'Reforming Competition and Consumer Policy'

Response to the Public Consultation by the Department for Business, Energy and Industrial Strategy

Proposals on Markets and Merger Control Jurisdiction

Euclid Law Ltd.

Introduction

1. Euclid Law Ltd. (**Euclid Law**) is a boutique competition law firm, with offices in London and Brussels. We advise on all aspects of UK and EU competition law. Our partners and consultants are senior practitioners with many decades of experience of this field, gained at some of the world's largest law firms.

2. We are submitting this paper from the position of practitioners who strongly believe that consumers, businesses and practitioners benefit from rational, predictable and up to date competition and consumer law regimes. The views stated are our own and do not necessarily represent the views of any client of our firm.

3. While the Government's reform proposals are extremely wide-ranging, we have focused this response on the two areas where the proposed changes cause us most concern, namely the markets and merger control regimes.

MARKETS PROPOSALS

4. The Government's consultation looks at strengthening the somewhat unique feature of market investigations. This allows the CMA to impose remedies in markets where there is no evidence of wrongdoing. It is essentially the exercise of a Ministerial power delegated to the CMA, enabling the CMA to regulate parts of the economy without any Ministerial or Parliamentary involvement. Few other competition authorities enjoy such wide-ranging powers. The flipside of that coin is that the process involves a lengthy and rigorous review by independent Panel Members, only at the end of which remedies can be imposed – so-called "Market Investigation References". The Panel Members are part-time and are independent of the CMA and its Board. It is that independence that is seen as an integral part of the system.

5. While the CMA has the ability to conduct Market Studies without a full market investigation (and thus without the involvement of independent Panel Members), it lacks the power to

impose a binding remedy in such cases. If the CMA wishes to impose remedies, the only option is for the Board of the CMA to refer the matter to an independent Panel for a market investigation. Of course, the CMA already has other options available to it short of imposing remedies, such as seeking voluntary undertakings from market participants in lieu of a reference or making recommendations for others to take action (including other regulatory bodies or Government).

6. The ability to impose interim measures currently arises only once the Panel has made an adverse finding following a Market Investigation Reference.

7. Given the need to conduct an initial Market Study before launching a market investigation, the full process involves a CMA Market Study (up to 12 months) followed by a Market Investigation (up to 24 months). The consultation document expresses some frustration with the duration and complexity of that second phase and suggests that this may have contributed to the UK's current competition challenges, including increasing levels of concentration in the UK. It goes on to make a number of proposals, which can be summarised as follows:

    a. either the current two stage process should be wrapped into a single integrated process or the two stage process should be retained and the CMA Board should be given the ability to adopt certain remedies at the end of a Market Study;
    b. there should be an ability to accept voluntary undertakings at a much earlier stage in the process;
    c. the ability to impose interim measures should be provided for at an earlier stage in the process;
    d. remedies should be capable of review at a later date without a further market investigation; and
    e. the Panel should be constituted from a smaller group of full-time professional members.

8. We will comment on each of these in turn:

    Either the whole process should be wrapped into a single process or the two-stage process should be retained and the CMA Board should be given the ability to adopt certain remedies at the end of a Market Study

9. The CMA has to have some way of identifying which cases merit a full market investigation, which should be dealt with in some other way, such us through competition or consumer

enforcement, and which require no further action. Much as a single process looks attractive from afar, there is real merit in retaining the market study phase in order to achieve such a triage of cases to determine which merit further investigation, preventing the use of a sledgehammer to crack a nut. It should also be pointed out that in some cases (e.g. Digital Advertising, EV Charging) the Market Study is sufficient to identity competition concerns and to propose a course of action for addressing them without a full market investigation. The recent EV Charging market study also demonstrates how a market study can be completed in substantially less than 12 months (7.5 months in that case).

10. As part of this response, we have also looked back at Market Studies conducted over the last two years, the vast majority of which did not result in a Market Investigation Reference.

11. If one moved to a single process for all cases, there would still need to be some form of informal process for case selection, similar to the Market Study. The Market Study process was in fact introduced to address that very issue and the need has not gone away.

12. The single stage tool also envisages a significant reduction in the role of the CMA Panel, with a Panel being appointed only at provisional findings stage (once the CMA has identified the AEC and recommended particular remedies) to take the final decision on the existence of harms identified and appropriate remedies. By the time of the Provisional Findings, all the investigation, hearings and substantially all the submissions have already taken place. It is difficult to see how CMA Panel members would be able to interrogate meaningfully the evidence and recommendations made at this point, within a relatively short timeframe (and potentially without access to the parties subject to the inquiry), and thus do anything but rubber stamp the CMA staff's proposals. This would effectively strip the Panel of any meaningful role in the process.

13. The alternative proposal suggests that one might retain the two phases and simply give the CMA Board the ability to impose certain remedies at the end of the Market Study stage. Again, while at first sight this may appear to be a rather beguiling solution, it would require very significant procedural changes to the way that the Market Study is conducted in order to ensure procedural fairness. We also feel deeply uneasy about giving the Board of the CMA a power to impose remedies in these circumstances, even where structural remedies were excluded. It should be borne in mind quite how unusual and far-reaching such remedies are: unlike antitrust cases, by definition, there has been no finding of unlawful conduct of any sort; and, unlike mergers, such remedies would be changing the status quo rather than suspending a change in the status quo. Under the current system, such interventions can be legitimate only

as a result of the involvement of an independent panel. It is difficult to argue that the CMA Board would offer anything like this degree of challenge and independence by way of 'fresh review' of the case team's conclusions.

14. So, on balance, we would be in favour of retaining the current two-stage system. We would also have severe reservations about the CMA Board taking any remedy decision at the end of a Market Study.

There should be an ability to accept voluntary undertakings at a much earlier stage in the process

15. This seems to be a sensible suggestion in market studies or market investigations where there is a small number of participants or where the issue is very clear-cut. It should, however, be noted that the process started off being based on voluntary undertakings and over time, the CMA has gone to making formal orders at the market investigation stage.

16. It would also be open for the CMA to reflect the Government's commitment on alternative dispute resolution from 2011, much in the way that HMRC is doing.[1]

17. To the best of our knowledge, it has never done so, presumably because the CMA sees itself as an enforcer and not a party in a dispute. It is unclear how that mindset is going to change as part of the new proposals.

18. We believe that early mediation could be a very powerful tool in market investigations where there is a small number of market participants. The CMA would not be bound by the outcome of a mediation unless that outcome is accepted formally by the CMA. It would be very sensible to build that step into the markets process. Even if an early mediation is unsuccessful, it will narrow down the issues more effectively and thereby allow for a more focussed investigation.

The ability to impose interim measures should be provided for at an earlier stage in the process

19. This is by far the most controversial part of the Consultation. In circumstances where there is no suggestion of illegality, no unlawful conduct, and as yet no considered conclusion as to how a market should be changed through intervention, it is inappropriate that the market should already be subject to intervention (that changes the status quo) before the investigation has

[1] See https://www.gov.uk/government/news/government-supports-more-efficient-dispute-resolution.

been undertaken. In this respect, any comparison to Competition Act investigations is misleading.

20. That problem is not resolved by setting the legal bar higher – for example by requiring "serious harm". The point is that there is simply no unlawful conduct and there has not yet been an investigation that is sufficiently rigorous to justify an intervention in a market *that is operating lawfully*. If there is unlawful conduct infringing the Competition Act, the CMA can open an investigation and impose interim measures as necessary. Market features alone cannot be a sufficient basis to impose interim measures, absent a full investigation. Short of repealing the Human Rights Act 1998 and throwing all established rights of defence to the wind, this is one proposal that will never fly.

Remedies should be capable of review without a further market investigation

21. This is one area where considerable progress could be made and the proposals in the Consultation are welcome. It should be perfectly possible to have a system whereby an adverse finding by a Panel could be valid for a period of years (perhaps five), during which the remedies can be reviewed (by a specially appointed Panel, potentially including some of the original Panel members) without further market investigation – any amended remedy would however need to meet the same tests of effectiveness, reasonableness and proportionality. During that time the same industry could also be deemed to be protected from further market investigation references.

22. The aspect that is missing entirely in the Consultation is some form of sunset clause, which would require the CMA to commence a new market investigation or otherwise allow the remedies to lapse after a longer period. A sunset clause could, for example, be deemed after 15 years. This would avoid old remedies remaining in place when they are no longer required.

The Panel should be composed of a small group of full-time professional members

23. This proposal has previously been considered and rejected in the UK. The reasons are that a smaller full-time group of Panel Members would be less independent, as it would be harder for them to maintain other outside interests and combine the CMA Panel role with them. They would likely be more dependent on their CMA Panel work and would be likely less – rather than more – diverse. They would also need to be paid more to enable them to serve as full time panel members, rather than being appointed part-time. While some trimming of the Panel may

be desirable (there are currently 34 members) to increase efficiency and the caseload and thus expertise of individual Panel members, that should be possible without losing their part-time status, which is so intrinsic to their independence.

24. As we have already argued, the independence provided by the Panel system is no more important than in the markets regime where far-reaching remedies can be imposed without any finding of illegality. The integrity of the system stands and falls with the integrity of the Panel system. Proceed with caution!

Conclusion

25. Much as the Consultation contains some beguiling aspects for reform, we are of the view that it is a wolf in sheep's clothing. Giving increased powers to the Board of the CMA and removing the independence of Panels will undermine the integrity of the system and make the UK a less attractive market to invest in.

26. We also return to the fundamental point: there is no unlawfulness or illegality in markets cases. It is quasi-governmental power, which is being exercised by an independent Panel, and is so exceptional that it is not typically shared by other competition authorities around the globe. Reducing that independence will diminish the CMA's standing internationally and reduce the attractiveness of the UK as a place to invest.

27. Finally, we would like to quote Panel Member Richard Feasy in his excellent speech on the role of the CMA Panel:[2]

"The regime needs to command the trust and support of the business community if it is to be sustainable.

So, having people on the Panel who have previously been in the same position as the executives who now find themselves in front of the CMA helps overcome the preconception that regulators are run by people who have no real experience of business or of how markets actually function in real life. Having a process that doesn't alienate business people also helps."

[2] See https://www.gov.uk/government/speeches/the-role-of-the-cma-panel-in-decision-making-merger-enforcement-and-reform.

MERGER CONTROL PROPOSALS

28. Our practice includes advising on the application of UK merger control to a wide range of transactions, with a particular focus on international transactions involving at least one non-UK party. We often advise on transactions involving inward investment in UK companies by non-UK investors.

29. The transactions on which we advise commonly require the UK merger control analysis to be integrated with analysis of other merger control jurisdictions, as part of an integrated multijurisdictional analysis. We are increasingly encountering transactions where this multijurisdictional merger control analysis has to be undertaken alongside analysis of filing requirements under a growing range of foreign direct investment regimes.

30. We note that the Government's objective is to have a UK merger control regime that is "as efficient as possible" and which focuses its attention on "mergers most likely to be harmful to competition and consumers, without hindering benign investment".[3] We also note that the Government considers that the UK regime is "working well" on "most metrics".

31. While it is certainly the case that the UK regime provides for a rigorous, independent and fact-based assessment of mergers, our experience over recent years suggests that its defects increasingly outweigh those benefits. These defects primarily arise from the regime's vague jurisdictional limits and onerous procedural requirements, including in particular those associated with the IEO regime. Combined with the CMA's more expansionist approach to asserting its jurisdiction and exercising its powers in recent years, the outcome is substantial uncertainty for businesses and their advisers and material disruption to transactions.

32. We would suggest that an effective merger control regime should be proportionate, predictable and administrable. For this to be achieved, two objectives need to be balanced:

    a. authorities need to be able to identify, review and take effective action against transactions that would have a material adverse impact on competition in their jurisdiction; and

[3] Consultation Document, paragraph 1.90.

b. parties and their advisers need to be able to determine the boundaries of the regime, plan the review process, and assess the associated transaction risk, with a reasonable degree of confidence.[4]

33. Merger control regimes must take account of a trade-off when balancing these objectives. Since authorities' resources are limited, regimes with mandatory filing requirements generally seek to catch deals between larger parties (typically assessed by reference to their turnover)[5], on the basis that such deals are more likely to raise appreciable competition concerns. The higher the thresholds, the fewer transactions will be notifiable. Since some markets are very small, this can lead to some anticompetitive transactions falling outside the reach of a regime, except in those jurisdictions that give authorities a residual power to review transactions that are not notifiable.[6]

34. The UK regime adopts a different approach to this trade-off, by combining vague and flexible jurisdictional boundaries (which can catch very small transactions) with a voluntary filing system, under which parties are generally free to complete a transaction without notification or clearance. The main benefit of this approach is that the vast majority of transactions are never notified, reducing costs to business while leaving the CMA free to concentrate on deals that are more likely to raise concerns, rather than sifting through filings of benign transactions. Until recently, the consensus view has been that those benefits have outweighed the disadvantages, in terms of uncertainty and material costs and disruption for parties facing CMA reviews, especially where transactions have been completed without clearance. For the reasons set out below, however, we consider that this balance has now shifted in the opposite direction to the extent that the UK regime is no longer fit for purpose.

35. We agree that the standard of the CMA's substantive assessment is high by international standards. This means that it generally intervenes in mergers only where there are identifiable competition concerns, which are identified using recognisable economic principles. Transparency is also high, especially during phase 2 reviews, as is the quality of written

[4] As the ICN's Paper on Recommended Practices for Merger Notification and Review Procedures puts it, "*Clarity and simplicity are essential features of well-functioning notification thresholds [and] the business community, competition authorities, and the efficient operation of capital markets are best served by clear, understandable, and easily administrable 'bright line' tests.*"

[5] Given recent concerns over the potential for acquisitions of smaller innovative companies generating little or no revenues by large companies to lead to anticompetitive outcomes, a number of regimes (notably Germany and Austria) have adopted new value-based thresholds.

[6] For example, the USA and now, in certain cases, the EU.

decisions. Case teams are well-resourced and are able to draw on relevant specialist expertise within the CMA.

36. Unfortunately, the strengths of the UK regime are increasingly undermined by procedural and jurisdictional weaknesses which, taken together, have fundamentally shifted the balance on which the UK regime has historically relied. The regime is now overly complex and subject to unpredictable and heavy-handed intervention by the CMA, meaning that it is no longer possible for parties to undertake the meaningful risk analysis that a voluntary filing system requires. The consequences of getting the risk assessment wrong, or missing a procedural point, can be severe, both in terms of deal disruption and financial penalties. This issue is particularly acute for international transactions, where non-UK parties and their advisers must grapple with the jurisdictional and procedural peculiarities of a regime that is a clear outlier.

37. While we agree that the Government's proposed jurisdictional reforms would be helpful on their own terms, they do not address this fundamental problem. Indeed, they would in some respects exacerbate the issue by introducing additional complexity to the regime. We would therefore urge the Government to undertake a root and branch review of the UK merger control regime that addresses its current defects, rather than embarking on yet another partial review.

Background

38. Since the UK first implemented a system of merger control in 1965, the regime has combined two unusual aspects: the absence of any mandatory notification requirement for the vast majority of transactions and a jurisdictional threshold based on the parties' share of supply of goods or services "of any description". Indeed, the origin of 'share of supply' as a test that is expressly based on a subjective administrative assessment of when goods supplied are of the 'same description', rather than a market share test based on economic principles, go back to the definition of monopoly in the Monopolies and Restrictive Practices (Inquiry and Control Act) 1948. This demonstrates that the original intention behind the share of supply test was to catch transactions that risked increasing a party's market power, rather than being the arbitrary and legalistic jurisdictional gateway that it has become.

39. As other countries implemented national merger control regimes, most did not follow the UK's approach, opting instead for regimes that required parties to notify transactions that met specified jurisdictional thresholds (most commonly based on the size of the parties' revenues in the jurisdiction and on a worldwide basis). Notwithstanding this general trend, and despite

a number of significant reforms to its merger control regime, the UK has adhered to the core principles summarised above.

40. Until recently, the divergent nature of the UK regime was not a material issue in practice, given the lack of a mandatory filing obligation and the broadly consistent policy approach taken by the Office of Fair Trading and subsequently the CMA. The subjective nature of the share of supply test was rarely an issue, since both the OFT and CMA interpreted the test in a broadly predictable manner. The OFT and CMA also focused on identifying transactions with a UK nexus that raised material competition concerns. In addition, the introduction of EU merger control meant that the largest cross-border transactions were exclusively reviewable by the European Commission, removing such transactions until this year from the reach of the OFT and CMA.

41. Under this system, parties and their advisers were able to undertake a risk-based assessment of whether a filing was advisable and were able to notify their transaction in a flexible and proportionate manner if a risk was identified. Flexible timetables enabled the duration of the phase 1 review to be adjusted, to give the authority time to undertake its initial assessment. While parties that proceeded with closing a transaction without notifying it faced the risk of disruption in the event of a subsequent investigation, these largely arose at the phase 2 review stage and could thus be avoided in most cases.

Recent changes

42. The UK regime has experienced a number of discrete - and generally unrelated – developments over recent years. While each change has been relatively minor, the cumulative effect is that the UK regime has become materially different from the model summarised above.

    a. The introduction of a **statutory timetable** at phase 1 has led to the CMA pushing much of its substantive review into pre-notification discussions, significantly extending overall timetables. Even though the CMA phase 1 review timetable is already long by international standards, the CMA now undertakes primary information gathering and investigation during pre-notification as a matter of course.
    b. The abandonment of the flexible merger notice format and the move to a detailed **mandatory notification form** for all mergers has increased the amount of information that parties have to provide before the CMA will agree to start the 'phase 1 clock'.
    c. Enhancement of the CMA's **phase 1 information gathering powers** has led to it issuing increasingly onerous information requests to parties and third parties. These

commonly include extensive document production requests, often during pre-notification. At the same time, it has used the threat of material **financial penalties** to compel compliance.

d. UK **merger fees** have increased significantly, as the CMA has come under pressure to cover more of its own costs from fees.

e. The CMA has adopted a **more aggressive approach** to seeking out and 'calling in' transactions for review, especially global acquisitions by large technology companies and transactions in the life sciences sector. This has led it to adopt increasingly creative, convoluted and unpredictable definitions when applying the share of supply test, extending to both the question of whether the parties' products are of 'the same description'[7] and the question of whether there is a relevant supply in the UK.[8] As a result, it has become practically impossible for parties and their advisers to assess whether the CMA has jurisdiction over a transaction. It has also led to extensive information gathering by the CMA during pre-notification and in the course of its phase 1 review, from parties and third parties, *simply to determine whether it is able to assert jurisdiction*. The nature of the share of supply test means this information gathering is often entirely independent of the fact gathering required to establish whether a transaction raises a substantive competition concern. The CMA may adjust its share of supply analysis throughout its investigation, making it difficult for parties to engage. Once the CMA has reached its definitive position parties have limited ability to challenge its assessment, with the CMA enjoying broad discretion under statute.[9] In the most extreme cases, this has led to the CMA blocking transactions with minimal UK nexus, in circumstances where the transaction has been cleared in more directly affected jurisdictions.[10]

f. The introduction between 2018 and 2020 of **new lower jurisdictional thresholds** for acquisitions of companies that are involved in the production of military/dual use equipment, quantum technology, computer hardware, artificial intelligence, advanced

[7] See, for example, *Google/Looker*, where the share of supply was assessed by reference to "tools for analysing web analytics data", whereas the competitive effects were analysed by reference to the supply of business intelligence tools.

[8] See, in particular, *Roche/Spark*, where the share of supply was assessed (in a *12 page* section on jurisdiction) by reference to "the number of UK-based employees engaged in activities relating to novel non-GT and GT Hem A treatments (including commercialised treatments and pipeline treatments at Phase II (or more advanced) stage of clinical development) in the UK" and *Sabre/Farelogix*, where jurisdiction was assessed by reference to "the supply of services to British Airways that facilitate the indirect distribution of airline content".

[9] As confirmed by the CAT in its judgment in *Sabre Corporation v. CMA*.

[10] See footnote 6 above.

materials and cryptographic authentication has added more complexity to the UK regime, as well as opening up a greater range of transactions to political intervention.[11]

g. The UK's **departure from the EU** has led to parallel reviews by the CMA and European Commission. This is a particular issue for more complex international transactions, where the UK regime risk is being assessed alongside other regimes. The unique aspects of the UK regime make this difficult.

h. The CMA's enhanced **powers to prevent post-closing integration** during its phase 1 review, as enforced through the Initial Enforcement Order ('**IEO**') process, has materially increased the procedural burden on parties. The CMA takes a strict approach to compliance and significant financial penalties for non-compliance are increasingly common. The costs and effort required for monitoring and reporting on compliance with an IEO can now rival those of the substantive assessment itself.

43. The cumulative impact of these changes on merging parties is significant. In particular, it has become increasingly difficult for parties to predict whether and how the CMA will assert jurisdiction over their transaction.[12] While a degree of uncertainty is inherent in a voluntary filing regime, and it has always been the case that the CMA (and before it the OFT) would look for ways to assert jurisdiction if they saw a competition issue, the lengths to which the CMA can now go - including to assert 'share of supply' jurisdiction over purely complementary transactions - have rendered the share of supply test meaningless. This does not mean that parties can simply ignore the test, however, since it still forms the basis of the CMA's legal jurisdiction. As such, the CMA have to determine whether it is met in the absence of sufficient UK turnover and parties may be reluctant to concede that it applies in the absence of any clear product overlap. This is the worst of all worlds.

44. The adverse consequences for parties who get the jurisdictional or wider risk assessment wrong are now substantial. While the risk of unwinding a completed transaction has always been present in cases raising serious concerns, given the non-suspensory nature of the regime, transaction risks are now also material in phase 1 clearance cases, where concerns are ultimately insufficient to justify an in-depth investigation. To give just one scenario, where a buyer has proceeded with completing a transaction while a CMA phase 1 review is underway

[11] Although this particular issue will be resolved next year when the NSI Act regime commences, it has caused additional complexity in the meantime.

[12] The ICN Best Practices paper recommends that, as far as jurisdiction is concerned, "publicly available materials should permit ready determination of […] the precise tests or thresholds that govern whether the parties must notify the transaction or whether the competition agency has jurisdiction over a transaction". Notwithstanding the available CMA guidance, we consider that the UK regime does not meet this threshold.

(as it is entitled to do), the inevitable IEO means that it will be unable to assert effective control over the acquired business until the CMA's review is complete. As a result, in addition to the significant compliance costs associated with the IEO and derogations process, acquirers have to manage a situation where they have paid to acquire a business that is in a form of limbo during a potentially extended review. In such situations, the value of the acquired business may be eroded over time as the uncertainty arising from the CMA process continues, with staff and customers drifting away. While the CMA will counter that parties can simply postpone completion until the CMA's review is complete, this also creates uncertainty for the parties and may not be practicable, or even contractually possible, once mandatory merger control consents have been obtained.[13]

45. The unique and uncertain nature of the UK regime also makes it more likely that a CMA investigation may not start until long after other authorities' reviews have started or even ended. Combined with the CMA's lengthy procedure, this increases the disruptive impact of a CMA review on international deals.

46. Responding to parties' need for enhanced comfort with respect to the UK merger control risk, the CMA's Mergers Intelligence Unit has developed an informal practice, under which it is prepared to indicate whether it wishes to 'call in' a transaction for a full review based on a short briefing memo from the parties. Parties adopting this procedure, which amounts to a de facto 'short form' notification, bring a transaction to the CMA's attention in return for establishing at an earlier stage whether it will be subject to a full CMA review. While this process is certainly helpful as a means of identifying CMA risk at an earlier stage, without the need for a full filing, the fact that the CMA's conclusions are expressed to be provisional (and have subsequently been reversed in at least one case of which we are aware) reduces its value, as does the fact that it is an informal procedure that is dependent on MIU resourcing. Nevertheless, we are seeing this procedure used in an increasing number of cases, reflecting the significant discomfort felt by parties over relying on the voluntary filing principle (i.e. waiting and seeing whether the CMA contacts them) in the new environment summarised above.

47. In summary, the current state of affairs is deeply unsatisfactory and causes material disruption to merging parties on a global basis. In a short space of time, the UK regime has gone from one that was probably underestimated to one that is viewed as one of the most onerous in the

[13] Many international merger agreements will include standard condition precedent wording that requires the parties to close once all mandatory consents have been obtained. As the UK regime does not impose a filing or suspensory obligation, CMA clearance will not be a condition precedent under such a clause, unless it is specifically included.

world. While the CMA and government may see this as a welcome development, to the extent that parties may be less likely to enter into anticompetitive transactions affecting the UK, the impact goes far beyond that. To be clear, our concerns are not with the intensity of the CMA's substantive review but rather with the uncertainty and disruption arising from the CMA's expansionist approach to jurisdiction, abetted by flaws in the regime's architecture.

48. While we can understand the government's reluctance to abandon the long-standing voluntary filing principle of the UK's regime, in our experience we have already moved a long way from that principle. In effect, the UK increasingly resembles a mandatory regime with suspensory effect, given the material adverse consequences of the IEO process. At the same time, we still have the vague and arbitrary jurisdictional boundaries that were created for a voluntary, non-suspensory system. The government's proposals must be seen in this light.

The Government's Proposals

49. In summary, Government is proposing three changes to UK merger control jurisdiction:

    a. increasing the £70 million UK turnover threshold to £100 million;

    b. removing mergers where both parties have worldwide revenues of less than £10 million from the CMA's jurisdiction; and

    c. creating a new threshold, under which the CMA will be able to review a transaction if any party has both UK turnover of more than £100 million and a UK share of supply of 25% or more.

50. The first two of these proposals are broadly welcome, in that they will marginally reduce the number of small transactions that are caught by the regime. The proposed increase in the turnover threshold will have little or impact on the concerns outlined above, however, since they largely arise from the CMA's application of the share of supply test. Furthermore, the second proposal is unlikely to remove many transactions from the scope of the regime, since cases typically involve the acquisition of a small company by a larger one.

51. We do not support the third proposal as it stands, as it introduces a further convoluted threshold for what is already an unusual and complex regime. While it is apparently envisaged to catch acquisitions by larger companies, it does not say this but as proposed would also apply where the *target* meets the threshold. By using the share of supply concept, it also exacerbates the current issues surrounding the separate share of supply threshold. While we acknowledge

the concerns can arise from acquisitions of nascent competitors by dominant companies, this concern is already being addressed in digital markets by the Governments separate proposals in that area. The CMA's current practice has in any event demonstrated that the regime enables the CMA to review such transactions across the economy, including life sciences.

52. The only benefit of this proposal is that its introduction would amount to implicit acknowledgement that the CMA's application of the share of supply test in cases that raise concerns over innovation competition has gone well beyond the transactions between direct competitors that the share of supply test is intended to catch.

53. Were the Government to proceed with implementing this threshold, at the very least it should be based on market share, rather than share of supply, and should apply only to parties that acquire a controlling interest, rather than any party to the transaction.

Alternative proposals

54. In light of the concerns raised above, we welcome the Government's invitation for suggestions of other reforms to the UK jurisdictional tests. We would propose the following alternatives, in order of preference:

Mandatory filing regime

55. The introduction of an entirely new mandatory filing regime, based on clear turnover-based thresholds, would address most of the current problems with the UK regime. It would resolve much of the uncertainty and make it easier for parties to international transactions to align the UK notification process with that in other countries. A requirement for a minimum level of UK revenues would resolve issues concerning CMA overreach in cases with limited local nexus.

56. While this would have the disadvantage of significantly increasing the number of CMA notifications, with a knock-on impact on parties to competitively benign transactions, the impact could be moderated by setting the turnover thresholds at a sensible level. These could be supplemented if necessary by a value-based threshold, to enable the CMA to review acquisition of highly valued companies with low or no turnover. The burden could also be reduced by simplifying the notification requirement for transactions that are less likely to raise concerns, enabling use of a short form filing similar to the current briefing paper format. A similar light touch approach has been adopted for the NSI Act regime.

57. If Government has concerns that too many small transactions would fall outside the regime, the CMA could retain a residual jurisdiction to call in transactions that raise *prima facie* competition concerns, provided that this power was used only exceptionally.

Simplified jurisdictional thresholds

58. As an alternative, in the event that adoption of a mandatory regime is seen as a step too far, we would suggest retaining the voluntary filing regime but removing the current turnover and share of supply thresholds altogether and replacing them with a simple requirement that the target have a minimum level of UK revenues or assets. While the CMA would be able to review almost any transaction that raises concerns under this approach, it would at least remove the need for extended and often fruitless information gathering and debate over whether the share of supply test is met.

59. In parallel, the briefing paper process could be formalised, to provide parties wishing to bring a transaction to the CMA's attention with greater certainty.

Tighten up existing thresholds

60. As a minimum, we would recommend replacement of the discredited share of supply test with a market share test based on widely understood economic principles. While this would not entirely resolve uncertainty, since views on market definition may differ, it would at least be more predictable than the current regime, which has become arbitrary and subjective. It would also better reflect the origins of the share of supply test, namely combating monopoly power by controlling mergers of direct competitors.

61. In parallel, we would recommend an improved local nexus requirement and that the rules be clarified to ensure that the regime only catches acquisitions of businesses that actually supply goods or services on a market.

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