 *Lyonnaise des Eaux SA/Northumbrian Water Group*, following the UK Water Industry Act 1995.

<sup>47</sup> For example, in the *E.ON/Endesa* (2006-2008), the European Commission was examining E.On's acquisition of Endesa from a competition perspective. Spain passed laws enabling the national energy regulator to impose conditions on the acquisition, which it did. The EC issued a decision finding that Spain had breached article 21 EUMR. After some iterations between Spain and the EC, the EC issued a second decision finding amended conditions also breached 21 EUMR and the rules on free movement. The EC referred the case to the Court of Justice of the EU which found that Spain was in breach of its obligations under EU law. In the *Albertis/Autostrade* (2006-2008) the European Commission cleared Albertis' acquisition of Autostrade. Italy objected on the basis that the Spanish acquirer would not be able to make the necessary investment in Italian motorways. The EC issued a decision finding Italy in breach of article 21 EUMR. After various further procedural steps Italy withdrew the obstacles to the merger and the EC closed the infringement proceedings.