

Response from the Competition and Markets Authority to the Government's National Security and Infrastructure Investment Review Green Paper

Executive summary

1. The Competition and Markets Authority (CMA) recognises the Government's legitimate interest in ensuring that the United Kingdom's national security interests are safeguarded and that ownership or control of critical businesses or infrastructure does not provide opportunities to undertake espionage, sabotage or exert inappropriate leverage.
2. The CMA considers that any new or amended mechanisms introduced to achieve such objectives should be designed so that they:
 - (a) minimise consequential impacts on, or any extension of, the CMA's existing competition-based scrutiny of mergers; and
 - (b) avoid unnecessary uncertainty and costs, both for businesses and the CMA, in practically applying the measures alongside the existing merger control regime.

The CMA welcomes the Government's stated commitment to maintaining an open and reliable mergers regime.

3. The CMA looks forward to continuing to work productively with Government on these issues as the Government's proposals are developed in light of the responses received to the Green Paper.

Introduction

4. This paper sets out the CMA's response to the Government's National Security and Infrastructure Investment Review Green Paper (the Green Paper) published on 17 October 2017. The Green Paper sets out both short-term steps and long-term reforms to how the Government scrutinises investments for national security purposes. This paper responds to both sets of reforms.

5. The Green Paper highlights the need for the UK to be alert to the risk that those with ownership or control of critical businesses or infrastructure could be provided with opportunities to undertake espionage, sabotage or exert inappropriate leverage. The need to deal with this risk is also recognised by the regimes in other developed and open countries.
6. The CMA welcomes the Government's commitment to addressing this issue in a way that maintains the UK's reputation as a country with effective and largely competition-focused merger control. The CMA agrees that such a merger control regime is an important component in making the UK a destination in which people can invest with confidence. The CMA believes that the current effectiveness of the UK's merger control regime rests, in large part, on its functioning as an independently administered, rule-based system that does not impose undue cost or delay on the vast majority of mergers which do not raise competition (or public interest) concerns; provides legal certainty; limits itself to proportionate, economically-justified interventions; and inspires business and consumer confidence. This is as important for wholly domestic mergers as those that involve foreign investment.
7. In the CMA's view, there need be no inherent conflict between achieving the national security aims set out in the Green Paper and maintaining the effectiveness of the merger control regime. The CMA welcomes that the Green Paper shares this position. The CMA therefore considers that it should be possible to implement both the short-term steps and the longer-term reforms set out in the Green Paper in a way that maintains the current effectiveness of the competition-based merger control regime.
8. We set out below key principles that the CMA believes will help ensure that the proposed reforms are implemented in a way that achieves their national security aims without detriment to the existing merger control regime, focusing principally on the Government's short-term proposals. The CMA looks forward to continuing to liaise with the Government as any proposals that are ultimately pursued take shape.

Short-term steps

9. The Green Paper proposes, in advance of any long-term reforms, lowering the jurisdictional thresholds set out in section 23 of the Enterprise Act 2002 for (1) the military and dual use sector and (2) parts of the advanced technology sector (the 'defined sectors'). Specifically, the turnover threshold would be reduced from £70 million to £1 million and the requirement for the merger to **increase** the share of supply to, or over, 25% would be removed. This change will result in transactions in the defined sectors which would previously not

have given rise to a 'relevant merger situation' doing so, and therefore coming within the jurisdiction of the CMA.

10. The Green Paper makes clear that the purpose of the changes proposed is solely to enable national security-related issues raised by such transactions to be looked at, and that they are not motivated by any other public interest or competition concern.¹ The CMA does not consider the defined sectors should be treated differently from other sectors for competition reasons.
11. The CMA does not expect that the proposals outlined in the Green Paper will bring about any material change in its approach to the assessment of mergers on competition grounds. The CMA therefore supports the Government's proposal to publish guidance that reassures businesses that the changes are focused on national security and are not intended to result in mergers currently assumed not to give rise to competition concerns being scrutinised on competition grounds.²
12. Nevertheless, jurisdictional thresholds provide a legal 'safe harbour' below which transactions will not be investigated. The reduction of the turnover threshold within the defined sectors will remove the benefit that this safe harbour provides to business involved in certain smaller transactions. The CMA therefore considers that it is important that there is sufficient clarity about how such transactions will be treated, in particular to ensure that mergers that currently fall under the safe harbour that do not give rise to either competition or national security concerns are not subject to unnecessary regulatory review.

Voluntary notification of mergers to the CMA

13. The CMA is under a statutory duty to make a reference for a phase 2 investigation if it has a reasonable belief, objectively justified by relevant facts, that there is a realistic prospect that a merger, over which it has, or may have, jurisdiction, will lessen competition substantially.³
14. It is for businesses, often assisted by professional advisers, to decide whether they wish to notify a merger on competition grounds. Where mergers meet the CMA's jurisdictional thresholds, and may raise competition concerns, businesses should self-assess whether to notify a merger to the CMA.
15. The short-term changes proposed in the Green Paper will result in more, and smaller, transactions meeting the jurisdictional thresholds. However, the CMA

¹ See paragraphs 99–101 of the Green Paper.

² See Green Paper Question 5.

³ See sections 33 and 35 of the Enterprise Act 2002 for anticipated and completed mergers (respectively).

does not anticipate that the proposed short-term reforms will require businesses in the defined sectors to adopt a different approach when self-assessing whether or not to notify their transactions on competition grounds. We take this view because we expect that the mergers that might raise competition concerns which would be brought under the new threshold would already fall under the CMA's jurisdiction through the share of supply threshold and are not currently aware of other cases causing concern that we have not been able to investigate because of the current thresholds.

16. The CMA therefore does not anticipate that in practice merging parties will need to materially change their approach to deciding whether to voluntarily notify a merger on competition grounds as a result of the proposed changes to the turnover thresholds.

Exercise of the CMA's powers to call-in unnotified mergers and its duty to refer

17. The CMA has a duty to track merger activity to determine whether any unnotified merger may give rise to a substantial lessening of competition.
18. The basis on which the CMA exercises its power to call-in unnotified mergers is set out in [Guidance on the CMA's merger intelligence function \(CMA56\)](#). The CMA's assessment of whether to investigate a merger that has not been notified to it is not simply a question of the CMA having jurisdiction, but also of whether the transaction raises potential competition concerns.⁴
19. Given the nature of the CMA's statutory duties, it is not able to state that it will never call in any mergers in the defined sectors where it would previously not have had jurisdiction. Nevertheless, the CMA considers it very unlikely, for the reasons given in paragraph 15 above, that it will need to initiate investigations on competition grounds in relation to additional transactions in the defined sectors as a result of the change in thresholds that is proposed.

Measures to support the effectiveness of the UK merger control regime

20. Effective implementation of the short-term reforms will require businesses, and the CMA, to be able to determine reliably whether a transaction falls within the scope of the new regime.
21. In many instances this is likely to cause little difficulty. However, care should be taken to ensure that the scope of, for example, the defined sectors is set out as clearly as possible in the implementing legislation and associated

⁴ [CMA56](#), paragraph 6.

guidance. It will be important that the reforms are centred on activities likely to give rise to national security concerns and provide sufficient clarity in difficult or borderline cases. This will be critical to ensure that businesses, and the CMA, are not unduly impacted by uncertainty or a lack of transparency in applying these thresholds. Given the CMA's role in assessing jurisdiction, any unnecessary uncertainty in the scope of the defined sectors could impose a material burden on the CMA (in particular from merging parties seeking guidance on jurisdiction or submitting unnecessary merger control notifications where jurisdiction is unclear).

22. Similarly, where a transaction may raise national security concerns, it is, in the CMA's experience, particularly important that merging parties should be able to engage with Government on these concerns in a transparent, timely manner. The CMA therefore welcomes the commitment set out in the Green Paper to provide a clear point of contact for businesses and investors to engage with Government. The reputation of the UK, and its merger control regime, could be adversely affected if merging parties and their advisers are not able to engage quickly and transparently with Government in this way. In particular, difficulties in engaging with Government about transactions with a national security dimension could result in unnecessary merger control notifications being submitted to the CMA as merging parties attempt to control the timing of any potential public interest intervention. This could, again, impose a material burden on the CMA.
23. Finally, the CMA recognises that it will continue to be important for business certainty and transaction planning to ensure that effective processes exist for communication and engagement between the CMA and Government in relation to any potential exercise of the Government's powers to intervene on public interest grounds, including for transactions affected by the proposed reforms. The CMA looks forward to working closely with Government in this regard as it develops its proposals further.

Long-term reforms

24. In comparison to the short-term steps, the proposal for long-term reforms are at an earlier stage of development. To this end, we have provided some, initial views below, but look forward to working with the Government as any proposals taken forward are elaborated further.
25. As a general principle, the CMA considers that, while it is appropriate for public interest (and in particular national security) considerations to be taken into account in defined cases, a merger regime that generally assesses mergers only on competition grounds is in the interest of the public, inspires

business confidence and benefits the UK as a whole⁵. By ensuring consistency and predictability for business, such an approach fosters inward investment and enables the UK to advocate for similar predictable rules to be applied to UK businesses investing and doing business abroad. The CMA therefore welcomes the Government's stated desire to maintain an open and reliable mergers regime, and to weigh carefully the rationale for greater intervention against the potential impact on the existing competition-focused UK regime.

26. The CMA will work closely with Government to ensure that any national security-focused proposals taken forward by the Government operate effectively alongside the existing merger control regime and do not result in unintended adverse impacts on that regime. For this reason, the CMA considers, in broad terms, that the design of any such proposals should seek to ensure a clear separation between the two regimes. As the Green Paper notes, this is consistent with the approach taken in a number of other jurisdictions, including the United States.
27. Such separation would, among other things, allow each regime to apply thresholds, processes and substantive assessments that are specifically tailored to the specific (national security or competition) objectives they are each designed to pursue. This would help to maximise clarity and certainty for businesses engaging with each regime.
28. Moreover, it will retain the principle that has underpinned the evolution of merger control both in the UK and internationally over the past two decades, which is of a merger control regime based on sound competition economics with intervention on other grounds, such as national security, only in limited, clearly defined circumstances.

⁵ See further the CMA submissions to the Business, Innovation and Skills Committee's [inquiry into the Government's industrial strategy](#) (Sept 2016) and to the OECD Competition Committee Working Party meeting on [Public Interest Considerations in Merger Control](#) (May 2016).