Response to Q.12 of BEIS Consultation on 'Reforming competition and consumer policy'

Respondent: Dr David Reader[†]

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Question 12. *What reforms are required to the CMA's merger investigation procedures to deliver more effective and efficient merger investigations?*

Executive Summary

- The Government's consultation outlines a goal of reducing unnecessary burdens on business by considering options for improving the efficiency of the UK merger control regime.
- Enforcement trends suggest that the 'more targeted approach' the CMA has taken to identify mergers that warrant investigation has significantly reduced the potential caseload of the Phase 1 decision-maker. This approach has benefited from renewed investment in the CMA's mergers intelligence function.
- While the ERRA13 reforms to the Phase 1 timetable initially saw more cases resolved at Phase 1 via undertakings in lieu of a reference (UILs), 2019 and 2020 saw a lower proportion of UILs accepted compared to the pre-reform era. This suggests the 'reduced burden' that merging parties have derived from the reforms in practice has been overstated. There is likely to be untapped opportunities to improve efficiency through a return to more effective use and promotion of the UIL procedure.
- The Government consultation proposes limiting the scope of Phase 2 investigations to concerns identified at Phase 1 (para 1.118). While this would likely have a streamlining effect on the investigation procedure, it also carries a heightened risk of confirmation bias by narrowing the Phase 2 decision-maker's 'starting point' and 'field of vision'. Enforcement trends under the existing regime show no sign of confirmation bias within the CMA's merger investigation processes.
- Previous government estimates suggest pre-notification discussions endure for approximately 1 month on average, with practicing commercial lawyers observing the length of these discussions to have increased since the deadlines of the formal investigation procedure were tightened under the ERRA13. In some cases, long delays in 'starting the clock' on Phase 1 investigations can be as burdensome to merging parties as delays in the formal process. Opportunities to improve the efficiency of the merger procedure are likely to be present in these informal discussions, as well as in the formal procedure itself.

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1. The Study: merger control enforcement trends

1.1. The UK merger regime under the Enterprise Act 2002 (EA02) has undergone a sustained period of evolution, most significantly through an initial 'bedding down' period and a package of procedural and institutional reforms under the Enterprise and Regulatory Reform Act (ERRA13). To determine the impact that this evolution has had in practice, we can look to outcomes data to detect trends in enforcement activity. The CMA now publishes transparency data on merger review outcomes on its website,[1] providing a comprehensive statistical resource relating to mergers investigated by the UK competition authorities since April 2004.

1.2. The observations in this consultation response draw on 16 years of statistical data covering the reporting years from 2004-05 to 2019-20. For the most part, the analysis utilises the methodologies of previous empirical studies of the UK merger regime undertaken in Parr (2010)[2] and Robert (2017),[3] and updates these studies based on the most recent data available at the time of writing.[4]

2. A higher rate of enforcement, but not all is as it seems

2.1. The 'rate of enforcement' denotes the proportion of mergers reviewed by the competition authority that ultimately lead to some form of intervention, be this in the form of undertakings in lieu (UILs) of a referral at Phase 1, or remedies and prohibitions at Phase 2.[5] A higher rate of enforcement is indicative of a statutory regime with a low threshold for finding infringement,[6] and enforced by a competition authority that adopts a stringent approach to interpreting and executing its statutory remit. Conversely, a lower rate implies a regime that adopts a high standard of proof for satisfying the SLC test (or one where the parties have a credible opportunity to argue a defence). Other specific variables, such as the

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[1] CMA, 'Merger inquiry outcome statistics' (*Gov.uk*, first published: 7 May 2014) <www.gov.uk/government/publications/phase-1-merger-enquiry-outcomes> accessed 1 August 2020.

[2] Parr uses data collected between 1999-2008 and, in doing so, draws insights on the initial impact of the EA02 on merger enforcement; Nigel Parr, 'The Competition Commission, Merger Control and the SLC test' in Barry J Rodger (ed), *Ten Years of UK Competition Law Reform* (Dundee University Press 2010).

[3] Robert uses data from 2007-2016 to draw insights on the potential impact that the CMA and the ERRA13 reforms had on various aspects of enforcement; Gavin Robert, 'Three years of CMA merger control: a statistical review' (2017) 3 Comp Law 211.

[4] The abovementioned studies were repeated to test for accuracy, before the updated CMA data was incorporated. Any errors are the author's own.

[5] Within the scope of 'interventions', Robert also includes mergers that were abandoned after a referral to Phase 2. This, he suggests, demonstrates the burden parties attribute to Phase 2 investigations and how a referral decision (regardless of the Phase 2 outcome) is 'itself a significant form of regulatory intervention'; Robert (n 3) 212-13. The logic of this is convincing and, as such, this chapter adopts the same definition of 'intervention'.

[6] Namely, a regime where the standard of proof for finding an SLC is low and there are very few defences available to the merging parties.

level of resources at the authority's disposal and the statutory timeframe it has to conduct investigations, can also have a bearing on the rate of enforcement.

2.2. The institutional change from the OFT/CC model to the CMA model has presented intriguing opportunities to observe changes in the enforcement rate before and after 1 April 2014, when the CMA took the reins. Between 2007-2020, the average enforcement rate under the EA02 has been 16.9% (Table 1);[7] that is to say, roughly one in six mergers reviewed by the competition authorities have resulted in the imposition of either UILs, remedies or prohibitions. The rate of enforcement has also witnessed a small but notable increase under the CMA's stewardship, from 14.5% in the OFT/CC era, to 20.2% in the CMA era. Indeed, the CMA's enforcement rate between 2015-2020 is 23.4%, just shy of one in four mergers, which is significantly higher than any other period in the regime's history.

Table 1: Rate of merger enforcement under the EA02 (2007-2020)[8]

	2007-08 to 2013-14 *(OFT/CC)*	**2014-15 to 2019-20** *(CMA)*	**2007-08 to 2019-20**
Notifications less 'out of scope'	497	367	864
Phase 1 remedy	35	41	76
Phase 1 remedy as a % of notifications less 'out of scope'	7.0%	11.2%	8.8%
Phase 2 remedy	17	18	35
Prohibition	6	4	10
Withdrawal post-Phase 2	14	11	25
Total Phase 2 enforcement	37	33	70
Total Phase 2 enforcement as % of notifications less 'out of scope'	7.4%	9.0%	8.1%
Total enforcement	72	74	146
Total enforcement as a % of notifications less 'out of scope'	14.5%	20.2%	16.9%

2.3. A likely contributor to this is the 'more targeted approach' that the CMA has taken towards identifying mergers that require investigation, which has benefited enormously from renewed investment in its mergers intelligence function.[9] The CMA's Mergers Intelligence Committee is tasked with detecting non-notified mergers that raise competition concerns, thereby allowing the CMA Board to open 'own initiative' investigations which typically equate to anywhere between a quarter and a third of all annual UK merger enforcement.[10]

[7] This figure is a percentage of the total number of investigations that were ultimately found to fall within the jurisdiction of the EA02. It excludes mergers that the CMA data refers to as 'found not to qualify' (i.e. do not create a relevant merger situation), as the competition authorities do not have the ability to enforce these mergers in any case; Robert (n 3) 212.

[8] Adapted and updated from 'Table 2' of ibid 214.

[9] Andrea Coscelli, 'The First Year of the CMA' (British Institute of International and Comparative Law, London, 30 April 2015) 4.

[10] For an excellent first-hand account of this function, see Simon Chisholm and Tom Heideman, 'The decision to investigate mergers in the United Kingdom's voluntary regime' (2017) 13(4) JCL&E 637.

2.4. Rather than indicating a tougher approach by the CMA, a higher rate of enforcement may therefore denote a more effective screening mechanism (where transactions that raise little or no suspicion of an SLC – or which are unlikely to meet the jurisdictional thresholds – are not recommended for a formal Phase 1 investigation). This is supported by the CMA statistics, which show a sharp and consistent decline in the number of Phase 1 investigations where a relevant merger situation was ultimately found not to exist (this was true in 21.6% of OFT investigations, compared with only 4.4% of investigations conducted by the CMA). The knock-on effect of this is that the CMA's Phase 1 caseload, at least in terms of formal investigations, is markedly lower than its predecessor, despite initially showing a willingness to launch more investigations.[11] Between 2004-2014, the OFT tabled an average of 111 Phase 1 decisions each year, whereas the figure is 64 decisions per year for the CMA between 2014-2020.

3. A false dawn for undertakings in lieu?

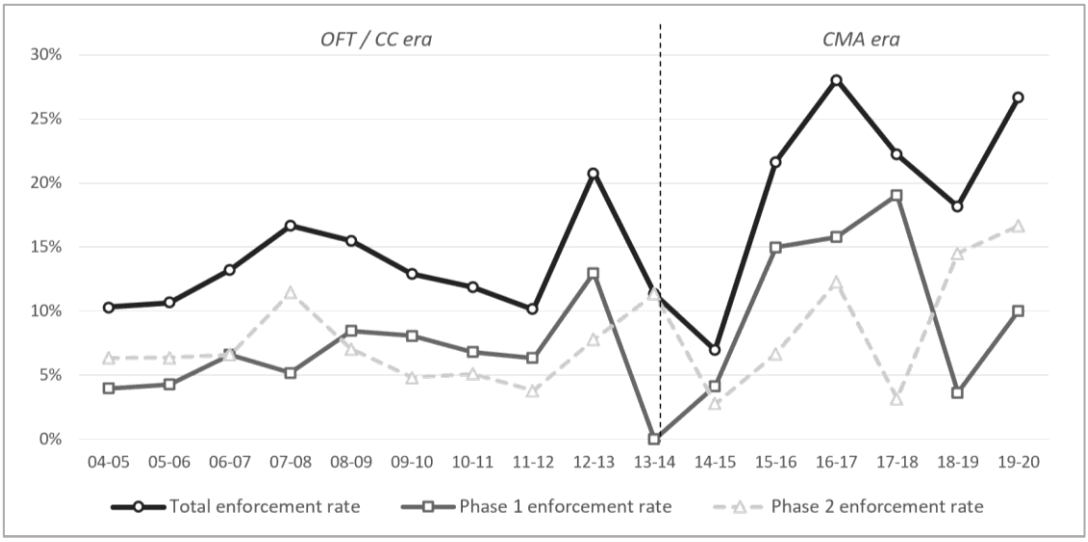

Figure 1. Rate of enforcement under the EA02 (2004-2020).

3.1. Figure 1 shows that the main contributor towards the CMA's initial enforcement rate (between 2015-2018) was the imposition of remedies at Phase 1, i.e. agreeing UILs with the merging parties. This demonstrates the early success of the reforms to the Phase 1 timetable under the ERRA13, particularly regarding the opportunity parties now have to read the CMA Board's Phase 1 decision before proposing UILs. Robert suggests that this initial revival in UILs may also be explained by (i) parties' fear of confirmation bias within the new single authority model (with UILs offering an appealing alternative to a repeat performance at Phase 2), and

[11] The CMA tabled 83 Phase 1 decisions in its first year, compared to 65 by OFT in its final year; Alastair Chapman, Sarah Jensen and Michael Caldecott, 'UK Antitrust Reform: The CMA's first year' (2015) 29 Antitrust 61, 62.

(ii) by a policy shift whereby the CMA became more open to resolving investigations at Phase 1 in order to reduce the burden on parties and their employees.[12]

3.2. However, Figure 1 also illustrates how the Phase 1 enforcement rate has returned to something resembling pre-CMA levels in more recent times and, during the 2018-2020 reporting periods, the CMA Board made exactly three times more Phase 2 referrals than UILs (Figure 2). While there have been signs of a greater propensity by the CMA to accept (or at least contemplate) UILs, this may yet prove to be a false dawn.

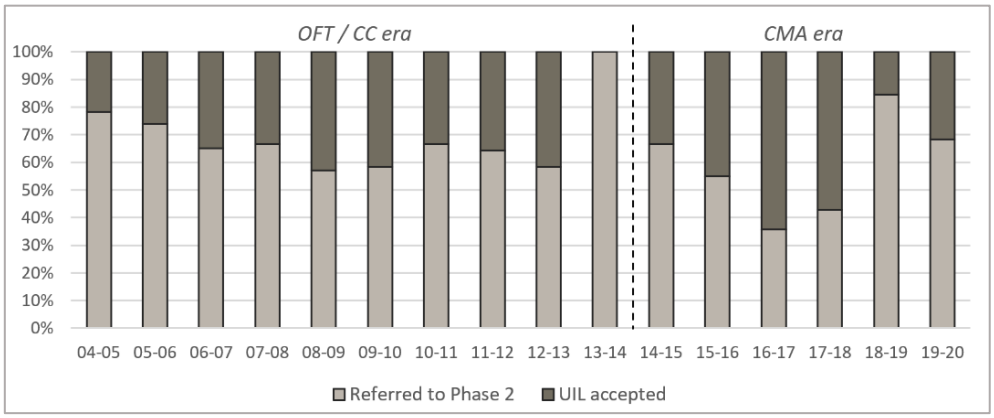

Figure 2. Outcomes of Phase 1 decisions raising SLC concerns (2004-2020), excl. abandoned cases.

4. The likelihood of referral remains unchanged under the CMA

4.1. The early cases of *IBA Health* and *UniChem* arguably had the effect of lowering the standard of proof for Phase 2 referrals, meaning 'marginal cases' were at an increased risk of being referred. Parr (2010) observes evidence of this in 2004 and 2005, the period immediately following the *IBA Health* case, when references increased to their highest level under the EA02.[13] This period still represents the highest frequency of referrals in the EA02 regime's history (Figure 3) and, given that the number of referrals was in decline for several years after this period, it has been suggested that the OFT was taking an extra-cautious approach to its duty to refer during this time,[14] presumably in an effort to avoid further third party litigation.

[12] Robert (n 3) 215.
[13] Parr (n 2) 206-207.
[14] ibid.

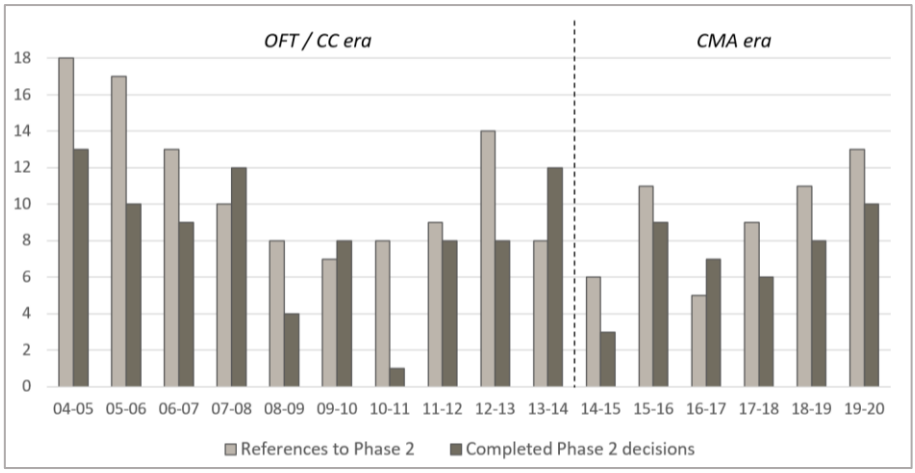

Figure 3. References to Phase 2 and completed Phase 2 decisions (2004-2020).[15]

4.2. The period from 2004-2005 does not, however, represent an unusually high *rate* of referral (14.3% of qualifying cases) when considered alongside the OFT's average referral rate (12.9% between 2004-2014). In fact, the final two years of the OFT's existence both witnessed higher rates of referral; 18.2% (2012-13) and 15.1% (2013-14). Equally, while the CMA makes comparably fewer references each year on average (9.2 referrals p.a.) compared to the OFT era (11.2 referrals p.a.), it too displays a marginally higher rate of referral when one considers the total number of qualifying cases it investigates (see Table 2).

Table 2. Likelihood of Phase 2 referral under the EA02 (2007-2020)[16]

	2007-08 to 2013-14 *(OFT enforcement)*	**2014-15 to 2019-20** *(CMA enforcement)*	**2007-08 to 2019-20**
Notifications	601	384	985
Out of scope	104	17	121
Notifications less 'out of scope'	497	367	864
Phase 2 referrals	64	55	119
Phase 2 referrals as a % of notifications less 'out of scope'	12.9%	15.0%	13.8%

4.3. As noted in the table, the Phase 2 referral rate across the EA02's enforcement history stands at 13.8%, a slightly less than a one-in-seven chance of any given merger being referred. This rate is relatively high compared to referral rates in other regimes but, as Robert observes,[17] this can also be explained by the ability of the UK's voluntary regime to "hand-pick" the non-notified mergers that have the potential to raise competition concerns, while disregarding the mergers that are very unlikely to raise any concerns. It is not, therefore, necessarily the case that a given merger is more likely to be referred in the UK, despite the referral rate increasing slightly from 12.9% in the OFT era, to 15% under the CMA's reign.

[15] Adapted and updated from 'Figure 1' of ibid 207.
[16] Adapted and updated from 'Table 1' of Robert (n 3) 213.
[17] ibid 213.

4.4. Of course, the notable alternative to making a referral is accepting UILs and, in 2016-17, the Phase 2 referral rate dropped to an all-time EA02 low of 8.8%, as the CMA (and merging parties themselves) began to see UILs as a more viable option post-ERRA13 (see Figure 2, above). Yet with the CMA accepting fewer UILs between 2018-2020, referral rates have witnessed a resurgence; 21.7% of qualifying mergers were referred to Phase 2 in 2019-20, a higher percentage than any seen under the EA02.

5. No evidence of confirmation bias within the CMA model

5.1. The 'merging' of the Phase 1 and Phase 2 decision-makers under the ERRA13 prompted initial concern that bias would enter into the merger assessment process by virtue of the single-authority set-up. The first concern is that, within a single authority, the CMA Board may have an incentive to consider resource allocations before deciding whether or not to refer a merger for in-depth investigation by the CMA Panel. As the previous sub-section notes, the rate of referral has actually increased slightly under the single-authority arrangement, meaning there is no evidence to suggest resource considerations are weighed against the duty to refer.[18]

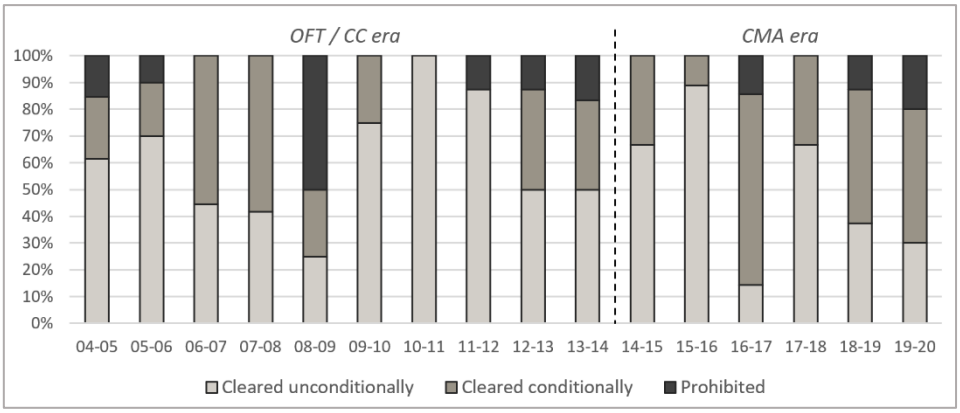

Figure 4. Completed merger decisions by outcome (2004-2020).[19]

5.2. The second concern related to the risk of confirmation bias between the phases, i.e. that initial thinking and conclusions at Phase 1 would, following a referral, cross over to Phase 2 and influence the CMA Panel's final decision. Robert (2017) proposes a simple test for confirmation bias; namely, by determining whether a Phase 2 referral 'inevitably' leads to remedies or prohibitions in an excessively high proportion of Phase 2 decisions.[20] Given that the CMA Board's duty to refer is subject to a lower standard of proof than the CMA Panel's ultimate infringement decision, 'it can only be expected that there will be more cases referred to Phase 2 than cases which ultimately lead to an SLC finding', meaning a significant

[18] This logic is proposed in ibid.
[19] Adapted and updated from 'Figure 2' of Parr (n 2) 207.
[20] Robert (n 3) 217.

proportion of cases should receive unconditional clearance at Phase 2 (assuming confirmation bias is not present).[21]

5.3. Under the OFT/CC framework, 46.9% of all Phase 2 referrals were cleared unconditionally, compared with 38.2% of referrals to the CMA Panel (Table 3). Both of these figures are sufficiently far above 0% to reject the suggestion that confirmation bias has been an inherent problem under the EA02 regime; although, the marginal decline of unconditional clearances under the single-authority model may arouse concern in the business community. However, Figure 4 illustrates how the unconditional clearance rate has varied significantly during the CMA's tenure, from a high of 88.9% in 2015-16, to a low of 14.3% a year later in 2016-17. This lack of consistency again acts to corroborate the suggestion that there is no ingrained conformation bias within the CMA's decision-making process.

Table 3. Testing for confirmation bias between the Phase 1 and 2 decision-makers (2007-2020)[22]

	2007-08 to 2013-14 *(OFT/CC)*	**2014-15 to 2019-20** *(CMA)*	**2007-08 to 2019-20**
Notifications less 'out of scope'	497	367	864
Phase 2 referrals	64	55	119
Total Phase 2 enforcement	37	33	70
Phase 2 unconditional clearance	30	21	51
Unconditional clearance as % of Phase 2 referrals	46.9%	38.2%	42.9%

5.4. As a separate point, the relatively high rate of unconditional clearances in 2014-15 and 2015-16 (by the CMA's standards, at least) might be seen to indicate a period where the new authority struggled to manage the workload presented by a stricter Phase 1 time-limit following the ERRA13 reforms – the suggestion being that the CMA Board was more likely to refer 'marginal' cases to Phase 2 in order to meet the 40-working day statutory deadline. However, as Section 4 (above) touches on, referral rates during this period were in keeping with the levels observed under the OFT, suggesting the CMA has been perfectly able to carry out thorough Phase 1 assessments within the post-ERRA13 time-limit.

6. A streamlined regime, but questions over pre-notification discussions

6.1. Since the introduction of the revised statutory time-limits under the ERRA13, the CMA has succeeded in meeting the Phase 1 and Phase 2 deadlines in all of its investigations.[23] This compares favourably to the pre-ERRA13 period, which saw numerous instances where the OFT exceeded the 40-working day administrative deadline on non-notified mergers at Phase

[21] Robert (n 3) 217.
[22] Adapted and updated from 'Table 3' of ibid 217.
[23] Department for Business, Energy and Industrial Strategy, *Competition law review: post implementation review of statutory changes in the Enterprise and Regulatory Reform Act 2013* (July 2019) 74.

1,[24] and where the CC was inconsistent in the time taken to accept final undertakings in the period following a Phase 2 infringement decision.[25] In the first four years of the CMA's existence, the average duration of a Phase 1 investigation was 34.8 working days, suggesting the CMA often completes its investigation well in advance of the 40-working day statutory deadline.[26] This points towards an overall quicker formal review process post-ERRA13.

6.2. However, commercial lawyers have expressed concern over the interpretation of these figures,[27] noting that they do not take account of the 'informal' element of the review process – namely, the pre-notification discussions – which several commentators had predicted could take longer as a result of the stricter deadlines introduced by the ERRA13.[28] Some respondents to the government's post-implementation review of the ERRA13 reforms claimed to observe an increased tendency of CMA case teams to use the pre-notification discussions to ask questions that would have traditionally been asked during the formal Phase 1 investigation which, they suggest, may be a case of the CMA delaying 'starting the clock' in order to manage its workload.[29]

6.3. Former Chairs of the Mergers Intelligence Committee at the OFT and the CMA have also confirmed that the ERRA13 has had the effect of widening the scope of questions that parties are asked during pre-notification and has led to an increase in the number of information requests.[30] The government review estimates that approximately 60% of CMA merger investigations were launched after pre-notification discussions, and that these discussions extend to a mean average of 33.5 working days (and a median of 29 working days); although, it is conceded that this may underestimate the full extent of the pre-notification period, as the date at which parties first contact the CMA is not publicly available.[31]

6.4. Delays in 'starting the clock' cannot, however, be solely attributed to suggestions of more extensive questioning by the CMA during pre-notification discussions. Much also depends on the speed of the parties themselves in terms of responding to information requests with the level of detail that is demanded of them.[32] Indeed, an NAO audit of the UK competition regime revealed that many merging parties 'valued having early discussions with decision-makers',[33]

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[24] National Audit Office, *The UK competition regime* (Report by the Comptroller and Auditor General, HC 737, 5 February 2016) 38 (Figure 17).
[25] Ali Nikpay and Deirdre Taylor, 'The New UK Competition Regime: Radically Different or More of the Same?' (2014) 5(5) JECL & Pract 278, 279.
[26] BEIS Competition Law Review (n 23) 74. A greater proportion of 'less complex' cases (i.e. cases that do not require an issues/review meeting) are being reviewed in fewer than 35 days, increasing from 23% in 2014-15 to 91% in 2017-18; (n 23) 75.
[27] ibid 75.
[28] See e.g. Tamara Todorovic, 'The reform of the UK merger regime in the Enterprise and Regulatory Reform Act 2013 – Not much to shout about' (2013) 12(3) Comp Law 338, 342.
[29] BEIS Competition Law Review (n 23) 75-76.
[30] Chisholm and Heideman (n 10) 654.
[31] BEIS Competition Law Review (n 23) 76.
[32] ibid 77.
[33] NAO 2016 (n 24) 9.

which contradicts the suggestion that the CMA has extended pre-notification discussions for its own ulterior motives.