Merger Control

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The economics of UK merger control: retrospect and prospect

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Introduction

There are a number of reasons why UK merger control is important from an international perspective. In particular: the UK is the second-largest economy in Europe; there have been material changes in UK merger control procedures and institutional changes since 1 April 2014; and Brexit may prompt further changes to be considered.

Against this background, this chapter covers two topics. First, it surveys UK merger control over the first three years since the Competition and Markets Authority (CMA) took responsibility for UK merger control on 1 April 2014. Our overall conclusion is that UK merger control has evolved, rather than there being any revolution. This is despite there being material changes in UK merger control procedures and institutional structures following the formation of the CMA.

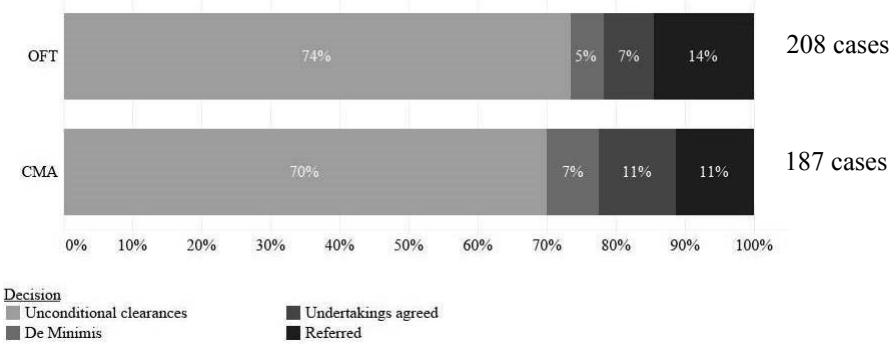
Second, the chapter comments on various policy options for reforming UK merger control.[1] It is widely forecast that Brexit will lead to a large increase in the CMA's workload as mergers between sizeable companies with UK businesses will no longer fall under the exclusive jurisdiction of the European Commission under the EU Merger Regulation.[2] It is against this backdrop that any potential reform of UK merger control should be considered. Our view is that it is difficult to make material changes to UK merger control without compromising its efficacy or efficiency, and that the CMA will need additional resources to address the increase in its workload if this is to be avoided.

Retrospect

During its first three years, the CMA's merger control focus has been on refining and enhancing the UK merger control process. The initial changes included: introducing a statutory timetable for Phase 1 decisions;[3] releasing further guidance on merger pre-notification;[4] changing the statutory process for undertaking in lieu of reference;[5] implementing hold separate orders in relation to completed mergers; and introducing various additional forms and guidance.[6] In its 2016 review of the CMA, the Department for Business Innovation & Skills concluded that each of these changes had led "*to certain efficiencies in the area*".[7] This section explores whether these changes, and the formation of the CMA more generally, may have influenced merger case outcomes by comparing the last three years of the Office of Fair Trading (OFT) with the first three years of the CMA.[8]

The OFT made 208 Phase 1 decisions in relation to qualifying mergers between 1 April 2011 and 31 March 2014,[9] and the CMA made 187 Phase 1 decisions in relation to qualifying mergers between 1 April 2014 and 31 March 2017.[10] Most cases continue to be cleared unconditionally at Phase 1. Chart 1 below summarises the proportion of OFT and CMA cases across the various potential Phase 1 outcomes in relation to qualifying mergers.

Chart 1: Case outcomes relating to qualifying mergers at Phase 1 – OFT vs. CMA



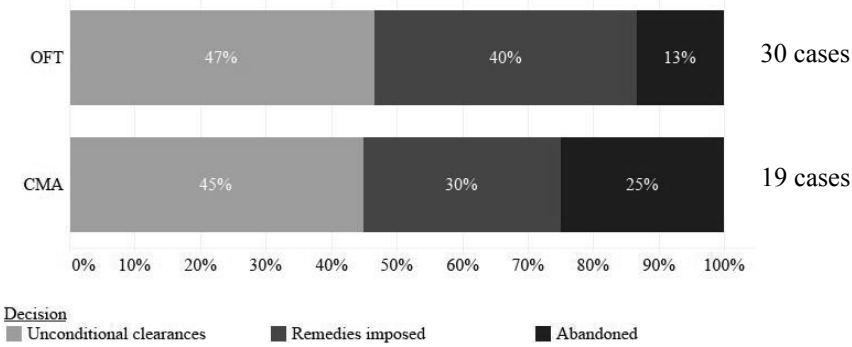
Source: CMA Merger Statistics and AlixPartners analysis

The main potential trend is that undertakings in lieu of reference have been accepted slightly more frequently by the CMA at Phase 1 instead of referring a merger to Phase 2 investigation, with the share of qualifying mergers being cleared subject to undertakings in lieu increasing from 7% to 11% and there being a similar, corresponding decline in the percentage of qualifying mergers referred. This small change should not be over-interpreted, but might be attributable to the fact that since 1 April 2014 undertakings in lieu are only formally discussed with the parties after a decision has been made to otherwise refer the merger, and thus the parties now have clarity as to the precise nature and scope of the CMA's substantial lessening of competition (SLC) finding before deciding on undertakings.

It is also striking that over the last three years the *de minimis* exception to the CMA's duty to refer a merger has been as important a reason for a merger not to be referred as undertakings in lieu. The *de minimis* exception applies where the CMA considers that the market(s) concerned are not of sufficient importance to justify a reference. As discussed further below, the use of this exception is likely to increase slightly as the CMA has recently decided to raise the market size thresholds applied to assess the potential scope of this exception.

Turning to the outcomes of merger references, Chart 2 below summarises the proportion of cases across the various different Phase 2 outcomes.

Chart 2: Case outcomes at Phase 2 – OFT vs. CMA



Primarily due to the CMA accepting undertakings in lieu more frequently, 11 fewer mergers have been referred by the CMA over the last three years than by the OFT over the preceding three years.[11]

The proportion of cases cleared unconditionally at Phase 2 has not varied materially. Although the proportion of abandoned mergers has increased from 13% to 25%, we would not attach any significance to this due to the small sample size.

We also reviewed the number of Phase 1 case review meetings held over the last six years, with such meetings being called where the CMA wishes to consider further whether the merger potentially warrants Phase 2 investigation absent suitable undertakings in lieu being offered.[12]

There is very little difference between the proportion of cases the OFT and CMA call to a case review meeting (39% and 40% respectively). The only difference is the fall in the number of cases the CMA decides to refer to Phase 2 following an SLC finding**,** as discussed above.

The relevance of competitive dynamics

The Third Edition of Parr, Finbow & Hughes (2016) included a chapter that considered in detail the specific factors that affected the risk of a Phase 2 reference. The key focus of UK merger control continues to be mergers that may lead to anti-competitive unilateral effects due to the loss of rivalry between competing suppliers creating a realistic prospect that the merged business would worsen its competitive offer, such as by increasing prices. Notwithstanding this focus, mergers that create or enhance high market shares, or otherwise lead to few competitors remaining, continue to be cleared unconditionally at Phase 1. This is clear from a review of individual cases, and the overall merger statistics referred to above.

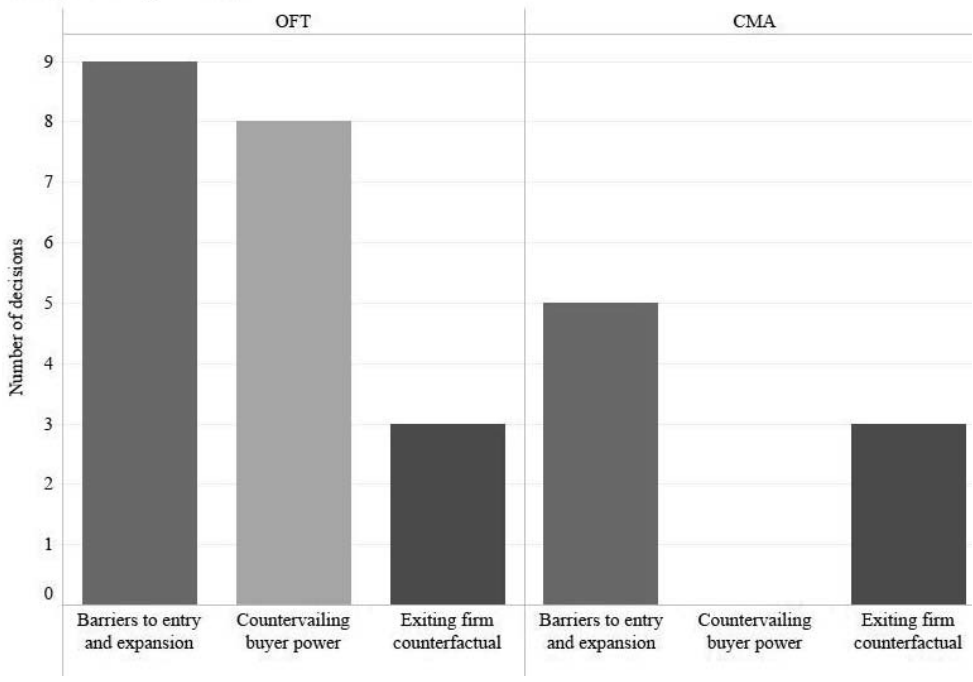
There are broadly two sets of reasons – potentially applying in combination – why the CMA will clear a merger between competitors at Phase 1 despite the market(s) affected being concentrated.

First, where the loss of current rivalry between the parties is nevertheless not appreciable as the parties are not close competitors, and due to the strength of rivalry from other competitors.

Second, competitive dynamics may mean that the loss of rivalry between the parties is not appreciable. In particular, customers may not be adversely affected if barriers to entry and expansion are low such that timely, likely and sufficient entry/expansion will occur, or if customers have sufficient countervailing buyer power and this will not be compromised as a result of the merger. In addition, in a few cases, the exit of one of the parties may be inevitable if it is failing, such that a loss of competition would occur in any event and this is therefore not a consequence of the merger. However, we emphasised that compelling evidence is required at Phase 1 for these considerations to lead to a merger being cleared, and discussed in detail the OFT's and CMA's appraisal of specific evidence across various cases.

Our analysis has now been extended to cover the most recent year to allow a comparison of the last three years of decisions taken by the OFT and the first three years of decisions taken by the CMA. This is summarised in Chart 3 below.

Chart 3: Successful arguments – OFT & CMA (1 April 2011 – 31 March 2017)



Source: AlixPartners analysis

It is striking that there has been a notable decline in arguments about competitive dynamics being accepted at Phase 1 during the first three years of the CMA. The CMA has yet to accept countervailing buyer power as a material factor in driving a clearance decision. In addition, in only five cases (11% of those cases with a conclusion – compared with 14% for the OFT) was entry and expansion an important factor in the clearance decision.[13] Although it is difficult to draw strong conclusions from small samples, the CMA seems to be proceeding more cautiously than its predecessor in the weight it attaches to competitive dynamics in clearing mergers at Phase 1.

As regards barriers to entry and expansion mitigating the loss of rivalry between the parties, the CMA's scepticism as to whether predicted entry will eventually occur may have been increased by a recent report prepared for the CMA. In this report, KPMG conducted an *ex-post* evaluation of eight merger cases.[14] For Phase 2 decisions the report concluded: "*In all three of the Phase II cases we reviewed, however, entry did not occur in the way the CC predicted and there is some evidence to suggest prices have increased as a result of the merger.*" While the report also notes that "*the predictions made by the CMA / OFT in the Phase I cases we reviewed were largely realised*", KPMG goes on to conclude that often, entry or expansion did not occur as predicted. For example, in *Ballyclare / LHD*, the OFT placed material weight on the entry of Hunter. Although Hunter entered, KPMG found limited evidence on their strength of competition. In addition, in *Cartonplast / Demes*, the OFT concluded that entry by two firms (PLS and to a lesser extent PLP24) would be timely, likely and sufficient to restore the pre-merger rivalry. However, KPMG found no evidence that either entry occurred. Instead, an existing supplier (Loadhog – also noted by the OFT in its decision), expanded post-merger and continues to constrain the merging parties.

These findings do not mean that the clearance decisions were misplaced, not least as the threat of entry or other factors may have disciplined the merging entity and this may be difficult to assess. Moreover, KPMG did not assess whether entry or expansion has occurred in other cases, contrary to the authorities' expectation that this would not occur on a timely and sufficient basis. However, KPMG's report is likely to increase the CMA's caution at both Phase 1 and 2 in concluding that entry and expansion will remove the risk of an SLC that may otherwise arise.

The final element of competitive dynamics is whether the exiting firm argument applies, which depends on the imminent exit of one of the parties' businesses, the absence of alternative purchases for the business or assets in question, and a consideration of competitive conditions following any such exit. The OFT considered 35 such cases in its final three years, and the CMA 28 cases over the last three years. As illustrated above, both authorities only accepted the exiting firm argument in three cases, reinforcing their stated position of cautiously assessing the merger against the prevailing conditions of competition if any real doubt or uncertainty remains as to whether the exiting firm argument applies.

Prospect

The increase in the CMA's workload

Before considering any options for reforming UK merger control, it is appropriate to first consider this against the background of some of the implications of Brexit for the CMA's workload.

The CMA has estimated that Brexit could increase its annual caseload by 30–50 Phase 1 cases and six Phase 2 cases.[15] To put these figures in context, the CMA only published 56 decisions concerning qualifying mergers in 2016/17, and 60 such decisions in 2015/16. The number of Phase 2 cases varies year on year, but in the three years ending 2016/17 the CMA referred an average of about seven mergers a year. Accordingly, Brexit could raise material workload issues for the CMA. These workload issues are likely to be understated by these statistics, because the CMA would also need to liaise with the European Commission if these mergers were also being investigated by the Commission, and large-scale European mergers may impact UK customers across multiple relevant markets.

The CMA's overall workload will further increase as, following Brexit, the UK authorities will acquire sole responsibility for enforcing all competition law in the UK.

As noted above, one of the specific exceptions to the CMA's duty to refer mergers that may lead to an SLC is where the markets affected are not of sufficient importance to warrant detailed Phase 2 investigation – i.e. the *de minimis* exception. In June 2017, the CMA increased the upper threshold for markets considered to be sufficiently important to justify a merger reference from £10 million to £15 million, and raised the lower threshold for markets not considered to be sufficiently important from below £3 million to below £5 million. Where the size of the market falls between these two thresholds, the CMA will continue to evaluate, on a case-by-case basis, the potential harm caused by the merger against the cost of an investigation.

It is clear the *de minimis* exception has become an important part of UK merger control. It is particularly important since it only applies where, in principle, clear-cut undertakings in lieu of reference could not be offered, and the parties would thus otherwise face the costs and risks of a Phase 2 investigation. Over the last seven years, 28 mergers have

been cleared on *de minimis* grounds, and absent this exception the number of merger references would have increased by 46% (28/61). (Over this period, a further 40 mergers were cleared conditionally at Phase 1 based on undertakings in lieu of reference.)

At first sight, the proposed changes in the thresholds at which the *de minimis* exception may apply may suggest that it will be applied substantially more often. However, some words of caution are warranted.

First, as a matter of policy, the CMA will not apply the *de minimis* exception if, in principle at least, clear-cut undertakings in lieu of reference could be offered. Second, considering the CMA's proposed £5 million threshold for mergers where the *de minimis* exception will generally apply, since 1 April 2010 only another two referred mergers would fall into this category.[16] Third, turning to those mergers with turnover between £5 million and the proposed £15 million threshold, the *de minimis* exception may be considered in many more cases. However, historically the OFT/CMA has referred many of the mergers below the £10 million upper bound, and it remains to be seen whether this will be the case in relation to the higher £15 million threshold.

Indeed, in *Vodafone / Capita* (2017), the CMA investigated a merger of the last two UK pagers businesses (one-way, wide-area paging services). The CMA decided not to apply the *de minimis* exception, even though the total annual sales of the market were between £5 and £10 million. In reaching this decision, the CMA emphasised that anti-competitive effects were likely (above the 'may be the case' standard) and serious, due to the reduction in suppliers from two to one. This decision was reached notwithstanding that the use of one-way wide-area paging services was in decline and Vodafone had stated that it would otherwise close its business. Indeed, immediately following this merger decision, Vodafone announced the closure of its pagers business. This exit may cause more inconvenience for customers than would have been the case had Capita been allowed to acquire the customer base, customer contracts, and some assets of Vodafone's pagers business. The main purpose of referring to this case is not to dispute the CMA's reference decision, but simply to illustrate that the *de minimis* exception is not automatic – particularly where the markets affected are above the size of the lower threshold (now £5 million).

In short, the revisions to the CMA's guidance on the *de minimis* exception are likely to reduce the number of merger references slightly. However, this is unlikely to address the workload issues that the CMA will face.

Should UK merger control continue to be voluntary or should there be some element of mandatory filings?

In contrast to most other countries' merger control regimes, including the EU Merger Regulation, UK merger control is "voluntary". This means there is no need for mergers to be notified to the CMA prior to completion, or even at all. Whilst this is not a new issue, it may be appropriate to revisit this point as, post-Brexit, the CMA will have sole responsibility to assess mergers that affect UK markets, which raises the question of whether the UK system should be made mandatory, as it is in most countries.

Two key issues are whether UK merger control would be more efficient or effective if UK merger filings were mandatory prior to completion.

Mandatory regimes are not efficient – finding needles in haystacks

Considering first efficiency, it is highly unlikely that anyone wishing to reduce the CMA's workload would propose mandatory filings. This is because mandatory regimes require

the parties to file – and the competition authority to investigate – regardless of whether the merger raises any real competition issues that warrant investigation.

However, just how inefficient would a mandatory regime be? Over the last five years, only 7.0% of the mergers notified to the European Commission were either cleared subject to commitments at Phase 1 or subject to Phase 2 review.

By contrast, over a similar period, 30.4% of the CMA's Phase 1 decisions relating to qualifying UK mergers were either: (a) clearances subject to undertakings in lieu of reference; (b) clearances on *de minimis* grounds (which is not a basis for clearing mergers under the EU Merger Regulation); or (c) subject to Phase 2 review. Moreover, over this period, 40.5% of qualifying UK mergers were subject to a case review meeting.

These figures indicate that the UK merger control regime, with its voluntary filing rule, is far more focused on investigating mergers that may be anti-competitive, rather than finding needles in haystacks.

Mandatory regimes may fail to capture all anti-competitive mergers – keeping it (jurisdiction) simple may be stupid

Another difficulty with mandatory regimes is that, because notification is mandatory, to make the system workable the jurisdictional criteria tend to be relatively simple. Accordingly, mandatory regimes typically apply to certain types of merger transactions and depend on the turnover of the parties. However, there are trade-offs between the simplicity of these criteria (and legal certainty), failing to capture anti-competitive mergers, and inefficiently investigating and delaying mergers that are not problematic.

For example, the European Commission has consulted on extending the EU Merger Regulation to the acquisition of minority stakes in rivals or firms active in related markets, even where the firm has not acquired "control". Similarly, the European Commission has consulted on whether the EU's turnover thresholds should be expanded by adding more thresholds. In 2016, the Commission observed that turnover-based jurisdictional thresholds may be particularly problematic "*in certain sectors, such as the digital and pharmaceutical industries, where the acquired company, while having generated little turnover as yet, may play a competitive role, hold commercially valuable data, or have a considerable market potential for other reasons*". In both instances, the concern is that anti-competitive mergers may be escaping scrutiny under EU merger control.

Whatever the precise scale and seriousness of any enforcement gaps in EU merger control, any such gaps are smaller in relation to UK merger control. In large part this reflects the more subjective nature of the UK jurisdictional tests applied. For example, UK merger control applies where firms acquire "*material influence*" over another firm, which is less than "*control*" under the EU Merger Regulation. Similarly, UK merger control is not limited to a turnover-based threshold. This is because a merger may also qualify if market shares of 25% or more are created or enhanced in the supply or acquisition of particular goods or services, whether in the UK as a whole or a substantial part of the UK. Accordingly, the CMA can investigate the acquisition of small competitors with low turnovers where the so-called "share of supply" test is satisfied.

The downsides of voluntary filings are low

There are two potential downsides of voluntary filings. First, the CMA may fail to investigate some anti-competitive mergers that were not voluntarily notified. While this is possible, this is likely to be rare. In particular, in 2016/17, the CMA's Merger Intelligence Committee (MIC) reviewed more than 650 transactions to assess whether

they warranted investigation. Ultimately, the CMA only investigated a small minority of these mergers, but 13 (approximately 23%) of the CMA's decisions in 2016/17 resulted from MIC investigations into non-notified mergers (13/56). Moreover, seven of these mergers were considered at a case review meeting, and an SLC finding was reached in relation to three of these mergers.

In short, the parties to anti-competitive mergers, even in small markets, should not assume that by not notifying they can "fly under the radar" and avoid investigation. It is particularly unlikely that large UK mergers that currently fall for consideration under the EU Merger Regulation will escape scrutiny from the CMA.

A second potential downside is that, after merger integration, it may be difficult for the CMA to re-create two independent firms. However, this issue is largely addressed by the CMA's power to impose "hold separate orders" in relation to completed mergers that prevent merger integration pending the CMA's final decision. The CMA routinely exercises this power, but it may revoke the order earlier if it becomes clear that there are no issues.

How else could the CMA's workload be reduced?

There are three other ways in which the CMA's workload could be reduced:

- removing the 'share of supply' test;
- integrating the CMA's Phase 1 and Phase 2 review teams; and
- removing the CMA's duty to refer a merger, but giving it discretion to do so.

Should the CMA look at fewer mergers, and is the 'share of supply' test an appropriate jurisdictional threshold?

A distinctive feature of UK merger control is that mergers may qualify for investigation where the merger creates (or enhances) a market share of 25% or more in the UK, or a "*substantial part*" of the UK (the so-called "share of supply" test). They may also qualify where the UK turnover of the target firm exceeds £70 million (the "turnover test").

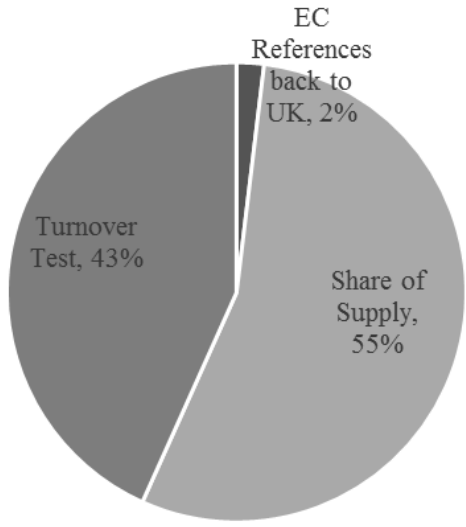
The share of supply test can be applied very narrowly at both:

- the product level – This is because the share of supply test is based on a "*description*" of goods and services. These descriptions can be very narrow and do not need to correspond to economic markets; and
- the geographic level – The CMA can consider shares in goods or services in local areas (such as say Slough), which the CMA considers to be a "*substantial*" part of the UK.

The share of supply test often creates uncertainty for the parties. Often they do not know the products and geographic area over which the CMA will apply the test. It is also unlikely they know their competitors' precise sales, making market shares difficult to calculate. It is therefore legitimate to question whether the share of supply is an appropriate jurisdictional threshold.

However, there are two good reasons for retaining the share of supply test. First, the share of supply test captures effectively mergers that may be problematic. From 1 April 2010 to 31 March 2017, 55% (57 cases) of the 104 Phase 1 merger cases that were either cleared subject to undertakings in lieu of reference or referred only qualified for investigation under the share of supply test. Abandoning the share of supply test would therefore grant a "free pass" to these mergers – unless the turnover test is reduced.

Chart 4: The jurisdictional basis of Phase 1 merger cases either cleared subject to undertakings in lieu of reference or referred



Source: AlixPartners analysis

Second, the share of supply test is a highly effective and focused way of enabling the CMA to investigate mergers that may lead to an SLC. In particular, UK merger control focuses on mergers that create or enhance high market shares, or that reduce the number of competitors from four to three (or fewer). Between 1 April 2010 and 31 March 2017, 93% of Phase 1 mergers where undertakings in lieu were accepted or the merger was referred, involved horizontal mergers between competitors where:

- the merger created or enhanced high market shares of 40% or more; or
- the merger reduced the number of competitors from four to three (or fewer), or where the merged undertaking's market share exceeded 35% (calculated on various different bases).

Should the CMA be fully integrated such that there is no distinction between the review teams at Phase 1 and Phase 2?

Creating the CMA as a single, integrated competition authority was intended to yield various synergies. In particular, the CMA has responsibility for both Phase 1 merger review (previously carried out by the Office of Fair Trading) and Phase 2 merger review (previously carried out by the Competition Commission). However, a clear distinction between Phase 1 and Phase 2 has been retained. In contrast to most other competition authorities, at Phase 2, a new case team is appointed, with largely separate staff to Phase 1 and the decision-makers at Phase 1 are not involved at Phase 2. The purpose of this structure was to retain the independence of the decision-makers at Phase 2, with the CMA Panel making the final decisions at Phase 2.

The concern is that an integrated Phase 1 and 2 process would suffer from "confirmation bias", namely a case team finding a competition problem at Phase 1 may be predisposed to follow suit at Phase 2.

The CMA's costs, and possibly those of the parties, could be reduced to some degree by dispensing with the separation of the Phase 2 and Phase 1. However, as the government

indicated when it created the CMA, the independence and impartiality of the Phase 2 regime is a particular strength of UK merger control. Whilst the government consulted in May 2016 on the precise structure, identity and number of CMA panel members, there are strong arguments for retaining the independence and impartiality of the CMA panel.

Removing the CMA's duty to make merger references

One further possibility to reduce the CMA's workload would be to remove the CMA's duty to make a merger reference if it considers that there is at least a realistic prospect of an SLC. For example, this could be changed to a discretion on the CMA's part. However, the difficulty with this is that third parties would then find it even more difficult to appeal Phase 1 clearance decisions even under the (high) judicial review standard. It can be argued that the decisions of independent competition authorities should be subject to effective review.

Extending the scope of merger control to cover broader issues?

Finally, another issue is whether UK merger control should continue to be focused on competition issues, and whether the authorities' existing ability to consider non-competition issues is sufficient. In this regard, it should be noted that the UK authorities may already consider national security matters, plurality of the media, and the stability of the financial system.

For example, in April 2017 the Department of Business, Energy and Industrial Strategy issued an intervention notice on national security public interest grounds relating to Hytera Communication's proposed acquisition of Sepura. This merger was not referred to the CMA for detailed investigation on the basis of undertakings given relating to the protection of sensitive information and technology and the continued supply of a repair service for secure communication devices used by the emergency services.

The Queen's speech of 21 June 2017 stated that proposals would be introduced "*to ensure that critical infrastructure is protected to safeguard national security*". Accordingly, it is appropriate to have regard to the Conservative Party's manifesto on these points, notwithstanding that legislative priorities may change and that (at the time of writing) the Democratic Unionist Party has merely agreed to support the minority Conservative government on a case-by-case basis on matters of mutual concern.

The Conservative manifesto envisaged rules to ensure that foreign ownership of companies controlling important infrastructure does not undermine British security or essential services. It noted that Ministerial scrutiny and control in respect of civil nuclear power has already been strengthened, and stated that it was intended that a Conservative government will take a similarly robust approach across a limited range of other sectors, such as telecoms, defence and energy.[17]

It is currently uncertain as to how any changes would be implemented, how they would differ from what currently occurs and the extent to which the CMA would be involved. One option would be to create a stand-alone regime, more common in other jurisdictions including the US (CFIUS), Australia (FIRB), and Canada's 'Investment Canada Act' controls.

The Conservative Party manifesto also proposed updating the rules that govern mergers and takeovers. The manifesto indicated that "*[w]e will require bidders to be clear about their intentions from the outset of the bid process; that all promises and undertakings made in the course of takeover bids can be legally enforced afterwards; and that the government can require a bid to be paused to allow greater scrutiny*".[18]

It would be premature to draw conclusions as to the merits of these proposals. However, two appealing features of the UK merger control regime are its focus on competition issues and its independence from political interference. Wide-ranging public interest type regimes risk being uncertain, opaque, and vulnerable to lobbying. Such considerations may deter investment in the UK. This is not to say that matters such as national security should not be considered, but merely that any such additional regimes should be precisely defined and focused.

Conclusions

Our view is that UK merger control has continued to evolve, but notwithstanding this its overall appraisal of mergers continues to be both stable and consistent. UK merger control has already been subject to material fine-tuning in recent years. Whilst many options for reform may be considered, it is difficult to identify any radical measures that do not risk compromising the efficacy or efficiency of UK merger control.

* * *

Endnotes

1. This section of the chapter closely follows blogs by the authors that were originally published on the Competition Bulletin's website.
2. This is subject to the turnover of the undertakings concerned satisfying the requisite turnover thresholds under the EU Merger Regulation.
3. The statutory timetable is a 40-working day limit for investigations – usually starting when the merger notice is complete. While parties can spend a long time in pre-notification (the average was 33 days in 2016/17), more certainty has been welcome in the business community seeking clarity on completion timetables.
4. While UK merger control remains voluntary, the CMA allows firms to submit a short note (up to five pages) addressing why the merger is not a relevant merger situation or why it does not give rise to an SLC. Coupled with the fact that pre-notification discussions are now compulsory on the basis of a draft merger notice, this has been particularly useful in reducing the number of mergers 'Found Not to Qualify', as there was just one in 2016/17, compared to an average of approximately 19 *per annum* for the three years prior to the formation of the CMA.
5. As the CMA cannot formally impose remedies on parties at Phase 1, the onus is on the merging parties to offer suitable remedies that address the realistic prospect of an SLC. The parties now have up to five days following an SLC decision to formally offer undertakings in writing. The CMA then has until 10 working days after the initial SLC decision to decide whether the undertakings offer (or modified version) is acceptable to remedy the SLC. The CMA then has up to 50 working days after the initial SLC decision is made to finally accept the undertakings offered. The CMA also permits the parties to have informal discussions about undertakings before it reaches its SLC decision.
6. These included a new form to file merger notifications, an Initial Enforcement Order template, and a Remedies Notice form.
7. See paragraph 2.42 of: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/532140/cma-response-bis-consultation.pdf.

8. OFT decisions include those from 1 April 2011 through to 31 March 2014. CMA decisions include those from 1 April 2014 to 31 March 2017.
9. This excludes one merger between water and sewerage enterprises that are subject to automatic reference and 56 decisions where the transaction was found not to qualify for investigation.
10. This excludes one merger between water and sewerage enterprises that are subject to automatic reference and 13 decisions where the transaction was found not to qualify for investigation.
11. The breakdowns in the chart exclude one Phase 2 case referred during 2016/17, *Central Manchester University Hospitals / University Hospital of South Manchester* (2017), where the CMA has reached a provisional adverse finding but not formally concluded.
12. Fast-track references and cases which the CMA has already deemed satisfy the *de minimis* exception are not considered at case review meetings.
13. These statistics as to where barriers to entry/expansion were a factor in reaching a clearance decision include *Sheffield City Taxis/Mercury Taxi* (2015). This Phase 1 case was actually cleared on *de minimis* grounds, but the CMA's overall clearance decision was heavily influenced by the CMA's SLC finding being limited to tender customers, whereas the CMA accepted that there would not be an SLC in relation to cash and account customers due to significant constraints from mid-size operators, hackneys and recent entrants such as Uber and Gett.
14. See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/606693/entry-and-expansion-in-uk-ex-post-evaluation-kpmg.pdf.
15. UK Merger Control: 2016 in review and a forward look at 2017, Sheldon Mills, Senior Director of Mergers, CMA, and Colin Raftery, Director of Mergers, CMA, 14 March 2017. Presentations given to the Competition Section of the Law Society.
16. The two mergers are *Dorf Ketal Chemicals / Johnson Matthey* and *General Healthcare / Covenant Healthcare*.
17. See the Conservative and Unionist Party Manifesto – "Forward together – Our Plan for a Stronger Britain and a Prosperous Future", pages 17–18.
18. See the Conservative and Unionist Party Manifesto – "Forward together – Our Plan for a Stronger Britain and a Prosperous Future", page 17.

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Mat Hughes is a Managing Director in AlixPartners' European competition practice, which is part of a broader litigation practice. He has over 25 years of experience as an anti-trust economist and in dealing with competition authorities and specialist utility regulators in relation to all aspects of competition law. Mat started his career as an economist at the UK Office of Fair Trading, and until March 2013 was Chief Economist at Ashurst LLP. Mat has worked on a diverse range of mergers, including over 30 Phase 2 UK mergers and a large number of Phase 1 mergers. Mat has written widely on the economics of merger control, including the Third Edition of *UK Merger Control: Law and Practice*.

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