BEIS: National Security and Infrastructure Investment Review (Proposals for long-term reforms)

Consultation response from the

Centre for Competition Policy

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Date: 9 January 2018

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This consultation response has been drafted by the named academic member of the Centre, who retains responsibility for its content.

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CCP Response to BEIS National Security and Infrastructure Investment Review (Proposals for long-term reforms)

1. I welcome the opportunity to respond to the second phase of BEIS's National Security and Infrastructure Investment (NSII) Review, in relation to the proposals for long-term reforms encompassed in Chapter 8 of the Green Paper. Here, I wish to respond specifically to Question 14 of the Green Paper which broadly relates to some of the issues covered in my response to the Government's short-term proposals.[1] As I mentioned in my previous response, the Green Paper should be commended for emphasising the importance of ensuring that any uncertainty arising from the proposed reforms is kept to a minimum. The characteristics of 'transparency' and 'predictability' are key to achieving this, which is why I wish to focus on these in this response.

Q14. How could the Government best ensure that the expanded call-in power is exercised in a proportionate way and to provide sufficient transparency and clarity to businesses?

2. If the Government's call-in power is to be extended to encompass non-merger transactions, I broadly support the proposal to keep the national security and competition assessments separate. The long-term options for reform draw a great deal of inspiration from the processes at play in the merger regime under the Enterprise Act 2002. But, in the context of the proposal to assign the Secretary of State (SoS) the power to make a special "national security intervention",[2] the Green Paper is silent on whether the role of the SoS would be comparable to the procedures outlined under the 2002 Act.

3. In the 7 merger cases that, to date, have raised national security concerns and prompted the SoS to issue a public interest intervention notice (PIIN), the SoS has sought formal advice from the Competition and Markets Authority (CMA) before making his/her final decision on whether or not to refer the merger to an in-depth Phase II assessment. The report that the CMA prepares for the SoS will advise on any relevant competition issues and will also provide a summary of any representations that the CMA has received regarding national security concerns.[3] Historically, either the Ministry of Defence or the Home Office has been an active contributor to the CMA's consultation process, submitting representations on any concerns the merger raises with regards to e.g. strategic capabilities and classified information.[4] In each of these 7 cases, the

[1] David Reader, *Consultation response to BEIS National Security and Infrastructure Investment Review (Proposals for short-term reforms)* (CCP, 12 November 2017).

[2] Department of Business, Energy & Industrial Strategy, *National Security and Infrastructure Investment Review* (Green Paper, 2017), paragraph 118.

[3] Enterprise Act 2002, s 44(3).

[4] This role has typically been undertaken by the Ministry of Defence because, in the first 6 national security PIINs, the target firm in question had a notable contractual relationship with the British Armed Forces (e.g. to

MoD/Home Office has also prepared undertakings (in deliberations with the merging parties) to alleviate any national security concerns the merger raises.

4. It is true that none of the 7 national security cases resulted in the SoS referring a merger to a Phase II assessment; instead the SoS chose to permit the mergers subject to undertakings that the parties had negotiated with the MoD/Home Office. Nonetheless, the procedure was (and continues to be) in place for the CMA Panel to become involved in the process if a Phase II referral is made. In such a case, the CMA Panel would be required to submit a report to the SoS which advises him/her on both the competition and public interest (i.e. national security) implications of the merger.[5] Under the proposed "national security intervention" procedure, however, the Green Paper suggests that the SoS will undertake his/her evaluation of an investment's impact on national security *without* receiving advice from the CMA or any other independent body.[6]

5. I am concerned that an investment review regime based solely on assessments and decision-making by politicians or government departments (either via sole assessment by the SoS, or in consultation with the MoD/Home Office) would not create an environment that instils confidence in potential investors. Perceptions of bias and inconsistent political decision-making are well-documented in the context of UK merger control;[7] indeed, the uncertainty this produced amongst investors was a key rationale behind the UK's decision to move away from its politically-driven public interest regime under the Fair Trading Act 1973.[8] Moreover, as I noted in my response to the Green Paper's short-term options for reform,[9] the perception of bias is potentially aggravated by assigning the ultimate decision-making role to the BEIS Secretary, who is also tasked with heading-up the Government's proposed Industrial Strategy. Given the important role that investment plays within the proposed Industrial Strategy and the new powers that the BEIS Secretary would have over mergers and investments (if the Green Paper's reform options were implemented), investors may perceive the threat of the BEIS Secretary seeking to use these powers to further the UK's Industrial Strategy, rather than to protect national security.

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supply armoured vehicles, military helicopters, aerospace systems, etc). The Home Office recently adopted this role in the *Hytera/Sepura* case, which involved a target firm with contractual ties to emergency service authorities in the UK.

[5] Enterprise Act 2002, s 50.

[6] Note, in particular, that the Government would 'wish to retain […] a clear separation between competition- and national security-related assessments'; NSII Green Paper (n 2), paragraph 148.

[7] See e.g. the perceived issues of political short-termism in the UK context of media mergers; David Reader, 'Does Ofcom Offer a Credible Solution to Bias in Media Public Interest Mergers in the United Kingdom?' (2014) 4(1) CPI Antitrust Chronicle.

[8] See Bruce Lyons, David Reader and Andreas Stephan, 'UK competition policy post-Brexit: taking back control while resisting siren calls' (2017) 5(3) Journal of Antitrust Enforcement 347, 352-353. This departure was initially marked by the Tebbit doctrine and later formalised under the Enterprise Act 2002.

[9] Reader (n 1), paragraph 7.

6. It is important that any amending legislation should include measures that act to mitigate any perceptions of a risk of bias arising from political decision-making. This has, to a certain degree, been facilitated within the context of public interest mergers, where the SoS is required to seek advice from specific independent regulators before making a Phase II referral and before reaching his/her final decision.[10] Although the SoS is only bound to accept the CMA's findings in relation to competition,[11] the advice (s)he receives on the public interest element of the merger at least acts to incorporate independent evidence within the assessment process.

7. By analogy, one option for mitigating perceptions of political bias during a "national security intervention" process would be to establish an independent national security review body, which would effectively perform the role of that the CMA plays in the context of public interest mergers (with the exception of advising of competition matters, of course). Opponents to this proposal would likely cite the 'constitutional legitimacy concern', which suggests that decisions of overarching public interest (such as national security) are best left to publicly-elected representatives. Yet an independent body of this type may derive constitutional legitimacy from being delegated investigatory powers by elected representatives (via legislation) and by being prescribed objective and finite criteria to operate within.[12] In any case, I anticipate that the SoS would remain as the ultimate arbiter, with the national security review body acting in an advisory role (with no requirement for the SoS to accept the body's advice). This would permit a greater degree of transparency within the process and, assuming that the SoS's decision would be subject to judicial review and appeal (as is the case in the public interest merger regime), it would be a step towards minimising the business uncertainty created by political decision-making.

[10] This advice is predominantly received from the CMA, but Ofcom will advise on the public interest aspect of mergers raising certain issues relating to media plurality and the presentation of news during Phase I; Enterprise Act 2002, s 44A(2).

[11] The requirement for the SoS to accept the findings of the CMA with respect to competition is stipulated under s 46(2) of the 2002 Act. A similar requirement is imposed on the SoS for following the CMA's Phase II investigation, s 54(7).

[12] For a discussion of this reasoning in the context of competition authorities, see Anna Gerbrandy and Jan Polański, 'Addressing the legitimacy-problem of competition authorities taking into account non-competition values' (9th ACLE C&R Meeting, Amsterdam, December 2013).