Three years of CMA merger control: a statistical review

Gavin Robert[1]

Introduction

In 2014, I wrote an article comparing merger control enforcement across major jurisdictions around the world, namely the EU, the US, China, the UK, France and Germany.[2] The article sought to investigate the statistical evidence as to whether there is a material difference between jurisdictions as to the likelihood of enforcement activity. It did not however investigate the evolution of enforcement over time within any given jurisdiction.

At the time of the article, the Office of Fair Trading (OFT) and the Competition Commission (CC) in the UK had only just been merged into what is now the Competition and Markets Authority (CMA) – a merger which took effect on 1 April 2014. It has now been three years since that merger, and it is timely to build on the previous article, using the same methodology, to assess whether there has been any observable change in enforcement activity in the UK since the merger. This article considers:

- the likelihood of second phase referral;
- the likelihood of enforcement action being required, whether in Phase 1 or Phase 2; and
- the likelihood of unconditional clearance or enforcement action at the end of Phase 2, and any evidence for 'confirmation bias.'

This article does not conduct a substantive analysis of the CMA's decisional practice in merger cases.

The Annex to this article sets out the updated statistics on which this analysis is based. For the UK, this comprises the periods 2007–13 (pre-CMA), 2014–16 (post-CMA) and 2007–16 as a whole. These are based on the merger outcomes data which are now published monthly by the CMA on its website.[3] Also included are European Commission statistics under the EU Merger Regulation (EUMR), available on the European Commission's website,[4] for the equivalent periods, in order to provide a benchmark.

The CMA

The Enterprise and Regulatory Reform Act 2013 (ERRA13) established the CMA as the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. On 1 April 2014, the functions of the CC and many of the functions of the OFT, including the merger control fuctions of the CC and the OFT, were transferred to the CMA and these bodies abolished.

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2 G Robert, 'Merger Control Procedure and Enforcement: An International Comparison' (2014) 10(3) *European Competition Journal*, at pp 523–549 (the '2014 article').

3 https://www.gov.uk/government/publications/phase-1-merger-enquiry-outcomes. The 2014 article remarked that, curiously, the UK Competition Commission never published statistics on the outcome of its cases and expressed the hope that, as a unified authority conducting both Phase 1 and Phase 2, the CMA would do so. The CMA now does just that.

4 http://ec.europa.eu/competition/mergers/statistics.pdf.

Under the Enterprise Act 2002, one of the functions of the CMA is to obtain and review information relating to merger situations, and it has a duty to refer for an in-depth 'Phase 2' investigation any relevant merger situation where the CMA believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition (SLC) in a UK market. Following a reference for a Phase 2 investigation, the CMA conducts a more detailed analysis to determine whether: (i) there is a relevant merger situation falling within the UK merger control regime; (ii) that relevant merger situation has resulted, or may be expected to result, in an SLC; and (iii) it should take action to remedy any SLC identified. At Phase 2, those decisions are taken by an Inquiry Group of at least three people, selected for each case from the independent experts appointed by the Secretary of State to the CMA's panel. In anticipated or completed mergers, the CMA can, either on its own account or, in public interest cases, where so requested by the Secretary of State, negotiate undertakings in lieu of a reference for a Phase 2 investigation (UILs).[5]

Likelihood of Phase 2 referral

Like most merger control systems around the world, the UK has a relatively short first phase: following the reforms introduced by ERRA13, the CMA now has a statutory deadline of 40 working days. This acts as a 'first screen' after which the transaction is either cleared (with or without conditions) or referred for a longer in-depth investigation. This 'second phase' investigation is more detailed and entails significant burdens for the parties and substantial delay to completion of the transaction. Indeed, each year a number of transactions are abandoned rather than embarking on this second phase investigation. Nineteen transactions were abandoned in the period 2007–16 after a second phase referral. For this reason, it is itself a significant form of regulatory intervention regardless of the Phase 2 outcome.

Thus, one useful measure of regulatory intervention is the percentage of notifications or decisions that result in a second phase investigation.[6] Where there is a decision that a transaction does not fall within the agency's jurisdiction ('out of scope'), the agency does not have jurisdiction in the first place, and therefore does not have the ability to open a second phase investigation. As a result, this author believes that a true measure of the Phase 2 referral rate should be based on the total number of notifications or decisions less those 'out of scope'. See Table 1.

5 See more generally CMA, *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2, January 2014) [2014] UKCLR 452, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2__Mergers__Guidance.pdf.

6 The EU statistics are based on number of notifications as notification is mandatory and there is no jurisdiction to investigate mergers below the notification thresholds. Since notification is voluntary in the UK, and the CMA can investigate and decide upon un-notified mergers (which are 'called in' by the CMA's Mergers Intelligence Unit), UK statistics are based on decisions rather than notifications.

Table 1 – Likelihood of Phase 2 referral: EU and UK merger enforcement statistics 2007–16

	2007–13		2014–16		2007–16	
	EU	**UK**	**EU**	**UK**	**EU**	**UK**
Notifications	2152	601	1002	201	3154	802
Out of scope	0	104	3	13	3	117
Notifications less 'out of scope'	2152	497	999	188	3151	685
Phase 2 referrals	58	64	27	22	85	86
Phase 2 referrals as % of notifications less 'out of scope'	**2.7**	**12.9**	**2.7**	**11.7**	**2.7**	**12.6**

The UK has a relatively high Phase 2 referral rate of 12.6% over the entire period compared to 2.7% for the European Commission. This is easily explained by the voluntary nature of the UK's merger control system. In a voluntary system, simple cases without competition concerns tend not to be notified, leaving those that are notified (or 'called in' by the CMA's Mergers Intelligence Unit) as more likely to raise concerns and thus be subject to a second phase investigation.

Looking at the periods before formation of the CMA and after its formation, there is little material difference in referral rates. In 2007–13 the referral rate is 12.9%, and at 11.7% only modestly lower in 2014–16. The difference is too small to argue that the prospects of a reference being made has decreased since the OFT and CC merged. In theory, there may be incentives for a combined authority to take into account its resources across the organisation as a whole when deciding whether the legal test for a reference is met, given the significant additional resources required to conduct a Phase 2 investigation. There is, however, no evidence that this has had any effect to increase referrals (when there is spare capacity) or to reduce referrals (when capacity is constrained).

Rate of enforcement

This article defines 'enforcement' as interference with the merger proposal itself. This can be prohibition or remedies as a condition of merger clearance, accepted at any stage of the merger control process, ie both at the end of Phase 1 or Phase 2. Although the parties have the choice whether to propose remedies at the end of Phase 1 (in the form of UILs) and, if so, what remedies to propose, this article still regards Phase 1 remedies as 'enforcement'. This is because the merger would otherwise be referred to Phase 2 if no remedies are proposed or if the CMA regards the remedies as inadequate to resolve the competition concerns that it has identified. Enforcement also includes withdrawal of the notification following the opening of Phase 2 proceedings. It is impossible to discern the reasons for withdrawal and these may be entirely unrelated to the merger control process. This article assumes, however, that withdrawal after (but not before) the referral to Phase 2 is a result of the merger control process, for instance because continuing the process may have led to either prohibition or remedies that would be unacceptable to the parties, and so is reasonably characterised as 'enforcement'.

The measure used to gauge enforcement activity is the number of cases resulting in enforcement in Phase 1, Phase 2 or both, as a percentage of the total number of notifications or decisions (once again, less those cases judged 'out of scope'). See Table 2.

Table 2 – Rate of enforcement: EU and UK merger enforcement statistics 2007–16

	2007–13		2014–16		2007–16	
	EU	**UK**	**EU**	**UK**	**EU**	**UK**
Notifications less 'out of scope'	2152	497	999	188	3151	685
Enforcement						
Phase 1 remedy	89	35	44	21	133	56
Phase 1 remedy as % of notifications less 'out of scope'	**4.1**	**7**	**4.4**	**11.2**	**4.2**	**8.2**
Phase 2 remedy	23	17	18	7	41	23
Prohibition	5	6	1	1	7	7
Withdrawal post Phase 2	9	14	3	5	12	19
Total Phase 2 enforcement	37	37	22	13	59	50
Total Phase 2 enforcement as % of notifications less 'out of scope'	**1.7**	**7.4**	**2.2**	**7.7**	**1.9**	**7.3**
Total enforcement	126	72	66	34	192	106
Total enforcement as % of notifications less 'out of scope'	**5.9**	**14.5**	**6.6**	**18.1**	**6.1**	**15.5**

Compared to the European Commission, the total enforcement rate in the UK is significantly higher: 15.5% across the entire period 2007–16 compared with just 6.1% under the EUMR during the equivalent period. Once again, the UK's voluntary system means that a higher proportion of deals that are investigated are likely to involve serious competition concerns requiring remedy or prohibition.

There appears to be a modest increase in enforcement by the CMA since it commenced work in 2014. In the period 2007–13 the enforcement rate was 14.5%, and in the subsequent period 2014–16 this increased to 18.1% (an increase of around 3.5%). In the same period, the European Commission enforcement rate remained more or less constant. While there were (unsurprisingly) around 2.5 times more decisions taken by the CMA in the seven years 2007–13 than the three years 2014–16, this was marginally higher at 2.8 for Phase 2 enforcement but considerably lower at only 1.7 for Phase 1 enforcement. Indeed, the rate of Phase 1 enforcement has increased from 7% pre-CMA to 11.2% post-CMA, while the rate of Phase 2 enforcement has remained relatively static, with an increase of just 0.3%. This indicates that the increase in enforcement by the CMA since its formation has been driven almost entirely by an increase in cases resulting in Phase 1 remedies, ie UILs.[7]

7 Another potential reason for an apparent increase in enforcement, as measured by a percentage of total decisions, is the more pragmatic way that the CMA now deals with cases investigated in the first instance by the Mergers Intelligence Unit but which are ultimately regarded as not raising competition concerns. Whereas previously the CMA would have called in the case and proceeded to issue a formal decision not to refer, the CMA now investigates the case more thoroughly before calling it in, thus reducing the number of 'easy' decisions. This change has, however, only really taken effect since the beginning of 2015 and the main effects in terms of decisions were not felt until 2016/17.

That said, it should be borne in mind that, given the small number of cases, the increase is likely attributable to just one or two cases. To draw meaningful conclusions from the statistical data, a longer reference period is required.

Subject to the above caveat around statistical significance, there may be a number of reasons for any increase in Phase 1 enforcement. As discussed further below, parties may be more fearful of 'confirmation bias' in Phase 2 now that decisions at the end of both Phase 1 and Phase 2 are made within the context of a single body, even though Phase 2 decisions are still taken by a group of independent Panel Members appointed by statute. As a result, they may be more willing to propose UILs in order to avoid a Phase 2 reference. In contrast to decisions taken by the former OFT as a separate Phase 1 body which has no role at Phase 2, CMA decisions at Phase 1 in marginal cases may be more resource-driven in the interests of the organisation as a whole, preserving CMA resources to deal with other areas of enforcement such as antitrust and cartels. Where Phase 1 decision-makers know that overall capacity is constrained, they may be more inclined to accept UILs where they might not have done so as two separate bodies.

A policy drive by the CMA to resolve more cases in Phase 1 as a matter of regulatory efficiency need not be, however, simply resource-driven. Phase 2 investigations pose considerable burdens on the parties and third parties as well as the CMA itself. The time taken – around six months – is itself a significant disruption to the transaction timetable, delaying potential synergies and causing uncertainty for employees, customers and suppliers. It can therefore be justified as a reasonable policy goal in itself, in addition to the resourcing benefits it entails for the CMA. In its Annual Plan for 2014/15,[8] the CMA committed to implement specific changes to its merger procedures, including:

> 'Delivering further improvements to the speed and clarity of the CMA's mergers procedures, such as the revised Phase 1 decision-making system, the procedure for accepting undertakings in lieu of reference and the transition from the first to second phase of merger control.'

In its 2016 report, the National Audit Office recognised this development:[9]

> '2.19 The Enterprise and Regulatory Reform Act 2013 aimed to make the process more efficient . . . In response, the CMA has changed the merger process, particularly by seeking to resolve more mergers at phase 1, reducing the need for a costly and lengthy phase 2 (where businesses can also face significant costs). It is using more senior decision-makers at phase 1 and is encouraging early consideration of possible remedies that would allow clearance …
>
> 2.20 The CMA has met the new 40 working day statutory deadline for phase 1 on all merger cases. The average cost for phase 1 merger cases has increased by £9,600 from £23,900 in the Office of Fair Trading's final two years (2012–13 and 2013–14) to around £33,500 in 2014–15. This is partly due to increased senior oversight and a greater focus on resolving cases at phase 1 rather than phase 2 (7% of cases were referred to phase 2 in 2014–15, lower than in any of the previous four years). It also reflects the CMA's more targeted approach in identifying mergers that require a formal investigation, resulting in fewer decisions having to be taken.'

In its most recent 2016/17 Annual Report, the CMA states:

> 'Phase 2 investigations are time-consuming and costly – both for the businesses involved and the CMA. So we only want to carry them out where we find a competition problem

8 CMA, *Competition and Markets Authority Annual Plan 2014/15* (1 April 2014), at p 12.
9 National Audit Office, *The UK competition regime*, HC 737 Session 2015/16 (5 February 2016), at p 38.

> arising from a merger which the companies cannot resolve through offering acceptable undertakings at Phase 1. We have continued to make good use of our power to agree to acceptable undertakings in lieu of a Phase 2 investigation, saving money and time for firms and taxpayers by allowing our concerns to be addressed proportionately and promptly through undertakings in nine separate cases.'[10]

Indeed the reforms introduced by ERRA13 are designed to facilitate the acceptance of UILs. Prior to the reforms, the parties were required to offer remedies 'blind' without knowing the ultimate Phase 1 decision, and often with the fear that their offer of remedies would influence the decision on the substance (despite the best efforts by the OFT to ring-fence the decision-maker from the remedies process). In contrast, the parties now have up to five working days after receiving the CMA's reasons for its SLC decision to offer UILs formally in writing.[11]

To the extent there has been a material increase in Phase 1 remedies, this is therefore likely to be due to a positive policy by the CMA to resolve more cases through UILs, thereby achieving procedural economies, combined with procedural reforms designed to facilitate this.

With 133 Phase 1 remedy decisions taken by the European Commission during the period 2007–16, and 41 Phase 2 remedy decisions, the Commission is over three times more likely to intervene by way of Phase 1 remedies than Phase 2 remedies. There can be no doubt that it can be an important policy tool for competition agencies.[12]

As the 2014 article argued, the possibility of avoiding the burdens and delay of a detailed second-phase investigation by offering remedies at the end of Phase 1 is rightly seen as a procedural advantage. It may, however, also lead to over-enforcement. In some cases, parties may be willing to offer remedies to avoid a Phase 2 investigation which they may have successfully avoided had they fought the case through to the end of a more detailed investigation. It is important therefore that there are sufficient checks and balances in Phase 1 to avoid the acceptance of remedies where the case may not ultimately have been referred to Phase 2. This becomes more important as an agency increases its deployment of Phase 1 remedies as an enforcement tool.

Testing for confirmation bias

Finally, this study examines the number of Phase 2 cases which result in enforcement as a percentage of the total number of cases which enter Phase 2. Such a measure is a reasonable test for 'confirmation bias', ie whether there exists a negative pre-judgment about cases referred to Phase 2 such that Phase 2 inevitably leads to remedies or prohibition. Where remedies are available in Phase 1, any perception of confirmation bias is especially important as it will influence the decisions by the merging parties whether to offer remedies or fight the case in Phase 2.

The risk of confirmation bias is often leveled against the EU merger control regime on the basis that the same institution and, largely, the same case team decides whether to open Phase 2 proceedings and also decides the case at the end of Phase 2. In contrast, until the formation of the CMA as a single authority in 2014, the UK system had entirely separate Phase 1 and Phase 2 institutions: the OFT took the decision at the end of Phase 1 and, in the event of a reference, Phase 2 was conducted by the CC. This was regarded by many as the perfect (yet expensive) antidote to the risk of confirmation bias. When the merger of the OFT and the

10 CMA, *Competition and Markets Authority Annual Report and Accounts 2016/17* HC 24 (12 July 2017), at p 47.
11 Section 73A(1) of the Enterprise Act 2002.
12 In contrast, there is little or no ability to accept Phase 1 remedies in the US, China or Germany.

CC was proposed, many commentators expressed concerns that this would lead to confirmation bias, looking fearfully across the Channel to the European Commission. The hybrid panel system adopted by the new CMA is designed to achieve the best of both worlds: the efficiencies of a single institution but retaining the independence of Panel Members appointed by statute as Phase 2 decision-makers. Given the practicalities of working within a single institution as independent decision-makers, success in achieving the 'best of both worlds' is largely dependent on the integrity, working culture and day-to-day procedures of the CMA.

There are however different substantive tests under UK statute at Phase 1 and Phase 2 in terms of the likelihood of harm. In Phase 2 the CMA must decide whether, *on the balance of probabilities*, the creation of a relevant merger situation has resulted, or may be expected to result, in an SLC.[13] In contrast, at Phase 1, the CMA has a duty to refer if there is *a reasonable prospect* that a relevant merger situation may be expected to result in an SLC.[14] As the Merger Assessment Guidelines explain, the CMA at Phase 2 must form an expectation which has a higher level of probability than the 'reasonable prospect' threshold required at Phase 1, which is intentionally 'a lower and more cautious threshold' for an SLC finding than that applied in Phase 2 after more extensive investigation.[15] As a result, it can only be expected that there will be more cases referred to Phase 2 than cases which ultimately lead to an SLC finding. In other words, the unconditional clearance rate should always be above zero and, in practice, substantially above. See Table 3.

Table 3 – Testing for confirmation bias: EU and UK merger enforcement statistics 2007–16

	2007–13		2014–16		2007–16	
	EU	**UK**	**EU**	**UK**	**EU**	**UK**
Notifications less 'out of scope'	2152	497	999	188	3151	685
Phase 2 referrals	58	64	27	22	85	86
Total Phase 2 enforcement	37	37	22	13	59	50
Phase 2 unconditional clearance	22	30	4	11	26	41
Unconditional clearance as % of Phase 2 referrals	**37.9**	**46.9**	**14.8**	**50**	**30.6**	**47.7**

In the period 2007–13, prior to formation of the CMA, 30 out of 64 Phase 2 referrals resulted in unconditional clearance – an unconditional clearance rate of 46.9%. This compares with 37.9% by the European Commission during the same period. Unsurprisingly, this indicates a healthy lack of confirmation bias by the UK authorities, with just under half of all Phase 2 cases being cleared. Somewhat surprisingly, albeit only based on 22 Phase 2 cases over three years, the unconditional clearance rate has actually increased to 50% since Phase 1 and Phase 2 decisions have been taken within a single institution under the hybrid model described above. During the same period, the European Commission's unconditional clearance rate fell by 7% to 30.6%.

13 Sections 35(1) and 36(1) of the Enterprise Act 2002.
14 Sections 22 and 33 of the Enterprise Act 2002. The Court of Appeal clarified that the complex Phase 1 statutory language that '*it is or may be the case that* a relevant merger situation may be expected to result in an SLC' requires only a 'reasonable prospect' of harm: *IBA Health Ltd v OFT* [2004] EWCA Civ 142.
15 CC and OFT, *Merger Assessment Guidelines* (CC2/OFT1254, (1 September 2010), at pp 9–10.

Indeed, while one would expect an unconditional clearance rate above zero given the different thresholds at Phase 1 and Phase 2, any rate above 50% might indicate that the system is not working efficiently. It cannot be an efficient use of resources to see consistently more than half the cases referred to Phase 2 cleared without a finding of competitive harm. Any inefficiency may, in theory, be due to too strict an interpretation of the *reasonable prospect* threshold at Phase 1 or too lenient an interpretation of the *balance of probabilities* threshold at Phase 2, or indeed just the facts of the cases thrown up during the course of the relevant period.[16] Before leaping to conclusions, however, it should be borne in mind that an increase in 3% since formation of the CMA represents just one case going one way rather than the other.

Although it remains to be seen whether this trend continues over the longer term, the statistics indicate that the 'fresh pair of eyes', so cherished under the previous system, has not been undermined by the creation of a single authority.

16 It should also be borne in mind that this statistical measure is a blunt tool. It takes, for instance, no account of cases where the Phase 2 decision identifies fewer theories of harm than those identified at the end of Phase 1; and, as a result, cases where the remedies required by the Phase 2 decision are less burdensome than would have been required in Phase 1 to avoid a Phase 2 reference.

Annex – Overview of UK and EU merger enforcement statistics 2007–16

	2007–13		2014–16		2007–16	
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