Consumer and Competition Policy Directorate
Department for Business, Energy, and Industrial Strategy
4th Floor
1 Victoria Street
London
SW1H 0ET

By email: RCCPconsultation@beis.gov.uk

01 October 2021

Dear Sir, Madam

Re: Reforming Competition and Consumer Policy

We are writing on behalf of the British Private Equity and Venture Capital Association ("BVCA"), which is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 700 firms, we represent the vast majority of all UK based private equity and venture capital firms, as well as their professional advisers and investors. Between 2016 and 2020, BVCA members invested over £47bn into around 3,500 UK businesses, in sectors across the UK economy ranging from heavy infrastructure to emerging technology. Companies backed by private equity and venture capital currently employ 1.1m people in the UK and 90% of the businesses our members invest in are small and medium-sized businesses.

Overview of BVCA recommendations

The BVCA is supportive of measures that will enhance the effectiveness and efficiency of the UK competition law regime (including, for example, proposals to streamline the Phase 2 process for UK merger review). However, it is concerned that certain of the current proposals, such as the suggested third jurisdictional test for merger control, are unnecessary and risk capturing benign transactions with little or no meaningful UK nexus (particularly when combined with the current expansive application of the material influence test in UK merger control).

The BVCA is also concerned about the proposed introduction of greater political intervention in CMA activities and certain of the measures related to interim measures and the imposition of remedies which do not appear to have sufficient safeguards to protect the legitimate interests of companies subject to such measures. Finally, the BVCA encourages the government to take this opportunity to review and refine the approach to calculating the turnover of investment funds in the context of antitrust enforcement and parental liability.

BVCA responses to the consultation questions

We have limited our responses to those questions we believe are particularly relevant to our members.

Q1: What are the metrics and indicators the CMA and government could use to better understand and monitor the state of competition in the UK?

While the BVCA does not have a strong view on the merits of the CMA producing regular 'State of UK Competition' reports it would suggest that any such exercise should be limited to key sectors of the economy only. In doing so, it is also recommended that the metrics used are not based on industries, sectors or sub-sectors derived from SIC codes, as has occurred in the past, since this increases the risk

of flawed results in contrast to economic analysis based on correctly defined product and geographic markets.

Q2: Should the CMA have a power to obtain evidence specifically for the purpose of advising government on the state of competition in the UK?

There is no need for the CMA to have an express additional power to gather information for the stated purpose. The Office for National Statistics (ONS) already has sufficient powers to gather information for the purpose of preparing general surveys of the state of trade and business, and to impose penalties for failure to comply, under s. 4 of the Statistics of Trade Act 1947. In the BVCA's view, the CMA should request the ONS to obtain the necessary evidence under these existing powers.

Q3: Should government provide more detailed and regular strategic steers to the CMA?

It is important that the CMA remains independent from Government in order to retain its effectiveness and preserve its credibility as an institution. If the CMA were to be subject to political intervention in the form of "strategic steers" or otherwise there would be a serious danger that such action would undermine enforcement and the standing of the CMA.

Q4: Should the CMA be empowered to impose certain remedies at the end of a market study process?

In contrast to a full market investigation reference, a market study is necessarily conducted in a shorter timeframe and involves a more superficial exercise. The BVCA is concerned that the market study process does not allow the CMA sufficient time to understand the relevant market in sufficient depth to enable the imposition of carefully considered remedies. It follows that, if the CMA were to be given the power to impose remedies at the end of a shorter review, there should be a higher threshold to identify the harm which requires the remedy than there is under the current market investigation regime. It would also require suitable extensions to the timetable to ensure that the remedies are fully thought through prior to their adoption.

Q5: Alternatively, should the existing market study and market investigation system be replaced with a new single stage market inquiry tool?

There may be merit in adopting a single stage market inquiry tool to avoid unnecessary delay and duplication of effort. This would be welcomed if it led to shorter timelines and more efficient outcomes (subject to the need to ensure that there a sufficient degree of in-depth analysis is undertaken before remedies are imposed, as noted in the response to Q4 above). However, it is presently unclear how this proposal would interplay with the market investigation powers enjoyed by sectoral regulators – in particular, would this curtail their ability to conduct reviews under other powers or would this also be subsumed within the single regime?

Q6: Should government enable the CMA to impose interim measures from the beginning of a market inquiry?

The BVCA is strongly opposed to the suggestion that the CMA should be able to impose interim measures from the beginning of a market inquiry. Unlike competition enforcement cases, no laws will have been broken justifying immediate intervention. Moreover, at the start of any inquiry the CMA is

unlikely to have a sufficient understanding of the market to know whether such action is truly warranted and also whether it risks serious and unjustified adverse consequences.

Q7: Should government enable the CMA to accept binding commitments at any stage in the market inquiry process?

While the BVCA considers that this is a good idea in principle (particularly where it might expedite the process and make it less resource intensive) it considers that it is unlikely to be taken up in practice given the expected difficulty in negotiating such commitments between industry participants during the early stages of an inquiry.

Q8: Will government's proposed reforms help deliver effective and versatile remedies for the CMA's market inquiry powers?

If the CMA were to be empowered to require businesses to engage in remedy implementation trials it should also be required to take account of the burden that accompanies such trials before it exercises the power. This includes the costs imposed on businesses and the potential impact on customer relationships etc. Similarly, any CMA power to amend remedies could lead to substantial costs and uncertainty for businesses. Accordingly in considering either implementation trials or the amendment of existing remedies, the CMA should be required to undertake an assessment of whether: (i) the benefits are proportionate to the costs, with a cost-benefit analysis undertaken; (ii) the remedy or variant is focussed on the original adverse effect on competition (AEC) identified; and (iii) any changes should take into account changes to market dynamics

Q9: What other reforms would help deliver more efficient, flexible, and proportionate market inquiries?

Steps should be taken to enshrine the independence of the CMA from the risk of political interference which would otherwise threaten the ongoing efficiency, flexibility and proportionality of CMA market inquiries.

Q10: Should the current jurisdictional tests for the CMA's merger control investigations be revised? If so, what are your views on the proposed changes to the jurisdictional tests?

The BVCA supports the concept of a "de minimis" safe harbour for small acquisitions but the proposed requirement the worldwide turnover of <u>each</u> of the merging parties is less than £10m is too low to be meaningful. The relevant test should also be based on UK instead of worldwide turnover.

The BVCA also supports the proposed increase from £70m to £100m of the UK jurisdictional turnover test. However, it is not expected that the change will have any significant effect since the CMA's very expansive interpretation of the alternative "25% share of supply" test renders the turnover test irrelevant in most cases. The CMA's current approach to the assessment of any *enhancement* of a 25% or greater share of supply means that it can assert jurisdiction over many vertical, potential competition and conglomerate mergers based upon the ability of such a merger to strengthen a pre-existing market position. The BVCA therefore does not consider that the jurisdictional test needs to be supplemented to allow more expressly for the capture of such deals. More specifically, the BVCA is concerned about the following aspects of the proposed supplemental jurisdictional threshold:

- As currently proposed the new threshold requiring only that one party has 25% share of supply and £100m turnover would capture a great number of financial investor deals with no

nexus or impact within the UK. It is expected that the vast majority of financial investors would meet this threshold on virtually every deal irrespective of the target's geographical presence and business activities. This concern could be rectified by splitting the threshold test between the parties so that it could only be met if one party has a 25% share of supply in the UK and the other party has UK sales in excess of £100m.

- The 25% share of supply threshold is too low in the context of vertical or conglomerate mergers. In particular, foreclosure concerns are extremely unlikely to arise at this level of market concentration (as generally accepted in the European Commission's Vertical Restraints Block Exemption Regulation and substantive merger guidelines).

Q11: Are there additional or alternative reforms to the current jurisdictional tests for the CMA's merger control investigations that government should be considering?

The BVCA recommends that the government considers the CMA's current expansive application of the "material influence" test in determining whether enterprises have ceased to be distinct for jurisdictional purposes. As the test is presently being applied, a financial investor with a low minority stake and board representation may be considered by the CMA, in certain circumstances, to have material influence over the target. This over-inclusive test is out of step with most merger control regimes and has significant consequences for members of the BVCA who may hold a number of such, essentially passive, minority participations in portfolio investments.

Q12: What reforms are required to the CMA's merger investigation procedures to deliver more effective and efficient merger investigations?

The BVCA is broadly supportive of the merger investigation procedural reforms proposed. In particular, it agrees that it would be helpful to:

- allow the CMA to agree binding commitments earlier during phase 2;
- only consider the issues at phase 2 that were identified at phase 1; and
- make the recommended changes to the fast-track procedure.

Q13: Should the CMA Panel be retained, but reformed as proposed above? Are there other reforms which should be made to the panel process?

The BVCA considers that the CMA Panel structure should be retained. The potential benefits arising from the diversity of experience and expertise that are available from part time panellists is greatly outweighed by the difficulties that this creates for coordinating availability for hearings and other procedural steps, and the risk of inconsistent approaches between differently-constituted panels.

Panel members should retain the ability to direct the investigation and to decide on suitable remedies. In particular, they must be able to determine which evidence is necessary to allow them to properly decide on a merger. If this was not permitted, case teams would be able to determine outcomes by only presenting evidence to panel members that supported their case. That would effectively undermine the whole point of the panel system, which is to address the possibility of confirmation bias.

Q15: Should the immunities for small agreements and conduct of minor significance be revised so that they apply only to businesses with an annual turnover of less than £10 million?

In the BVCA's view, this immunity ceiling is too low to be meaningful.

Q16: If the immunity thresholds are revised for agreements of minor significance, should the immunity apply to a) any business which is party to an agreement and which has an annual turnover of less than £10 million or b) only to agreements to which all the business that are a party have an annual turnover of less than £10 million?

Please see the response to Q15 above.

Q23: Should government remove the requirements in the CMA Rules on the decision makers for infringement decisions in Competition Act investigations?

No – the BVCA considers that measures that protect against confirmation bias are an essential part of the decision making process.

Q24: What is the appropriate level of judicial scrutiny for decisions by the CMA in Competition Act investigations?

The merits standard of review should remain unchanged. Notably, the merits review is a requirement of the European Convention on Human Rights, and therefore the Human Rights Act 1998.

Q25: What is the appropriate level of judicial scrutiny for decisions by the CMA in relation to non-compliance with investigative and enforcement powers, including information requests and remedies across its functions?

There should be no change for appeals against procedural penalties which should remain subject to proper judicial scrutiny.

Q27: Will the new investigative powers proposed help the CMA to conclude its investigations more quickly? Are the proposed penalty caps set at the right level? Are there other reforms to the CMA's evidence gathering powers which government should be considering?

The BVCA does not support the proposed increase in penalty caps. There is no evidence to suggest that the current levels of fines are failing to deter infringements. The CMA has imposed such fines only 7 times since it came into existence. In all of those cases the relevant fine was below the statutory maximum, indicating that the CMA did not consider that a higher fine was necessary to secure specific deterrence and proportionality (in line with its guidelines).

The BVCA also disagrees with the proposal that Directors should be required to sign RFI responses with the imposition of associated liability and potential penalties. In particular:

- Directors are already under considerable burden of liability risk, which may increase as a result of Government proposals regarding audit and corporate governance.
- Infringements under the Competition Act 1998 and the merger control regime are committed by undertakings, and the merger control regime applies to enterprises. It is not consistent with those regimes to impose personal liability on individuals.
- It is rarely within the gift of a director to verify the accuracy of information that has been prepared by company employees.

Q28: Will the new enforcement powers proposed improve compliance? Are the proposed penalty caps at the right level? Are there other reforms to the CMA's enforcement powers which government should be considering?

There are no published examples of the CMA ever having had to go to court to secure compliance, which suggests that the current approach is effective and proportionate.

Government should take this opportunity to re-examine and refine the approach to aspects of the application of parental liability in the specific case of the investment fund or financial investor liability for the activities of portfolio investee companies. In particular, there should be no actual or de facto presumption of parental liability in the case of the investment fund or financial investor. Moreover, there is particular concern about the method of calculating the investment fund or financial investor turnover when determining the level of penalty that may be applied.

As things currently stand, the competition agencies aggregate the turnover of all portfolio companies "controlled" by the investment funds and consider that figure to constitute the "turnover" of the financial investor managing or advising the investment funds. This is derived from the approach taken by the European Commission under the EU Merger Regulation where it may have some merit as a relatively crude tool for the limited purpose of applying jurisdictional thresholds for review. However, this calculation methodology is inappropriate in the determination of financial sanctions for the purposes of establishing antitrust deterrence since it is incorrectly focussed on the financial investor as opposed to the investment fund which owns the investment and grossly overstates the true economic position of the financial investor and the investment fund. The BVCA would welcome the opportunity to elaborate on this topic if that would be of assistance to the government.

Q29: What conditions should apply to the CMA's use of investigative assistance powers to obtain information on behalf of overseas authorities?

If this is introduced, strict safeguards will be necessary including:

- Reciprocal assistance should be made available in the jurisdiction in question.
- Conduct must be same or similar to conduct that could be investigated by the CMA.
- Court approval should be required before providing such assistance.

The BVCA would of course be willing to discuss this submission with you further - please contact [redacted] [redacted]@bvca.co.uk) at the BVCA.

Yours faithfully,

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