

Consultation Response

Strategic Steer to the
Competition and
Markets Authority

March 2025



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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Competition Law Sub-Committee (**Committee**) welcomes the opportunity to consider and provide comments on the Strategic Steer to the Competition and Markets Authority (**CMA**) Consultation (**Steer**) that has recently been opened by the UK Government.

General Remarks

We note that the Steer ostensibly sets out a shift in the approach underpinning the enforcement of competition law and regulation in the UK (including in Scotland), with an emphasis being placed on the CMA to promote economic growth and investment. We understand that this shift seeks to address a perception that the CMA may have become overly assertive and interventionist in its approach to its statutory role (particularly in the context of mergers) and that there is a need for a new strategic steer to correct this.

However, in our view it is very important that even with this shift in approach, the Government must continue to ensure that the CMA remains focused on effective competition within the bounds set by law and on ensuring that the CMA's role as the UK's principal competition regulator is not undermined or downplayed. We therefore consider that the central legal and policy objective underpinning the Steer is a need to protect the independence of the CMA, and that this should be considered as vital to the success of any new approach.

Specific Remarks

Delivering Investment and Economic Growth

We are of the view that certain proposals in the Steer are broadly sensible in their approach. For example, we support a Steer that encourages the CMA to focus on markets and harms that particularly impact UK based businesses and consumers.

However, we would suggest that greater clarity is provided by the Government with regard to its meaning when it speaks of prioritising “pro-investment interventions”. We believe that this is not sufficiently clear and that greater clarity is essential if the Steer is to achieve Government's desired outcomes. Without such clarity, we are concerned that policy of prioritising "pro-investment" decision making could expose the CMA to a risk of lobbyist "capture" and thus undermine competitive practice in the UK (including Scotland).

To further explain, we consider that it is vital that the Steer that Government provides to the CMA avoids promoting a situation where businesses that are averse to CMA intervention can lobby against such intervention simply by framing it as a risk to investment and economic growth. The CMA simply will not be able to perform its core role where it is subject to pressure to give priority to those business actors that are the most outspoken, or that wield the most significant economic power. It is vital that any strategic steer avoids appearing to promote anything other than the CMA adopting a stance that is in the best interests of free

competition and it is essential that the CMA continues to promote the benefits of free competition in the medium to long term rather than focusing on the short term value of clearing individual business transactions. Rather than being pro-growth, we consider that such a situation would be anti-competitive and therefore harmful to growth in the medium to long term. This is because it is liable to accommodate a situation that permits the concentration of market power in the hands of a few businesses rather than offering a means to protect and encourage the competitive process (including in particular the ability of smaller and innovative businesses to drive effective competition) within the UK.

We therefore consider that the starting point of any strategic steer needs to be to promote the role of the CMA as an independent competition authority that is focused on a statutory duty of promoting effective competition. In doing so, we agree that the CMA should be encouraged to exercise its powers proportionately and not in an overly interventionist manner so as not to have an unwarranted chilling effect on business innovation and investment. However, care needs to be taken that the Government does not undermine the independence of the CMA and that a separation is maintained between the CMA's specialist regulatory role and government economic policy which is, for good or ill, liable to focus on short term outcomes.

We consider that the CMA's existing powers and functions clearly permit it to act in a proportionate manner, including when examining merger situations, and that it can and should be encouraged to adopt a more risk-focused approach when determining which business transactions require intervention.

We also consider that certain specific functions within the CMA could be better utilised. Specifically, the Mergers Intelligence Committee (**MIC**) could and should be put to better use in assessing mergers without the need for formal investigations (outside of reportable events undertaken by firms with strategic market status). We recognise and support the calls that have been made for the MIC to be braver in its approach in relation to providing businesses with comfort

that transactions have been determined to present low risk and can proceed without the risk of a call-in.

More broadly, we consider that it is vital to the integrity of the UK's merger assessment regime that it remains driven by a fully independent competition authority. That independence, and clarity and consistency of decision making, is central to providing legal and other advisers with the information that is necessary to properly advise their clients. The most "chilling" impact on business transactions comes from an inability, arising from ambiguity or contradiction in existing decisional practice, to determine how the CMA is liable to approach a given merger situation including the conditions that it is likely to impose. That being so, we would suggest that further Government guidance on the application of the new regime is vital to providing the necessary clarity, particularly in the context of applying and utilising statutory jurisdictional tests that remain exceptionally broad.

Engagement with Government

We note that the Steer appears to be intended to encourage the CMA to engage with the Government on key policy issues and to support its agenda when performing its statutory role. We would not demur from any strategic Steer that promotes the CMA taking account of Government policy when undertaking its functions. However, we consider that it is absolutely vital that the CMA feels that it retains the independence to prioritise (according to its own expert judgement) the importance of competitive markets. To that end, we would strongly emphasise the importance of the CMA continuing to inform and make recommendations to the Government with regard to competition policy in the context of clear free market principles. We would therefore endorse a clear statement by Government that it accepts recommendations to give a strategic Steer that focuses on the importance of free competition and does not, inadvertently or otherwise, appear to suggest a political appetite to accept political intervention that undermines those vital factors of free and fair competition.

However, we would emphasise the central importance of both the CMA and the Government is to recognise that a distinction needs to be drawn between the short to medium term aspirations of any Government to deliver economic growth between election cycles, and the (more important, in our view) longer term outlook that the CMA has the ability to take account of regarding what healthy competition will look like beyond a Governmental term.

Although we welcome strong, genuine and ongoing engagement with the Government, we are also of the view that the CMA cannot operate effectively if it does not engage with those that it is actively regulating, as well as other government departments and entities that have market and competition functions that are central to the Government's growth agenda (e.g. the Competition, Markets and Regulatory Reform Group within the Department of Business and Trade). Therefore, we consider that there appears to be a need for active collaboration with all stakeholders including businesses of all sizes as well as intragovernmental groups.

Accountability

Given the shift in approach that the Steer has outlined, and taking appropriate cognisance of the recent departure of the CMA's former Chair, we understand the Government to be of the view that the CMA has not done enough in terms of growth and the development of the economy when it comes to the exercising of its primary functions. It is therefore important that the CMA takes accountability for this and takes every opportunity to provide the Government with recommendations that improve policy which promotes both competition and in effect economic growth and investment.

However, in doing this we consider that the CMA must be given the space it needs to act independently and to ensure that it exercises its statutory role properly. We consider that the recent change at the top of the CMA only underlines a clear

need to give the CMA time (free of Government intervention) to foster a new way of working that strikes a balance in the objectives it is required to accomplish. Whilst we accept that the CMA ultimately needs to be accountable for its policy and decisions regarding investment and transaction decisions by businesses, it is essential that the Government does not intervene so much as to politicise the CMA's role in promoting competitive markets in the UK (including Scotland).

Protecting the independence of the CMA, and its ability to properly examine business transactions, requires not only that changes to the leadership of the organisation should emphasise the importance of that independence, but also that the Government is seen to act in a transparent way in connection with its choice of appointments and the handing down of strategic direction. In particular, the individuals that are appointed to positions of leadership need to be impartial in the exercise of the powers of the CMA and driven by its statutory functions rather than political imperatives even where these imperatives favour short term growth. We would be concerned about any situation that might involve appointing an individual with particular sectoral or business interests as Chair of any CMA inquiry group since this is likely to risk undermining the ability of the CMA to perform its statutory role.

Such a change to the role, in practice, of the CMA, could for example be seen as a harbinger of a watered down approach to enforcement, just as the Digital Markets, Competition and Consumers Act is becoming operational. We would therefore suggest that the Government consider and/or adopt possible options to ensure impartiality, for example, through the creation of an independent intra-Governmental panel with a remit to assist in the appointment of a new Chair, alongside helping to make other key decisions relating to the operational functions of the CMA.

Alongside this, we also consider that the CMA needs to be reflective of its previous failures and successes. In doing this, the CMA should be prepared to exercise (and act upon) such self-reflection. We also believe that there is a need for Government to identify the instances where macroeconomic policies that it has

promoted have (with the benefit of hindsight) failed to achieve pro-competitive outcomes, so as to ensure that this does not happen again in the future. In doing this, we would suggest undertaking regular reviews of guidance provided to the CMA and other regulators with a view to identifying where this may have been less than pro-competitive.

Concluding Points

In view of the foregoing, we consider that the ongoing independence of the CMA and the establishment of certainty in legal approach must remain the two main principles that will underpin any successful steer.

Should the Government fail to recognise these two important principles, we believe that the Steer will have overcorrected a perceived issue with regulatory intervention and that this will swing competition policy too far back towards a situation that permits the focusing of market power in the hands of a small number of well-established or advantaged businesses.



For further information, please contact:

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