Journal of Competition Law & Economics, 13(4), 637–665
doi:10.1093/joclec/nhx022
Advance Access publication 14 December 2017

THE DECISION TO INVESTIGATE MERGERS IN THE UNITED KINGDOM'S VOLUNTARY REGIME

Simon Chisholm[*] *& Tom Heideman*[†]

ABSTRACT

As merging parties can choose whether to notify their transaction in the United Kingdom, the competition authority has a well-developed procedure for capturing those that are not notified but may raise concerns. The resulting own-initiative investigations account for a significant proportion of overall UK merger enforcement. This mergers intelligence function is crucial to the voluntary regime working effectively, yet relatively little is known publicly about this preliminary investigative phase. We provide an overview of how the decision to investigate is taken, including the extent of transactions reviewed at this stage, an overview of the decision-making process, and an assessment of recent reforms to the process. We go on to analyze the extent to which decisions taken (not) to investigate are appealable.

JEL: K21; H11

I. INTRODUCTION

Notification of a merger to the UK Competition and Markets Authority (CMA)[1] is voluntary. Merging parties can therefore choose to complete their transaction without seeking competition clearance. By design, the voluntary notification regime[2] significantly reduces the regulatory burden on business (and the administrative burden to the CMA of merger scrutiny) and results in significant overall savings, estimated in 2011 to be around £80 million per year.[3]

[*] Vice President; Charles River Associates, London and Brussels. Email: schisholm@crai.com.
[†] Senior Legal Counsel; Authority for Consumers and Markets, Netherlands. Email: tom.heideman@acm.nl. Both authors were successive Chairs of the Mergers Intelligence Committee at the UK competition authority between 2012 and 2015. The authors wish to thank Sophie Simons at the Competition and Markets Authority (CMA) for helpful initial discussions on the topic.

[1] The CMA combined the functions of the Office of Fair Trading (OFT) and Competition Commission (CC) on 1 April 2014 by virtue of the Enterprise and Regulatory Reform Act 2013.

[2] For brevity and in line with common practice, we will refer to a 'voluntary regime' in the remainder of this article, although, as will be discussed, the voluntary nature of the regime relates only to the decision to notify a merger, not a CMA investigation of the merger.

[3] Net of benefits to the economy from capturing a greater number of anti-competitive mergers; calculated at the time of consulting on reforms to the mergers regime, when the UK Government undertook an appraisal of a switch to mandatory notification of mergers with a UK target turnover greater than £5 million and acquirer turnover greater than £10 million

If firms do not notify a merger that meets the jurisdictional thresholds,[4] the CMA can on its own initiative decide to investigate the merger. Transactions are, therefore, still commonly notified in advance of completion as companies seek legal certainty and manage the risk that subsequent merger review may delay the transaction, prevent integration, and lead to enforcement action. Besides self-assessment that their merger does not raise concerns, there are several other reasons why firms may go ahead with a potentially problematic merger without notifying. This may be a calculated strategy to avoid competition scrutiny or willingness to bear the regulatory risk;[5] to avoid merger fees;[6] as a result of poor self-assessment; or simply because the firm is unaware of the merger control regime.

A critical function of the UK merger control regime is, therefore, to monitor merger and acquisition activity to identify those transactions that potentially raise competition concerns but have not been notified. These transactions are then 'called in' for a Phase 1 investigation to ensure that they do not evade competition scrutiny. Significant research and evidence-gathering is undertaken by the CMA to fulfil this function. This so-called 'mergers intelligence' activity aims, first, to identify and examine as many transactions as possible that have not been notified but may reduce competition and affect UK customers; and second, as a consequence of this activity, to act as a critical deterrent to parties to problematic transactions from not notifying.

This intelligence-gathering and monitoring of merger and acquisition activity is underpinned by section 5 of the Enterprise Act 2002 (the Enterprise Act), which gives the CMA a wide function to collect information on mergers and monitor markets for mergers activity.[7] This monitoring function is an implicit requirement dictated by the CMA's duty to refer a merger to a Phase 2 investigation whenever it believes that there is a qualifying merger that gives rise to a realistic prospect of a substantial lessening of

(Department for Business, Innovation and Skills, *A Competition Regime for Growth: A Consultation on Options for Reform. Impact Assessment*, March 2011, pp. 4 and 47).

[4] There are two equally applicable alternative thresholds: the UK turnover of the target business must exceed £70 million, and/or the merging firms must overlap in the supply of specific goods or services in (a part of) the United Kingdom, with a combined share exceeding 25 percent.

[5] For example, where this helps the acquiring firm close the deal with the vendor by taking on the regulatory risk.

[6] When the current mergers regime was introduced in 2003, fees were staggered between £5,000 and £15,000 dependent on the turnover of the acquired company. Merger fees are now staggered between £40,000 and £160,000. Acquirers that qualify as a small or medium sized enterprise are exempt from merger fees.

[7] Section 5 of the Enterprise Act states that the CMA has 'the function of obtaining, compiling and keeping under review information about matters relating to the carrying out of its functions… with a view to (among other things) ensuring that the CMA has sufficient information to take informed decisions and to carry out its other functions [including its duty to refer] effectively.'

competition (SLC).[8] This duty exists regardless of whether the parties have chosen to make a notification.

While there is awareness of the CMA's mergers intelligence work, the policy and process through which the decision to investigate is taken, and the extent of transactions reviewed at this preliminary stage, remain largely unknown and opaque, yet they regularly lead to between a quarter and a third of all UK merger enforcement in any given year. The CMA itself has published little guidance about this aspect of its work.[9] This article aims to shed some light on this mergers intelligence process. Section II provides a summary of the scope of mergers intelligence activity in recent years. Section III provides an overview of the decision-making process and framework for determining which transactions are investigated. Section IV considers interaction with merging parties and third parties, including recent reforms. Section V discusses the nature of the decisions taken as a result of the mergers intelligence process, including whether they are appealable. Section VI suggests some reforms to the mergers intelligence process.

II. SCOPE OF MERGERS INTELLIGENCE

A. Own-Initiative Investigations

The CMA's predecessor for Phase 1 investigations, the Office of Fair Trading (OFT), established a dedicated mergers intelligence team in 2008. Although the OFT had previously monitored mergers, it is since then that mergers intelligence activity has become increasingly sophisticated and well-resourced.

As shown in Table 1, the CMA investigates around 80–90 mergers on average each year, of which 20–40 percent in any given year are cases that have not been notified. Instead a decision is taken to investigate after they are identified by the CMA's mergers intelligence function. Proportionately, more own-initiative investigations raise competition concerns than do notified investigations: 37 percent (nine out of 24) raised preliminary concerns at Phase 1[10] over the ten years to 2015/16, compared with 28 percent (eighteen out of 63) of notified cases; and 25 percent resulted in an SLC at Phase 1, compared with 19 percent of notified cases. In the last three years of this period, mergers intelligence activity has become more effective on this measure, with an average of

[8] Sections 22 and 33 of the Enterprise Act.

[9] The CMA's *Mergers: Guidance on the CMA's Jurisdiction and Procedure* (CMA2, January 2014, '*Jurisdictional and Procedural Guidance*') provides a brief overview of its mergers intelligence function in Chapter 6. In June 2016 (with an update in September 2017), the CMA published a brief guidance document to explain how it interacts with merging and third parties when conducting this function (*Guidance on the CMA's Mergers Intelligence Function*, CMA56, '*Mergers Intelligence Guidance*').

[10] Investigations raising preliminary competition concerns at Phase 1 are those where an Issues Paper (outlining the case for reference to Phase 2) is sent to the merging parties, and a Case Review Meeting is held, followed by a Decision Meeting where a decision on the outcome of the investigation is taken by a member of senior management of the CMA (or OFT, as it was).

Table 1. Summary of mergers intelligence activity relative to all investigations

Year	Total cases at Phase 1			Cases raising preliminary concerns at Phase 1			Cases with SLC finding at Phase 1			Enforcement activity (Phase 1 + Phase 2)		
	MI	Total	Share (%)	MI	Total	Share (%)	MI	Total	Share (%)	MI	Total	Share (%)
2015/16	13	62	21	9	25	36	4	19	21	3	8	38
2014/15	25	82	30	12	30	40	7	17	41	1	4	25
2013/14	23	65	35	8	19	42	5	11	45	2	7	29
2012/13	37	100	37	12	37	32	10	23	43	4	9	44
2011/12	39	100	39	5	29	17	4	20	20	1	9	11
2010/11	11	73	15	5	24	21	5	18	28	1	6	17
2009/10	13	72	18	11	22	50	7	15	47	2	3	67
2008/09	18	80	23	12	30	40	5	19	26	2	10	20
2007/08	25	111	23	6	22	27	5	16	31	5	11	45
2006/07	36	128	28	8	30	27	7	21	33	4	13	31
AVERAGE	**24**	**87**	**27**	**9**	**27**	**33**	**6**	**18**	**34**	**3**	**8**	**33**

Source: Merger Inquiry Outcome Statistics, available on the CMA's website, and CMA Mergers Intelligence data obtained from the CMA.
Notes: 'MI' refers to the number of mergers intelligence cases in each category, while 'Total' includes these as well as notified cases.
Cases are categorized by date of Phase 1 and Phase 2 decisions. Phase 2 decisions may be taken in the year following the Phase 1 decision.
An SLC at Phase 1 refers to those cases where the test for reference is met (that is, it has been found there is a realistic prospect of a substantial lessening of competition). This includes cases where the CMA found competition concerns but did not need to conclude on SLC because it would then have applied the *de minimis* exception to the duty to refer.
Enforcement activity consists of, at Phase 1, undertakings in lieu of reference and, at Phase 2, remedies or prohibition.

48 percent of mergers intelligence cases raising preliminary competition concerns, compared with 30 percent of notified cases. Own-initiative cases also represent around a third of all cases where enforcement activity is undertaken by the CMA, either at Phase 1 or at Phase 2 (remedies or prohibition).

Recent examples of cases that were captured by the OFT's or CMA's mergers intelligence team and prohibited after a Phase 2 investigation are *ICE/Trayport*, *Eurotunnel/Sea France*, and *Akzo Nobel/Metlac*,[11] while *Regus/Avanta*, *MRH/Esso service stations*, and *GTCR/Gorkana* are examples of cases where the merging parties offered remedies at Phase 1.[12] There are also several examples of cases that raised sufficient competition concerns to be referred to Phase 2 but were then cleared, such as *Linergy/Ulster Farm By-Products* and *Sonoco/Weidenhammer*.[13]

[11] Phase 2 reports of 17 October 2016, 27 June 2014, and 21 December 2012.
[12] CMA decisions to accept undertakings in lieu of reference of 1 February 2016, 29 January 2016, and 16 June 2015.
[13] CMA Phase 2 reports of 6 January 2016 and 3 July 2015.

B. Direct Benefits to Consumers

In a voluntary regime, if there is no mergers intelligence activity, anticompetitive mergers can take place without regulatory scrutiny. Where it leads to an own-initiative investigation of an anticompetitive merger that would otherwise have gone ahead, mergers intelligence activity, therefore, prevents consumer harm from arising. As a part of assessing its performance, the CMA, as before that the OFT and Competition Commission (CC) together, estimates the impact of its interventions annually with the target of delivering direct financial benefits to consumers of at least ten times that of their cost to the taxpayer. The CMA publishes average estimates of its impact measured by monetary savings to consumers.[14]

Using these results, we can assess the impact of the mergers intelligence function by estimating consumer benefits resulting from those cases where the CMA opened an own-initiative investigation. The total consumer benefits resulting from own-initiative cases for the period from 2010/11 to 2015/16 (to end-2015 calendar year) is estimated to be around £12 million. This represents less than 10 percent of the total consumer benefits from all cases attributable to the mergers regime over the same period.[15] The difference in estimated impact between own-initiative cases and notified cases reflects two related factors. First, aggregate impact estimates are generally driven by a few cases with a particularly significant estimated impact. Second, the cases which have the greatest impact are the largest. The greater the size of the transaction, the more easily detectable it will be and so the parties will generally choose to notify in those circumstances.

C. Deterrence

In addition to the direct effect of preventing consumer harm, mergers intelligence activity also has an indirect deterrence effect. The credible threat of a competition authority prepared to open an own-initiative investigation into

[14] The results of this assessment are published in the CMA (and prior to this the OFT and CC) Annual Reports and annual Impact Assessments. The focus of this assessment is on estimating the direct benefit to consumers (rather than business) measured as, for example, decreases in price relative to that which would have prevailed following the unconditional clearance of the merger. See *A Guide to OFT's Impact Estimation Methods*, OFT1250, July 2010, for details of the methodology used for such estimates.

[15] Based on CMA Positive Impact Estimates figures obtained from the CMA. Where remedies are accepted at Phase 1 or the merging parties abandon the transaction following reference, the CMA applies an SLC rate or 'hit rate' to take account of the likelihood that a Phase 2 investigation would have resulted in an SLC finding (see OFT1250 *op. cit.*). We assume a constant hit rate of 35 percent based on the estimated hit rate for cases through the period 2010/11 to end-2015, although note this is likely to be an underestimate (and lead to lower estimated benefits), not least because the hit rate on cancelled cases will be higher. The figures presented exclude one own-initiative case and one notified case for which no impact estimation was undertaken.

and take enforcement action against an anticompetitive merger deters other anticompetitive mergers from taking place. This means that anticompetitive mergers that could otherwise take place are not undertaken or are modified to address anticipated competition concerns due to the expectation of enforcement action.

In a voluntary merger control regime, the deterrence effect has two aspects: first, the extent to which firms expect the authority to take enforcement action against an anticompetitive merger; and second, as a prerequisite, the ability and readiness of the authority to open its own investigations into transactions that have not been notified. In the absence of an expectation of the authority opening an investigation, which then enables it to take enforcement action, merging firms could readily undertake anticompetitive mergers and avoid scrutiny. The extent to which this expectation is credible is determined principally by the effectiveness of monitoring activity undertaken by the authority.[16] Mergers intelligence activity is, therefore, critical not only due to the direct consumer harm it prevents as a result of actual enforcement action taken where the CMA opens its own investigation, but also due to the benefits arising from setting an expectation that if a harmful transaction is not notified it will still be subject to scrutiny.[17]

The impact of the deterrence effect on consumer welfare is often considered far greater than the impact of actual enforcement action. Studies have attempted to estimate the deterrence effect. In the United Kingdom, the OFT published separate estimates in 2007[18] and 2011,[19] both based on surveys of businesses and legal advisers. The 2007 study suggested that around 8 percent of proposed mergers were abandoned, and around 7 percent modified on competition grounds before the OFT became aware of them. This compared with around 3 percent where actual enforcement action was taken at Phase 1 or Phase 2, giving a five-to-one ratio for deterrence to enforcement effects. The 2011 study gives higher numbers, with 18 percent of proposed mergers abandoned and 15 percent modified, although was based on a limited sample of mergers.

[16] This is not solely determined by monitoring activity, as the authority can be notified of transactions by third parties, such as those adversely affected by a transaction or otherwise aware of it occurring (for example, customers, competitors, and suppliers). As a result, awareness of the regime, and the ability of third parties to provide information on transactions to the authority, is also helpful. This is discussed further below.

[17] This is borne out by internal documents reviewed by the CMA during merger investigations, which occasionally refer to the risk of completing without prior regulatory approval, with reference to specific previous transactions where the CMA has opened an investigation and taken enforcement action.

[18] *The Deterrent Effect of Competition Enforcement by the OFT: A Report Prepared for the OFT by Deloitte*, OFT962, November 2007.

[19] *The Impact of Competition Interventions on Compliance and Deterrence: Final Report*, OFT1391, December 2011.

D. Objective of Mergers Intelligence Activity

In the short run, without a mergers intelligence function, there would be little preventing harmful transactions being undertaken and avoiding scrutiny. The UK Government, in its most recent review of the merger regime, accepted that a voluntary regime could lead to missing some harmful transactions, but recognized that this would be outweighed by the benefits of a reduced regulatory burden on business and the wider scope of the regime.[20] Mergers intelligence is, therefore, crucial to minimizing the risk that harmful transactions avoid scrutiny.[21]

In the long run, without a mergers intelligence function, the consumer harm from anticompetitive mergers that are not investigated would outweigh the reduced regulatory burden on business. The likely outcome would be an introduction of a mandatory notification system. Given mandatory notification is inefficient in the sense it imposes additional costs on merging parties and the taxpayer overall, the mergers intelligence function acts, in effect, as an insurance scheme that enables the efficiencies of the voluntary regime to be realized.

An important element of the mergers intelligence function in a voluntary regime is the threshold for opening an own-initiative investigation. The lower this threshold, the fewer transactions escape scrutiny (including those that are harmful). In the extreme, a very low threshold would lead to all transactions identified through the mergers intelligence function being subject to a Phase 1 investigation. However, this would also defeat the purpose of a voluntary regime. The lower the threshold, the more the regime would resemble a de facto mandatory notification system.

In this light, a balance needs to be struck to achieve an effective mergers intelligence function, where its deterrence effect, while critical, should not be so great as to disrupt the efficiencies of a voluntary system, including by too frequently questioning unproblematic non-notified mergers and thereby creating legal uncertainty.

Alongside the threshold applied, another element of an effective mergers intelligence function is the resources dedicated to its monitoring and research activities. These are needed both to identify non-notified mergers and to collect information about their potential anticompetitive impact without opening an investigation. Greater resources used effectively allow for a more

[20] Department for Business, Innovation and Skills, *Growth, Competition and the Competition Regime: Government Response to Consultation*, March 2012, pp. 40–42. The Government considered that, to have the same scope as a voluntary regime, a mandatory regime would require very low turnover thresholds, which would be out of step with other jurisdictions and would significantly increase the burden on business and the CMA.

[21] The 2007 and 2011 deterrence studies noted above also give an indication of the magnitude of this risk. They report that around 3 percent and 9 percent of completed mergers that the OFT did not investigate would have likely raised competition concerns (the difference in these figures was partly caused by different methodologies used in 2007 and 2011).

informed application of the threshold for opening an investigation. Consequently, an effective mergers intelligence process would aim to distinguish, as accurately as possible, harmful and non-harmful mergers prior to the decision to investigate.

Deterrence and outcomes can also be improved through a competition authority setting expectations and reducing uncertainty, to enable firms to anticipate its concerns and its willingness to take enforcement action. The CMA has an excellent track-record of publishing guidance on its methods and approach to assessment and of publishing reasoned decisions. In our view, the CMA's transparency could be extended to the process and approach it takes to the decision to investigate a merger, reducing business uncertainty over this aspect of its activity.[22] This article aims to take a step towards addressing this.

III. DECISION-MAKING PROCESS

The mergers intelligence process involves initial monitoring and research activity with a wide information-gathering process and then a decision-making process. These are discussed in turn below. Before this, it is important to note the timing constraint that the mergers intelligence function is subject to.

The CMA must take a final Phase 1 decision within four months of a transaction completing or the date at which it was made public (whichever is later).[23] Once this four-month period has lapsed, the CMA no longer has jurisdiction over the transaction and thus no power to refer it to Phase 2 or accept remedies. If the transaction has been made public to an extent sufficient for the purpose of starting the four-month period[24] – for example, through a press release or an article about the transaction in a widely read news source – this period will start running regardless of whether the CMA is actually aware of the merger. The statutory four-month deadline, therefore, requires constant monitoring of mergers activity so as not to lose jurisdiction over a transaction that harms competition.[25]

[22] As noted at footnote 9 above, the CMA has published only limited guidance about its mergers intelligence function. Some of its decisions on reference mention that they result from an own-initiative investigation, but the CMA is not consistent in this practice.

[23] Section 24 of the Enterprise Act.

[24] Specifically, for the four-month period to start, 'notice of material facts about the arrangements or transactions concerned' must be made public, meaning 'so publicised as to be generally known or readily ascertainable' (section 24 of the Enterprise Act). See further *Jurisdictional and Procedural Guidance*, paragraphs 4.43–44.

[25] It is not at all unusual that a merger is called in two to three months after completion, for example because the merger was not made public on completion or because it took the CMA some time to determine whether to open an own-initiative investigation. During 2015/16, there were on average 43 working days between completion and the date the CMA opened an investigation by sending an Enquiry Letter. An extreme example is *Tesco/Brian Ford's Discount*

A. Initial Research

The CMA's mergers intelligence team consists of two full-time staff members with occasional support from other members of the CMA's Mergers Group. Mergers intelligence research begins with capturing all potentially relevant transactions using publicly available information. This involves an extensive daily sift of news alerts, use of merger and acquisition research databases, and reviews of the media, including trade publications. Another important source of information consists of leads from complainants, typically from customers, competitors, or employees. Leads may also come from other parts of the CMA and from other competition authorities.[26]

Given the volume of merger and acquisition activity, which will include acquisitions of even small stakes in other firms, this initial capture can involve between 500 and 1,000 leads each day. Consequently, a large part of the research process is to filter out relevant transactions—typically fifteen to twenty—and examine these in more detail to establish where a case appears to qualify (that is, meets the UK jurisdictional requirements) and may raise concerns. The research undertaken at this stage, although largely based on public information and previous CMA investigations in the same sector, can be extensive. In some situations, the CMA will also ask questions of the merging parties or third parties (this will be discussed further in the next section).

For example, in pharmaceutical transactions, in order to determine the extent of overlap between the merging parties for the purposes of both jurisdiction (share of supply test) and assessment of the degree of competition between the parties, the mergers intelligence team will generally undertake analysis of both companies' existing and pipeline medicines. This will also include analysis of the medical conditions the products of each firm are designed to treat and rival suppliers of products for those conditions, including generic competitors.

In another example, in mergers involving retail stores, the CMA will generally assess the closeness of competition between the merging parties' stores and the presence of remaining competing stores using catchment areas from previous decisions in the same sector. This enables an initial assessment of whether the share of supply test may be met and of the extent to which the transaction may give rise to competition concerns.

This aspect of mergers intelligence activity can, therefore, involve significant research on both substantive and jurisdictional aspects. While this appears relatively burdensome, it ultimately saves the merging parties—and

---

Store (OFT decision of 22 December 2008). This merger completed in 2003 but was not made public until it featured in a press article in June 2008.

[26] For example, where a merger is (mandatorily) notified in an EU Member State and may have an impact in another Member State, information about this notification is typically distributed through the European Competition Network.

the CMA—the costs of an unnecessary investigation, which would be significantly more extensive.

Due to the four-month time limit, transactions are given priority in the research process based not only on initial indications of their potential competitive harm, but also on their completion date. In some instances, the CMA may only become aware of a merger some months after it is announced so that the speed with which a decision to investigate is taken can have a significant effect on the time available to carry out the Phase 1 investigation and also on the risk of potentially harmful integration of the merging parties' businesses, as discussed further below.

The outcome of the whole filtering exercise is to synthesize the key prioritized leads into a report, prepared by the Head of Mergers Intelligence, which gives relevant information for a decision to investigate to be taken on each case, includes a recommendation, and prioritizes cases based on the timing of completion and the extent to which they could qualify and raise concerns.

B. Mergers Intelligence Committee

The decision on whether to open a Phase 1 investigation is taken by the Mergers Intelligence Committee (MIC), which acts under delegated authority from the Senior Director of Mergers. The MIC considers, on average, around 50 transactions each month.[27] The Committee meets weekly and is normally chaired by a Director of Mergers. Other attendees are the mergers intelligence team and typically at least two other members of the CMA's Mergers Group, including one or more Assistant Directors involved in Phase 1 mergers. The MIC normally includes at least one economist and one lawyer, reflecting the multidisciplinary teams working on merger investigations. Staff members with experience of the firms or sectors involved in mergers discussed at a particular MIC meeting also commonly attend for those cases. In our view, a balanced group of MIC members, with sufficiently experienced or senior input from the Mergers Group, is important to its proper functioning. In the past, this has been done by ensuring a quorum of at least two Assistant Directors for a decision to be taken. Normally MIC decisions are taken by consensus, but the Chair has the deciding vote.

C. Decision-Making Framework

The CMA must refer a merger to Phase 2 if in its Phase 1 investigation it has found there is a realistic prospect that the merger will result in an SLC. At the earlier stage of deciding whether to open a Phase 1 investigation, the MIC considers whether, based on the evidence available, the merger in

[27] The CMA's annual report 2015–2016 (p. 39) noted that in the two years after the start of the CMA, the MIC reviewed more than 1,200 transactions.

question is one in which there is a reasonable prospect that its duty to refer may be met.[28] In this sense, the threshold is akin to a 'double realistic prospect'. The decision-making framework is sometimes framed in a different way, which can help in reaching a decision on whether to investigate: whether it is more likely than not that the case will go to a Case Review Meeting.[29]

Three assessments underlie the decision-making framework:

- ***Jurisdictional assessment***: are the jurisdictional thresholds likely to be met?
- ***Substantive assessment***: do *prima facie* competition concerns exist?
- **De minimis *assessment***: are the markets concerned likely to be of insufficient importance to justify a reference?

These assessments are not made independently of each other but considered together. For example, if there is greater uncertainty over whether the jurisdictional test is met, this may be offset by a stronger likelihood that the merger will give rise to concerns.

Since the CMA has a duty to refer mergers that meet the reference test, it is not able to apply the prioritization principles it has drawn up for its other work.[30] This means that, for example, resource constraints are not a legitimate reason for the MIC not to call in a merger if it meets the tests set out above. In practice, it can be difficult for MIC members not to feel some pressure occasionally to take the capacity levels of the CMA's Mergers Group into account when deciding whether or not to call in a merger, in particular where the decision framework set out above does not give a clear-cut outcome. One way of resolving this tension between the duty to refer (as it applies to the decision to investigate) and the practical day-to-day resourcing issues the CMA faces is for decision-making authority in the MIC to be independent of the CMA Mergers Group. In our view, it is important to maintain close links with the Mergers Group to benefit from significant merger assessment experience in the MIC decision-making process. Nevertheless, the composition of the MIC could be adjusted so that Mergers Group staff are active members of the Committee but the Chair is from outside of the Mergers Group. This will mitigate the risk that resourcing contributes to a decision to call in a merger (when the Group is quiet) or not to do so (when the Group is busy).

[28] See *Jurisdictional and Procedural Guidance*, paragraph 6.15 (see also *Mergers Intelligence Guidance*, paragraph 2). This standard was the same at the OFT (*Mergers—Jurisdictional and Procedural Guidance*, OFT527, June 2009, paragraph 4.15).

[29] As noted above, a Case Review Meeting (CRM) is held during the Phase 1 investigation for mergers potentially raising competition concerns (see *Jurisdictional and Procedural Guidance*, from paragraph 7.32).

[30] This is acknowledged in *Prioritisation Principles for the CMA* (CMA16, April 2014), paragraph 2.4.

The only assessment that has an element of prioritization in the framework, the *de minimis* assessment, reflects a statutory exception to the duty to refer.[31] In making this assessment, the MIC is bound by the same criteria that apply when the CMA finds a realistic prospect of an SLC in its Phase 1 investigation. These include the size of the market(s) concerned (generally below £5 million and in any case below £15 million), the magnitude and duration of the loss of competition, wider implications such as replicability, and the hypothetical availability of undertakings in lieu of a reference.[32]

In recent years, the MIC appears to have become more willing to rely on the *de minimis* exception. This is suggested by the declining number of mergers intelligence cases to which this exception was applied at the end of the Phase 1 investigation.[33] This follows a number of mergers in the same sectors, in particular the bus industry[34] and car dealerships,[35] that were called in for review but then cleared under the *de minimis* exception to the duty to refer.

In our view, it is legitimate for the MIC to pre-empt the use of the *de minimis* exception by deciding not to call in cases that are likely to meet the criteria for applying this exception. It is a waste of the merging parties' and the CMA's resources to conduct a Phase 1 investigation if the MIC can determine that if at the end of the investigation a realistic prospect of an SLC was found, the likely outcome is a clearance based on this exception. This nevertheless stretches the statutory framework. The primary purpose of the *de minimis* exception is to avoid a reference where the public costs involved with a Phase 2 investigation would be disproportionate. By applying a *de minimis* assessment at the MIC stage, the CMA in effect extends the scope and objective of the exception to include avoiding the costs involved with a Phase 1 investigation. The MIC should, therefore, exercise caution when using the criteria of the *de minimis* exception to decide not to open a Phase 1 investigation.

Another reason for a cautious approach is that, without a Phase 1 investigation, making an assessment of the *de minimis* criteria is likely to be difficult.

[31] Sections 22(2)(a) and 33(2)(a) of the Enterprise Act.

[32] See *Jurisdictional and Procedural Guidance*, paragraph 6.14, and *Mergers: Exception to the Duty to Refer in Markets of Insufficient Importance* (CMA64, 16 June 2017, *De Minimis Guidance*), paragraphs 47–49.

[33] In 2015/16, no mergers intelligence cases were cleared under the *de minimis* exception. A contributing factor may be the increased willingness of the CMA to ask questions of merging and third parties at the mergers intelligence stage (discussed below), which allows it to apply greater accuracy in its estimate of the size of the market(s) that may be involved.

[34] *Midland General/Felix* (OFT decision of 30 May 2012), *Arriva/Liyell* (OFT decision of 21 January 2013), *Diamond Bus Company/FirstGroup Redditch and Kidderminster* (OFT decision of 23 August 2013) and *Arriva/Centrebus* (CMA decision of 6 May 2014).

[35] *Lookers/Shields Land Rover* (OFT decision of 9 December 2013), *Ridgeway/Parkview Skoda* (OFT decision of 21 March 2014) and *Eden/Two Riders dealerships* (CMA decision of 24 October 2014).

For example, the size of the market concerned is 'the sum of all suppliers' annual turnover in the United Kingdom in that market'.[36] This may be difficult to ascertain in many cases without third party enquiries, although in some sectors the MIC can estimate this based on previous cases. Furthermore, the CMA's general policy is not to apply the *de minimis* exception where clear-cut undertakings in lieu of reference could be offered by the merging parties to resolve the competition concerns identified.[37] The MIC should, therefore, in our view, only decide against calling in a merger if it has enough information to show that that the *de minimis* criteria will most likely be met, the size of the market is well within £15 million, and undertakings are unlikely.

The outcome of MIC meetings can take three forms: a decision not to investigate and the case dismissed, a decision to investigate, or the transaction is rolled over with a request from MIC members for additional research to allow for a more informed decision. Ultimately only a very small proportion of the mergers that are discussed at the MIC is called in. Decisions and a brief summary of the reasoning are recorded to provide an audit trail and for management information purposes. An MIC decision not to call in a merger is provisional. It can be reconsidered if new evidence comes to light, provided this happens within the four-month time limit. This could happen when a new complainant contacts the CMA about the merger, although in practice this is very rare.

D. Opening an Own-Initiative Investigation

When a decision is taken to investigate, the mergers intelligence team hands the case over to a case team that will conduct the Phase 1 investigation. The CMA then sends a so-called 'enquiry letter' to the merging parties. The enquiry letter has a set of questions designed to establish whether the jurisdictional thresholds have been met and whether the transaction could give rise to competition concerns. The CMA has published a template enquiry letter.[38] This template is adapted to the specifics of the transaction where possible, but this will typically only be done to a limited extent since the information available about the transaction and the parties' activities is often very limited at this stage. Where the merger has already completed at the time, the CMA sends the enquiry letter,[39] the information is requested under

[36] *De Minimis Guidance*, paragraph 30.

[37] *Idem*, paragraph 21.

[38] The enquiry letter process is described in the *Jurisdictional and Procedural Guidance*, paragraphs 6.15–19 and 6.59–60. The template is available on the CMA website at https://www.gov.uk/government/publications/merger-enquiry-letter-template.

[39] This will apply in the large majority of cases, but in rare instances the CMA may decide to investigate where a transaction has not yet completed. This allows the CMA to impose an initial enforcement order to prevent any integration that takes place in advance of or immediately following completion. This happened, for example, in *Diamond Bus Company/FirstGroup*

a statutory notice using the information-gathering powers under section 109 of the Enterprise Act.[40] This means that if the merging parties do not respond within the specified deadline, the CMA can suspend the four-month period to refer completed mergers.[41] Persons failing without reasonable excuse to comply with a section 109 notice can also be subject to a penalty.[42] Enquiry letters are sent under section 109 to ensure that the merging parties provide the information the CMA needs for its Phase 1 investigation and, for completed mergers, to prevent the four-month period expiring.

The information requested in the enquiry letter is extensive but does not quite have the same scope as the information requested in the merger notice form that must be submitted by parties notifying a merger, nor will it necessarily be sufficient for the CMA to start its Phase 1 investigation. The principal reason for this is the use of the statutory notice under section 109 to require the information. As there are penalties attached to non-compliance with the notice, the scope of the enquiry letter must be sufficiently factual, clear, and precise to determine whether or not the terms of the notice have been complied with. In addition, a cautious reading of section 109 suggests it can be used to obtain only facts, not the parties' views, and only information that already exists at the time the notice is sent (in other words, the CMA does not require information to be created under its section 109 powers).[43]

Nevertheless, the CMA's aim is that the information required from the merging parties in own-initiative cases is ultimately similar to the information required in notified cases, to avoid creating a disincentive to notify.[44] The information required in the enquiry letter, therefore, mirrors the information requested in the merger notice form as much as possible within the restrictions of the section 109 notice. In most cases, the CMA needs to supplement the enquiry letter with follow-up questions (also often under section 109 in completed merger cases) once the response to the enquiry letter allows it to focus its questions with more precision.

The parties have an incentive to engage with the CMA and provide the information it needs to conduct its investigation. If they do not, the CMA

Redditch and Kidderminster (OFT decision of 23 August 2013) and *Linergy/Ulster Farms By-Products* (CMA Phase 1 decision of 17 July 2015).

[40] From April 2014, information-gathering powers under section 109 were extended to Phase 1 merger investigations under the Enterprise and Regulatory Reform Act 2013.

[41] Section 25(2) of the Enterprise Act.

[42] The penalty may be a fixed amount not exceeding £30,000, a daily rate not exceeding £15,000 per day, or a combination of the two (see section 110 to 112 of the Enterprise Act). No penalty has ever been imposed for noncompliance with a request made under section 109.

[43] The CMA may ask additional questions outside the enquiry letter, for example in the covering e-mail, where it is not bound by the restrictions resulting from the use of section 109. However, the merging parties are not under obligation to respond to these questions.

[44] *Jurisdictional and Procedural Guidance*, paragraph 6.60.

will at some point have to proceed to a decision on reference regardless,[45] which may then rely more heavily on evidence that may be adverse to the parties' case. Despite this incentive, in practice, there is typically a difference (often significant) in the amount of information provided by merging parties in own-initiative cases compared with those that are notified. This usually reflects a lower willingness of the merging parties—usually a single party, the acquirer, as the transaction will have completed—to engage with the CMA in own-initiative cases. This may be because of a lack of resources or because they disagree with the decision to investigate. As a result, in some cases, the CMA has very little information with which to progress the case. Although the CMA may impose a penalty for an insufficient response to questions asked under section 109, it has never done so (nor have its predecessors) and in our view is unlikely to, except in very clear cases.

Although the CMA can in theory proceed to a decision on reference where the parties have provided very little information, in practice this is difficult. While reference may be legally possible,[46] without clear and credible *prima facie* competition concerns it would create legal and presentational risks for the CMA, due in part to the CMA's obligation (and standard practice) to publish reasoned decisions.[47] The CMA would be required to sign-off a reasoned decision based on limited information. Such circumstances also risk involving significantly increased resources due to a Phase 2 investigation that may in fact be unnecessary.

In these cases, the CMA finds itself in a difficult position where it has to weigh up the costs and risks of reference and clearance.

E. Timing Issues in Own-Initiative Investigations

Sending the enquiry letter in the form of a section 109 notice also means the CMA must set a reasonable time period for response, as a late response can (in theory) result in a penalty. The enquiry letter typically allows the merging parties two weeks to respond.[48] This effectively reduces the four-month time limit the CMA has to reach a decision on reference of a completed

[45] This is supported by the judgement of the Court of Appeal in *Office of Fair Trading v IBA Health*, referred to below. This possibility is implied in the *Jurisdictional and Procedural Guidance*, paragraph 6.17.

[46] This is suggested by the Court of Appeal's judgement in *Office of Fair Trading v IBA Health* [2004] EWCA Civ 142, paragraph 47: 'That lower degree of likelihood might, for example, exist in circumstances where the work done by the OFT did not justify any positive view, but left some uncertainty, and where OFT therefore believed that a substantial lessening of competition might prove to be likely on further and fuller examination of the position (which could only be undertaken by the Competition Commission).'

[47] See sections 107(1)(a)-(aa) and 107(4) of the Enterprise Act.

[48] There is a tighter deadline (typically two working days) for a response to the questions regarding basic information about the transaction to allow the CMA to impose an initial enforcement order as quickly as possible and stop integration between the merging parties.

transaction, because the clock continues ticking while the parties prepare their response.

For example, if there are four weeks of the four-month period remaining when the decision is taken to investigate and the merging parties respond in full to the information request by the end of the two-week period, the CMA has only two weeks left to reach a decision on reference (where its statutory time limit for Phase 1 investigations is eight weeks).[49] During this remaining time, the CMA is likely to need further information from the merging parties, as set out above, and the CMA needs to seek the views of customers and competitors on the merger.[50] There is then a real risk that the CMA's ability to refer times out. There is, therefore, a tension that the statute does not foresee, between the CMA's obligation to give merging parties a reasonable time to respond and the four-month time limit.

This risk was more manageable prior to the changes to the merger regime in 2014. These changes included the repeal of the power to request, but not require, information about mergers under section 31 of the Enterprise Act and stop the clock in case of an insufficient response.[51] The key difference between section 31 and section 109 is the potential for penalties for non-compliance and the consequent need for the deadline for response to be reasonable. Questions under section 31 could be sent out with plainly unrealistic deadlines as short as one day to allow the four-month clock to be stopped while the parties prepared their response. Such deadlines appeared unreasonable but were in the interests of both the parties and the authority since they avoided unnecessary references.

The removal of this possibility has implications for the point at which the MIC can decide to call in a merger. When a merger is called in close to the end of the four-month period, the CMA can likely still refer a case based on the limited information received in response to the section 109 notice.[52] Without the time for a full investigation, there is a risk of the CMA finding competition concerns where none in fact exist (that is, a risk of false positives). This possibility of referral on the basis of minimal investigation may fairly reflect the consequences of the merging parties taking the risk not to

[49] The CMA may extend the four-month period by up to 20 working days, but only with the merging parties' agreement (sections 25(1) and 32(4) of the Enterprise Act). In most cases, the parties agree to an extension since the alternative is a risk of a reference to a Phase 2 investigation if the CMA is unable to rule out the possibility of competition concerns in view of its limited investigation.

[50] Section 105(1) of the Enterprise Act requires the CMA to bring the merger to the attention of those who might be affected by it, although this requirement is subject to the caveat 'so far as practicable'.

[51] Section 31 and section 25(2) and (3) of the Enterprise Act before the Enterprise and Regulatory Reform Act 2013 came into force.

[52] This is supported by the judgement of the Court of Appeal in *Office of Fair Trading v IBA Health*, referred to above. The CMA implies this possibility in its *Jurisdictional and Procedural Guidance*, paragraph 6.21 (third bullet).

notify and so incentivises them to notify where appropriate. Referral in such circumstances is, therefore, important to maintain the integrity of the voluntary regime.

However, this gives rise to the same issues as identified above (the difficulty of determining whether the reference test is met, as well as legal and presentational risks to publishing a reasoned decision). The CMA is, therefore, also likely to be reluctant to refer in cases where the time period is close to expiring. There is thus a much greater chance of the CMA clearing a case when competition concerns do in fact exist (that is, false negatives). In addition, anticipation of these difficulties means that the CMA is in practice very reluctant to call in cases close to the end of the four-month period, except where there are very strong *prima facie* concerns.

Extending the information-gathering powers of the regime to Phase 1 (so that enquiry letters are sent out under section 109) has, therefore, had the unintended consequence of shortening the four-month time limit for referral. In our view, this has created distortions in the incentives of merging parties and their advisers to notify or take the risk of completing without notifying, by making it more attractive, albeit still risky, for firms to game the system.

IV. INTERACTION WITH MERGING PARTIES AND THIRD PARTIES

As noted above, the CMA takes a decision to investigate by sending an enquiry letter. The decision to investigate is a precursor to the decision on reference in completed cases. As discussed in detail below, the decision to investigate and the decision on reference are two distinct decisions in the statute.[53]

A. Extending the Scope of "Pre-investigation"—Section 5 Requests

The distinction between the research that results in a decision on whether to open a Phase 1 investigation and the investigation itself has legal consequences, because the Phase 1 investigation must involve inviting comments from third parties (so far as practicable) and result in a published, reasoned decision.[54] The research conducted by the mergers intelligence team must, therefore, avoid becoming, in effect, a Phase 1 investigation. This risk is small where the research is limited to information that is publicly available or is on the CMA's files from earlier investigations. However, the risk increases when research by the mergers intelligence team extends to requesting information from the merging parties and third parties. In the extreme, the CMA could ask a range of questions on both jurisdiction and the merger's competitive impact and undertake, in effect, an investigation sufficient to come to a

[53] Section 105(1) of the Enterprise Act states: 'Where the CMA **decides to investigate** a matter so as to enable it to **decide whether to make a reference** under section 22 or 33…' (emphasis added).

[54] See sections 105(1), 107(1)(a)-(aa) and 107(4) of the Enterprise Act.

decision on reference, but then use the information only for a decision (not) to investigate. How far can the CMA push its monitoring function under section 5 of the Enterprise Act—which, as noted above, in itself gives a wide scope for obtaining information—without triggering the consultation and publication requirements of a Phase 1 investigation?

To avoid triggering these requirements, mergers intelligence policy at the OFT was to allow only two exceptions to the reliance on publicly available information and precedents. First, communication with other government departments and sector regulators about specific mergers was seen as internal to government and, therefore, like an extension to internal research.[55] For mergers covering several countries, this also included other competition authorities. The second exception applied to unsolicited complaints. The OFT commonly sought, as the CMA still does, additional information from any complainant to substantiate its claims. This is critical to understanding the credibility of any complaint in order to inform the decision to investigate and so is not considered to reflect an investigation.[56]

However, given the limited information that can be obtained from public sources, the drawback of this strict approach was that in several cases, the MIC had to decide whether to open a Phase 1 investigation based on very incomplete information. Consequently, a disproportionate number of own-initiative transactions were found not to qualify for investigation as the jurisdictional thresholds were not met.[57] Following an internal review of its mergers intelligence function, conducted in 2012, the OFT revised its policy and allowed limited contact with merging parties prior to the decision to investigate. The CMA relaxed this policy further in 2016 by widening the scope of the questions that can be asked of merging parties and by allowing limited contact with third parties. This culminated in guidance that was published by the CMA in June 2016.[58]

In most cases, the MIC still reaches a decision based on internal research. However, as a result of these revisions, for some mergers, the MIC now asks the mergers intelligence team to send information requests to the merging parties and occasionally third parties. This depends on the availability of public information about the merger and the degree of potential competition concerns. These requests are issued under the CMA's general monitoring powers provided for in section 5 of the Enterprise Act, and are, therefore, referred to as 'section 5 requests'. They are informal, in the sense that the CMA cannot

[55] This is reflected in the *Jurisdictional and Procedural Guidance*, paragraph 6.7.

[56] The CMA emphasizes in its *Jurisdictional and Procedural Guidance* (paragraphs 6.9–14) that it will not investigate a merger just because it has received a complaint, in particular where complaints are made by competitors or rival bidders for the target firm. The CMA repeated this policy in its *Mergers Intelligence Guidance*, paragraphs 13–14.

[57] In 2011/12, 37 percent of cases called in via mergers intelligence were found not to qualify for investigation (the so-called 'FNTQ decisions'), compared with 21 percent of all cases. In 2012/13 these figures were similar (35 percent and 23 percent respectively).

[58] See Footnote 11 above.

compel parties to respond.[59] However, merging parties will have an incentive to respond to minimize the risk that the CMA opens a Phase 1 investigation and uses its powers under section 109 of the Enterprise Act to compel a response. Although the CMA occasionally asks short follow-up questions, it has stated that it will not typically engage in more than two rounds of questions.[60]

B. Scope of Section 5 Requests

The CMA limits the scope of section 5 requests to the merging parties to jurisdictional questions.[61] This may include questions about the target company's turnover (relevant for the turnover test) and about the transaction, such as its (planned) completion date (relevant for the start of the four-month period) and the nature of the target business (relevant to decide whether it is an enterprise). Section 5 requests can also aim to determine whether the share of supply test may be met, for example the extent to which the merging parties' products or stores overlap.

Requests involving turnover, completion date, and the nature of the target business relate to factual information that is generally objective and usefully informs the MIC's view about the likelihood that the merger will qualify for a Phase 1 investigation. This jurisdictional assessment is often relatively simple, with a wide discretion for the CMA and little scope for disagreement with the parties.

However, requests involving share of supply risk being different. Share of supply is commonly subject to significant debate, with merging parties disputing whether the CMA has jurisdiction. Calculation of the parties' share of supply typically requires piecing together a range of evidence, including from third parties, and can involve an element of judgement. In our view, section 5 requests related to share of supply should, therefore, be limited to questions of fact that can be objectively verified.

The competitive assessment of the merger would require more extensive information and be more complex. This would not normally be covered by section 5 requests to the merging parties, although the CMA has not ruled it out. The CMA has not published the reason for distinguishing between jurisdictional and substantive questions, but it is likely that in this way the CMA aims to minimize the risk that its research effectively turns into a Phase 1 investigation.[62] Naturally, there is nothing to stop merging parties from adding their own comments on their merger's competitive impact. The CMA is very

[59] Of course, if parties do respond, they must do so truthfully to avoid committing an offence under section 117 of the Enterprise Act.

[60] *Mergers Intelligence Guidance*, paragraph 7.

[61] *Idem*.

[62] The nature of the share of supply test means that the distinction between the jurisdictional and substantive assessments of a merger is not always clear-cut: if the share of supply test relates to a set of products that could form a market, it will disclose the parties' market share.

unlikely to engage with the merging parties about these comments, but it is also unlikely to ignore them in its MIC assessment. Parties that see a real risk that the CMA could misunderstand their merger's competitive impact can therefore use this opportunity to briefly explain this impact on top of their response to a section 5 request. In our view, the CMA should, however, treat these comments with caution, since without opening a Phase 1 investigation it cannot test these points, and ensure due process, with third parties.[63]

Section 5 requests to third parties other than other government departments, regulators, and complainants will be sent only rarely by the CMA.[64] They are limited to mergers in the public domain and will relate to understanding the nature of these parties' products and the degree of overlap with the merging parties' products. The CMA has referred to the share of supply test as the focus of these questions, but responses may also be valuable in informing the CMA about the size of the affected markets for the purpose of the *de minimis* assessment. The CMA has stated clearly that in this pre-investigative phase it will not ask third parties (except complainants) about the merger's competitive impact.

The CMA's more cautious approach in relation to third parties is due to specific risks, in addition to the general aim of preserving a clear pre-investigative phase. In particular, some third parties—especially competitors—will have their own agenda when responding and it may be difficult for the CMA to check their statements with the merging parties and other third parties without opening a Phase 1 investigation. The fact that share of supply is not only a jurisdictional test but also important in the competitive assessment (in particular where share of supply is similar to market share) is in our view another reason for focussing share of supply questions on objective facts relating to products and store locations. Further, third parties without specialist legal advice commonly struggle to distinguish between share of supply and market share, so the lines of what the CMA is asking third parties risk becoming blurred with these requests.

The CMA may also want to avoid an unwarranted expectation that the CMA will open an investigation and publish a decision, which could harm the merging parties by creating the impression that their merger may run into regulatory problems.[65] Also, for some mergers, the mere fact of the CMA's interest may even amount to share-price sensitive information.

[63] Section 5 requests to merging parties also carry a risk that they lead to integration steps that may be difficult to unwind. That risk is mitigated by the CMA's power, once it has begun a Phase 1 investigation, to demand these steps to be unwound when it imposes its routine initial enforcement order to stop integration. However, the CMA has not done this since this power was introduced in 2014. See *Interim Orders in UK Merger Control: An Interim Verdict*, Tom Heideman and Ajal Notowicz, [2016] E.C.L.R. 264.

[64] *Mergers Intelligence Guidance*, paragraphs 8–9.

[65] Although the CMA may not disclose which merger it is researching, this will be obvious where the CMA has learned about the merger from press reports.

Set against these risks, there are clearly significant potential benefits of the CMA's looser approach to the pre-investigative phase of inquiry. Improving the information available when the CMA decides whether to open an investigation reduces the risk of an unwarranted merger review and fits in with the objective of mergers intelligence identified above. There has been a marked drop in the number of decisions where the CMA opened a Phase 1 investigation only to find that the merger did not qualify for investigation.[66] In addition, the number of own-initiative investigations has gone down, both the total number and as a proportion of the total number of Phase 1 investigations (see Table 1). This could be due to better information, resulting in a better focus on potentially problematic cases. This is suggested by the significant increase in the proportion of mergers intelligence cases raising preliminary competition concerns, while the actual number of these cases has not changed much. As shown in Table 1, in 2015/16, this was 69 percent (nine out of thirteen cases), while in 2014/15, it was 48 percent (twelve out of 25) and in 2013/14, it was 35 percent (eight out of 23). The proportion of mergers intelligence cases resulting in an SLC finding at Phase 1 has also increased, albeit much less so (from 22 percent in 2013/14 to 28 percent in 2014/15 and 31 percent in 2015/16).

C. Briefing Notes from Merging Parties

In 2016, the CMA took a further step in promoting its aim 'to avoid the regulatory burden of unnecessary investigations': it invited merging parties to approach the CMA with a short briefing note about their merger, explaining why they do not propose to notify the merger.[67] The parties can raise both jurisdictional and competition reasons and the CMA may follow up with short questions. The MIC will treat the parties' briefing note as one of its sources of information when deciding whether to call in the merger for investigation. If the MIC decides not to call in the merger, it will tell the parties that it has no further questions at that stage. It will not say that it will not open an investigation, since, as set out above, that position is not final until the four-month period has expired.

This represents a significant change from the OFT's and then the CMA's previous position, which was to open a Phase 1 investigation every time merging parties informed the authority about their merger. The authorities believed this

[66] In 2015/16, there were only two such cases (3 percent of all decisions), only one of which was a mergers intelligence case. This is a sharp drop compared with the numbers in previous years (see footnote above). This trend continued in 2016/17, when only one merger was found not to qualify.

[67] *Mergers Intelligence Guidance*, paragraphs 10–13. The reference to the aim of avoiding unnecessary investigations was in this Guidance when it was published (paragraph 10), but was removed when this Guidance was updated in September 2017. This update also states that the CMA will, as a general rule, only consider briefing notes where there is a signed merger agreement (paragraph 12).

was necessary due to the requirement to publish any decision about whether or not to refer (publication requirements are discussed further in Section V).[68]

The CMA's new policy can be a useful tool for parties who might otherwise have notified out of an abundance of caution or a fear that the CMA might decide to open an unwarranted investigation based on a lack of information. Submitting a briefing note is not without risk for the parties, because the CMA may decide to open an investigation in spite of the parties' arguments while otherwise the merger may have gone unnoticed. The policy, therefore, has scope to be successful in reducing the number of investigations of unproblematic mergers and focussing the CMA's resources on the right cases.

However, there is also a risk that the CMA will effectively clear mergers without having properly investigated them, bypassing the consultation and publication safeguards set out above. Third parties play no role in the process at this stage and, therefore, cannot contribute their views. Also, if the CMA decides not to investigate based on the merging parties' briefing note, third parties cannot challenge this because they are not aware of it. This is an issue especially if the merger in question has not yet been publicized, since the four-month deadline for a reference will start as soon as the merging parties submit their briefing note to the CMA.

In our view, the CMA's mergers intelligence team and committee should, therefore, adopt a very cautious approach in order to avoid being gamed by the parties. First, the CMA should only apply its new policy for mergers that have been made public. This avoids the risk that if a merger is not public, the merging parties can start the four-month clock by submitting their briefing note to the CMA informing them of the merger and then let the clock run out without an opportunity for third parties to complain about the merger. Second, where other sources of information call the parties' submission into question, or the CMA does not have any other sources to cross-check the submission (for example, in a sector new to the CMA), the CMA should not hesitate to open a Phase 1 investigation. That will allow the CMA to obtain third-party information and reach a more informed view of the competition impact of the transaction. Finally, the CMA should publish statistics on the number of briefing notes it receives and the resulting decisions to create transparency in the frequency and outcomes of briefing notes.

V. THE NATURE OF THE DECISION TO INVESTIGATE

As noted above, the Enterprise Act distinguishes the decision to investigate from the decision on whether to make a reference. This raises the question of what the decision to investigate entails, in particular whether it can be appealed and whether it should be published. This is considered below.

[68] This was reflected in the OFT's *Mergers—Jurisdictional and Procedural Guidance* (OFT527, June 2009), paragraph 4.5.

A. An Appealable Decision

Decisions on reference have on a few occasions been appealed through the Competition Appeal Tribunal (CAT).[69] A decision (not) to investigate has never been appealed, although there have been instances where such action has been threatened by complainants. In practice, an appeal by merging parties against a decision to investigate is unlikely. As the threshold for investigating is low, the more effective strategy for the merging parties is to demonstrate that there is no relevant merger situation or no SLC and thus argue the decision to refer. If the CMA reaches a reference decision, this implies that the decision to investigate was correct and merging parties could appeal the reference decision (or, more likely, focus their efforts on the Phase 2 investigation). If the CMA clears the merger in Phase 1, that does not mean that the decision to investigate was wrong. Also, while merging parties may object to the cost, waste of time, and distraction of the Phase 1 investigation, by then the four-week period to appeal the decision to investigate will almost always have passed (the time periods for appealing a decision to investigate are discussed further in the next sub-section). In contrast, third parties may want to appeal a decision *not* to investigate, particularly where they may be adversely affected by the decision: without investigation, there can be no decision on reference. The right of appeal applies to 'any person aggrieved by a decision of the CMA',[70] which includes most complainants.

Any CMA decision 'in connection with a reference or possible reference' is subject to appeal under section 120 of the Enterprise Act.[71] This language is wider in scope than just a decision on whether or not to refer. In non-notified cases, this decision is contingent on a decision to investigate, which involves a preliminary assessment of the criteria that determine whether a reference is made. The decision to investigate is, therefore, likely, on the face of it, to be interpreted as being made in connection with a (possible) reference. Further, while there is no defined list of decisions that may be appealed, section 120 contains an exclusion only for certain penalty decisions. It also explicitly states that a 'decision' includes a failure to take a decision: a refusal to investigate could be seen as a failure to take a decision on reference. In

[69] Only decisions not to refer have been appealed (by third parties). The most recent appeal was of the OFT's decision in *Information Resources Inc./Aztec* Group, 13 December 2013 (*A.C. Nielsen Company Limited v CMA* [2014] CAT [8]). Section 120 of the Enterprise Act refers to 'apply for a review', but for simplicity we will refer to 'appeal'.

[70] Section 120(1) of the Enterprise Act.

[71] Section 120 of the Enterprise Act states: '(1) Any person aggrieved by a decision of the CMA … under this Part [that is, the merger control provisions of Part 3 of the Enterprise Act] in connection with a reference or possible reference in relation to a relevant merger situation… may apply to the Competition Appeal Tribunal for a review of that decision. (2) For this purpose "decision"– (a) does not include a decision to impose a penalty… ; but (b) includes a failure to take a decision permitted or required by this Part in connection with a reference or possible reference'. The CAT must apply the principles of judicial review (section 120(4)).

our view, the Enterprise Act, therefore, allows decisions to investigate to be appealed under section 120.

Of course, if there was no decision but only the exercise of discretion on the part of the CMA, then a complainant might still have a remedy by way of judicial review through the High Court. However, the UK Government has expressly stated that its intention with merger appeals under the Enterprise Act is to avoid such a prospect of a two-tier system.[72]

The main ruling on the meaning of an appealable decision in a mergers context is the CAT's judgement in *Sports Direct*.[73] The CAT found that section 120 may apply to a broad range of potential decisions, noting that 'the test for what is "a decision" for the purposes of section 120(1) is simply a matter of interpreting the plain statutory wording, taken in context.' The CAT went on to state that 'a decision will normally be covered by section 120 (1) if it is something that could form a ground of challenge in the appeal from the ultimate decision if it were not addressed and, if necessary, remedied on an interlocutory basis'.[74] In this case the vendor challenged the refusal by the CC to provide it with unredacted versions of working papers that CC staff had produced before the CC panel considered its provisional findings. The CAT rejected arguments made by the CC and OFT that the challenge was premature due to the merger investigation being at a 'pre-provisional stage'. The CAT stated that 'in the context of merger control, where there is a procedure before the CC typically involving preliminary decisions leading to a final decision affecting the parties' legal rights, judicial review under section 120 may lie against a preliminary decision not affecting legal rights, but which may lead to final decisions which do.'[75] The CAT further states that the primary concern is whether what has happened has resulted in real injustice.[76]

The CAT's judgement regarded a procedural challenge where a merging party's rights of defence were concerned, and does not, therefore, directly translate to a decision to investigate. The judgement nevertheless gives an insight into the CAT's interpretation of the decisions that can be appealed in a merger context.[77] Applying this, the 'plain statutory wording' leaves little doubt, given that section 105 refers to a distinct 'decision to investigate'.

[72] HL Deb 18 July 2002 vol. 637 col. 1505.

[73] *Sports Direct International plc v Competition Commission* [2009] CAT 32.

[74] *Idem*, paragraph 55.

[75] *Idem*, paragraph 50 (emphasis in original).

[76] *Idem*, paragraph 56.

[77] The CC in this case argued that 'it (necessarily) takes 'countless' decisions in the course of any merger reference' and that it 'would be unable to fulfil its statutory duties if parties could opportunistically challenge any or all such decisions' (paragraph 59 of the judgement). The CAT rejected this argument but emphasised the judgement would not apply to all cases where a decision is disputed. The question on the decision to investigate also appears to be clearer: the issue is not 'countless' informal decisions but two separate decisions that are described separately in the statute.

It is also likely that the decision to investigate could form the basis for a ground of challenge of a Phase 1 decision. A decision *not* to investigate cannot form part of a later appeal (since it means the CMA will not look further into the merger), but that only strengthens the argument that this decision ought itself to be capable of being appealed. In the alternative, a complainant may consider a refusal by the CMA to open a Phase 1 investigation as a breach of its duty to refer. However, these are different decisions that should not be conflated. They are made at different stages of an investigative process on the basis of different tests, as set out in Section III in the discussion of the decision-making framework for mergers intelligence.

In addition to *Sports Direct*, two other appeals are relevant in interpreting the meaning of an appealable decision in a mergers context. First, *CGL v OFT* regarded an OFT decision not to approve a proposed purchaser of a business that the merged entity had undertaken to divest following the OFT's conditional clearance of the merger.[78] The CAT held that the refusal to approve the purchaser was a decision subject to appeal under section 120. This was despite the lack of a publication requirement for this type of decision. This suggests that the lack of a publication requirement for a decision (not) to investigate does not in itself mean it cannot be appealed.

Second, at an early stage of its Phase 1 investigation of Ryanair's minority stake in Aer Lingus, the OFT took a decision on the narrow jurisdictional issue of whether it was time-barred from referring the transaction to the Competition Commission.[79] The decision that was appealed and ruled on by the CAT consisted of the OFT's position and reasoning on this narrow legal point, which was outlined in a letter it had written to Ryanair. The OFT sent the letter at a stage when little substantive assessment of the case had yet taken place, and in the knowledge that Ryanair would appeal this decision. The OFT did not publish its letter but it did announce its decision and short reasons.[80] Ryanair lost its appeal. When the CAT issued its ruling, it did not question the merit of an appeal of such a decision under section 120, even though it was made at an early stage and did not represent a decision on reference.[81]

A final point worth considering is whether a decision not to investigate a merger might be seen as comparable with a case closure decision in an investigation of a possible breach of the Chapter I or II prohibition of the Competition Act 1998 (CA98). It is possible for the CMA to close its case file on grounds of administrative priorities without coming to any views about

[78] *Co-operative Group (CWS) Limited v Office of Fair Trading*, [2007] CAT [24].

[79] The issue arose because Ryanair had acquired its stake more than four months before the OFT began its investigation. At that point, however, the OFT could not investigate due to the risk of conflicting outcomes between UK merger control and the EU Merger Regulation.

[80] OFT press release of 4 January 2011.

[81] *Ryanair Holdings PLC v Office of Fair Trading*, [2011] CAT 23. This point also did not come up in the Court of Appeal's ruling ([2012] EWCA Civ 643).

whether a breach has occurred.[82] Similarly, when the CMA decides not to investigate a merger, it has not done the necessary investigation to form a positive view on whether the duty to refer the merger arises. However, as discussed earlier, the duty to refer means the CMA must reach a decision on whether or not to investigate on substantive grounds alone; the CMA may not apply its prioritization criteria. The CMA has no similar duty under the CA98. As a result, a decision not to investigate is fundamentally different from a CA98 case closure decision.

B. The Complainant's Position Regarding a Decision Not to Investigate

In the (unlikely) scenario that a merging party wants to appeal a decision to investigate, this party can do so as soon as the CMA informs it of this decision[83] or it receives the CMA's enquiry letter. It is much more difficult for a complainant or other third party to determine when to appeal a decision *not* to investigate. The deadline for an appeal to the CAT is four weeks from the date on which the appellant was notified of the disputed decision, or the date of publication, whichever is earlier.[84, 85] Yet the CMA does not normally inform complainants of the decision it has reached. While the CMA has stated that it will tell merging parties that 'it has no further questions'[86]—which implies that the CMA has decided not to investigate unless further information comes to light—the CMA has made no similar statement in relation to complainants. In fact, it has been longstanding practice only to acknowledge receipt of a complaint.

This leaves complainants in a very difficult position. The complainant is in the dark not only about the nature of the CMA's decision, but also about the timing of it. A prolonged period of silence from the CMA after its last contact could mean one of the two things. First, it could mean that the CMA has opened an investigation and is engaged in the equivalent of pre-notification discussions with the merging parties. Especially, in own-initiative investigations, this can take several weeks, even months, while the four-month clock is stopped at various stages pending the parties' response to the CMA's section 109 notices. In many cases, the announcement that the CMA has imposed an initial enforcement order on the merged parties will tell the complainant at an early stage that the CMA has opened an investigation, but

[82] For example, *Cityhook Limited v Office of Fair Trading* [2007] CAT [18] and *Independent Media Support Limited v Office of Communications* [2007] CAT [29].

[83] The CMA states that it will generally do so within a week of the last contact with the merging parties (*Mergers Intelligence Guidance*, paragraph 15).

[84] *The Competition Appeal Tribunal Rules 2015* (SI 2015/1648), Rule 25(1). Indeed the CAT requests that a copy of the disputed decision is annexed to the application (Rule 9(6)).

[85] Note that in practice this means merging parties have four weeks from receiving an enquiry letter to appeal the decision to investigate, while third parties will be able to appeal up until four weeks following the end of the four-month statutory time period.

[86] *Mergers Intelligence Guidance*, paragraph 16.

the absence of such an announcement is not determinative (the merger may not yet have completed or the CMA may (unusually) have decided not to impose an order in a completed merger).

However, this silence could also mean that the CMA has decided *not* to investigate. In theory, the complainant will be able to infer that this is the case when the four-month time limit for a decision on reference has passed without a CMA announcement of an investigation. However, in practice it is extremely difficult to know when this point in time is reached. It will not always be clear for complainants when exactly the four-month period started, since this depends on the completion date of the merger or the date the CMA became aware of it. These dates are often not in the public domain. In addition, even if the complainant can calculate the expiry date of this period and the CMA has at that point not made any announcement about the merger, this is not evidence that the CMA is not investigating. The CMA may instead have stopped the four-month clock while it awaits information from the merging parties that is needed to begin its investigation.

In our view, this uncertainty makes it too difficult for a complainant to avail itself of the right of appeal that, as discussed above, it likely has under section 120 of the Enterprise Act. The CMA ought, therefore, to inform complainants of its decision shortly after it is taken, including (briefly) its reasons. A possible objection to this is that at that stage the decision is not yet final: it could be revised if the CMA receives new information. However, to safeguard the complainant's position, this should not be a bar for an appeal. In practice, it is extremely rare for the decision to be revised. Also, any such revision could take place up until the end of the four-month period, but, as noted, the complainant is very unlikely to know when this is. The CMA will also in many cases be uncertain of the date, since it has not needed to consider this. To let a complainant wait until the point in time the decision becomes final, would, therefore, not resolve the difficulties set out above.

A further question is how an appeal of a decision not to investigate relates to the four-month deadline for a reference. This deadline will expire shortly after an appeal is lodged, or indeed may already have expired by then. However, this is unlikely to be an issue. It is unlikely that a CAT ruling to quash the decision not to investigate and refer the case back to the CMA to make a new decision or to begin a Phase 1 investigation is then prevented by the previous expiry of the four-month deadline. This would effectively mean that the right to appeal has no practical effect.[87] If the four-month period is

[87] Compare the Court of Appeal's judgement in *Ryanair Holdings plc v Office of Fair Trading* [2011] EWCA Civ 1579, paragraph 28. Further, the expiry of the four-month deadline is also not an impediment to the CAT referring back a decision not to refer (for example, *A.C. Nielsen Company Limited v CMA* [2014] CAT [8]).

still running at the time of the appeal, the CAT is also likely to have the power to suspend this period to allow the appeal to reach a conclusion.[88]

C. Publishing a Decision (Not) to Investigate

The CMA never publishes a decision on whether or not to investigate a merger. The CMA is not required to do so, since this decision is not included in the requirement provided by section 107 of the Enterprise Act to publish certain decisions and give reasons, even though, as noted above, the decision (not) to investigate is recognized as a separate decision by section 105(1). Despite this absence of a publication requirement, the CMA could still choose to publish this decision (as it does, for example, with a decision that a merger does not qualify for review).

There is no real benefit of publishing a decision to investigate—this in effect already happens when the CMA invites comments as part of its Phase 1 investigation—but a decision not to investigate is different. Publishing such a decision would give an opportunity to appeal to third parties who are not complainants but are nevertheless adversely affected by the merger. There are, however, practical difficulties involved in publication. In particular, the number of decisions concerned is very large:[89] dozens of cases are discussed by the MIC each month and many more are (briefly) considered by the mergers intelligence team. It is doubtful that third parties will actively inspect such long lists of cases. Also, it is not practicable for the CMA to give reasons for each decision, given the limited research it has inevitably conducted for some cases. In our view, the costs of publication of decisions not to investigate outweigh the benefits, provided the position of third parties is protected in the ways we advocate above (that is, by refusing briefing notes about non-public mergers and by informing complainants about decisions not to investigate).

VI. CONCLUSION AND SCOPE FOR IMPROVEMENT

In this article, we have shown the critical importance of the CMA's merger intelligence activity in making the voluntary merger control regime work effectively. We have also noted the challenges faced by the CMA, particularly in two respects: first, identifying those mergers that are likely to be problematic, while avoiding investigations of benign mergers as much as possible; and second, minimizing the burdens on merging parties, while avoiding their manipulation of the process. These challenges have become especially

[88] In *Ryanair* (footnote 87 above), the Court of Appeal held that the CAT had the power to suspend the four-month period pursuant to Rule 61(2) of its 2003 rules (now Rule 24(2) of its 2015 Rules).

[89] Another difficulty is that this would mean publication of provisional decisions, because the date a decision becomes final—the end of the four-month period—generally is not known to the CMA, and waiting for publication until that date is, therefore, not practicable.

relevant following a number of significant policy changes that the CMA has made to its mergers intelligence function in recent years. These changes have the potential to improve the overall process for taking a decision to investigate, but also raise new risks.

In addition to the suggestions made above in relation to these risks, we believe that there are two areas where the CMA can make improvements to make mergers intelligence activity work better.

A. Transparency

In our view, information on mergers intelligence can be very useful for businesses and their advisers, particularly in taking the decision whether to notify. Currently, the CMA does not publish statistics on the number of transactions reviewed by its mergers intelligence team or the more limited number taken to MIC. Also, it is not always clear whether cases have been notified by the merging parties or are own-initiative investigations of the CMA. In many instances, the CMA notes in its decision on reference where it results from an own-initiative investigation, but this is not consistent.[90] Greater transparency is, therefore, required and the CMA could usefully publish statistics of its mergers intelligence activity on a regular basis (at least twice a year) and give the source of the case (notification or mergers intelligence) in each decision on reference.

B. Advocacy Programmes

The number of complaints about mergers currently received by the CMA is relatively low (not more than a few dozen per year), particularly compared with the extent of concerns raised in response to third party enquiries during a Phase 1 investigation. This may be due to potential complainants (customers and competitors) being unaware the merger has taken place. For example, suppliers may not inform customers of a merger and it may be to their advantage to continue operating under separate brands or company names, such as in a tender process with a limited shortlist. The proportion of own-initiative cases that result from complaints compared with those proactively identified by the CMA is also low. Given that merging parties in own-initiative cases can often be unfamiliar with the mergers regime, it should not be expected that third parties will be any more familiar.

We, therefore, believe that there would be benefits to allocating greater resourcing to advocacy and general publicizing of the mergers regime. This is likely to be a significant additional means of capturing non-notified anticompetitive mergers through complaints, on top of the mergers intelligence function that scans press leads and follows these up but is unable to test whether third parties are concerned.

[90] Whether a transaction is completed or anticipated is not a meaningful guide to this, as merging parties regularly complete before or shortly after notifying.