Department for
Business, Energy
& Industrial Strategy

Competition law review: post implementation review of statutory changes in the Enterprise and Regulatory Reform Act 2013

Presented to Parliament pursuant to Sections 46 and 56 of the Enterprise and Regulatory Reform Act 2013

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Title: Competition law review: post implementation review of statutory changes in ERRA 2013 **IA/PIR No:** BEIS001(PIR)-19-CCP **Lead department or agency:** BEIS **Other departments or agencies:** **Contact for enquiries:** competition@beis.gov.uk	Post Implementation Review **Source of intervention:** Domestic **Type of regulation:** Primary legislation **Type of review:** Statutory – sunset clause **Date of implementation:** 01/04/2014 **Date review due (if applicable):** 31/03/2019

1a. What were the policy objectives and the intended effects? (If policy objectives have changed, please explain how).

The reforms made in the Enterprise and Regulatory Reform Act 2013 (ERRA) with respect to competition were intended to deliver the following objectives[1]:

- in competition enforcement, to increase the volume of cases and decisions, improve the speed of the process, and improve the robustness of decisions, addressing perceptions of 'confirmation bias';
- to improve the use of competition enforcement powers in the regulated sectors, and improve co-ordination between the CMA and sector regulators;
- in market studies and investigations, to improve the speed and predictability for businesses of both the cases and the implementation of remedies; and
- in merger reviews, to create a more efficient, speedier and streamlined merger regime and ensure that mergers that were already completed or part-completed could be addressed effectivelythrough strengthened interim measures.

1b. How far were these objectives and intended effects expected to have been delivered by the review date? If not fully, please explain expected timescales.

There were no specific expectations for effects to have been realised at the point of review. A five year review point gave reasonable time for sufficient caseload to have been completed in order to assess whether the direction of change was right. However, five years produces few data points, and it is hard to establish using this snapshot approach with any great confidence either that the direction of travel is right or that it is due to the specific reforms in question.

[1] BIS (2012) *Growth, Competition and the Competition Regime: Government Response to Consultation*

2. Describe the rationale for the evidence sought and the level of resources used to collect it, i.e. the assessment of proportionality.

The reforms under review were not expected to impose a large direct cost to businesses (£140k according to the Impact Assessment produced at the time) and as the Equivalised Annual Direct Net Cost to Business is below £5 million per year this would usually require only a light-touch post-implementation review.

However, as ERRA formed part of a significant institutional overhaul of the competition regime, and the Government is reviewing the UK competition regime more generally ahead of a forthcoming green paper, the review sought to gather relatively comprehensive information about the performance of the regime.

3. Describe the principal data collection approaches that have been used to gather evidence for this PIR.

Management information on competition enforcement, merger and market case activities were provided by the CMA, in addition to a review of publicly available case information on the gov.uk website[2]. Data from the Global Competition Review were used to compare outputs with those of other authorities[3].

Qualitative information was provided through responses to a consultation in *Modernising Consumer Markets*, the Consumer Green Paper published by the Government in April 2018[4], and a targeted consultation exercise with specific stakeholders that have experience of the competition regime: regulators, academics and competition lawyers.

[2] https://www.gov.uk/cma-cases
[3] https://globalcompetitionreview.com/
[4] https://www.gov.uk/government/consultations/consumer-green-paper-modernising-consumer-markets

4. To what extent has the regulation(s) achieved its policy objectives? Have there been any unintended effects?

Competition enforcement

The reforms introduced in ERRA appear to have had a small impact, especially as several of the new powers were used a small number of times over the review period. However, the performance of the competition enforcement regime over the review period did demonstrate some progress against the stated aims of the reforms: there was an increase in the volume of CA98 cases, infringement decisions and speed in completing cases, whilst perceptions of confirmation bias declined and the robustness of decision making was generally solid with a relatively low number of decisions being successfully challenged on appeal. The limited evidence suggests that the overall package of reforms in ERRA, including the creation of the CMA, improvements to CMA procedures, management and processes appear to have contributed to an effective competition enforcement regime, even though the impact of the statutory reforms in ERRA was small.

Notwithstanding these improvements, questions remain about whether further reforms are required to ensure that the end-to-end competition enforcement regime operates as effectively as possible to deliver robust sanctions and effective deterrence in a timely way. These challenges are likely to be magnified as the CMA takes on an enhanced caseload following EU exit. Particular concerns have also been raised about the ability of the current regime to deal effectively and swiftly with concerns in digital markets. These concerns, and potential solutions to address them, will be considered fully in the forthcoming green paper and are not therefore addressed in detail in this review.

Markets and Mergers

The reforms to statutory deadlines and the accompanying increased investigatory powers appear to have contributed towards an improvement in performance against the aims of the reforms: faster, more predictable resolution of cases and implementation of remedies. Again, this improvement is also likely to have been driven at least in part by improvements to CMA procedures and processes, as well as due to the statutory reforms.

One potential unintended effect was highlighted in the review: the requirement to consult on making a market investigation reference within 6 months appears to have been of uncertain benefit and could force the CMA into making a decision on whether a Market Investigation Reference would be appropriate without having had time to fully consider the relevant evidence. This will be reviewed further as part of the forthcoming green paper.

More generally, as with competition enforcement, further reforms may be required to the markets regime to ensure that it is sufficiently responsive and flexible to address adverse effects on competition and consumers in markets that are not functioning well. For mergers, further changes are likely to be needed if the CMA is to be able to handle effectively the larger number of multi-jurisdictional mergers that it will have to review after EU Exit. This will be considered as part of the forthcoming green paper.

5a. Please provide a brief recap of the original assumptions about the costs and benefits of the regulation and its effects on businesses (e.g. as set out in the IA).

The impact assessment did not attempt to quantify the impact of the reforms to the competition enforcement regime and estimated the impact of the reforms to the markets regime to be zero. The only aspect of the reforms for which a quantified estimate was produced in the impact assessment was in the extension of investigatory powers in merger cases, where the cost to businesses was estimated at between £13k to £140k per year, due to the expected increase in requests to third parties. The impact assessment had assumed up to 388 additional third parties responding to requests for information per year, an assumption heavily driven by one single request for information for 300 third parties made by the OFT shortly before the impact assessment was produced.

5b. What have been the actual costs and benefits of the regulation and its effects on businesses?

In practice, based upon the data available, the extended Phase 1 investigatory powers have rarely been used to request additional information from third parties. On average, only one additional third party request each year has resulted from the extension of the powers. The actual additional cost to businesses from these regulations so far has therefore been small – estimated to be below £1,000 per year.

6. Assessment of risks or uncertainties in evidence base / other issues to note

The evidence base was limited due to the absence of comprehensive management information on mergers for the period before the CMA was formed. This meant that it was not possible to carry out a full before-and-after comparison on timescales of merger assessments before the reforms to statutory timescales. Instead, the impact was assessed against the benchmark of the new statutory timescales. Whilst this is a compromise, comparing performance against the benchmark of the new statutory timescales is a reasonable measure of improvement as the statutory timescales were chosen to be shorter than the typical duration of cases before the reforms.

7. Lessons for future impact assessments

The ERRA impact assessment gave general commentary on the anticipated impact of the broad approach to reforms on competition enforcement, mergers and markets. It did not quantify most of the anticipated impact of changes in scope of this review. This is likely because most of the changes were not expected to have a direct impact on businesses. In future impact assessments, however, it would be useful where there is a statutory duty to review specific aspects of legislation, to give those aspects clear and explicit assessment in order to provide a benchmark for comparison at the point of review.

8. What next steps are proposed for the regulation (e.g. remain/renewal, amendment, removal or replacement)?

The Government will publish a Competition Green Paper later this year which will contain a range of policy reforms for the competition regime. These will consider some regulations within scope of this review as well as other regulations across the full breadth of the competition regime.

With respect to the provisions within scope of this review, the evidence supports:

- considering whether change to the maximum penalty associated with the civil enforcement of investigation powers introduced in section 40 would be sensible in order to ensure the powers are consistent with those available in other aspects of enforcement and with those in other jurisdictions;
- considering further change to the powers to make interim measures directions, as the amendments introduced in section 43 have not addressed procedural barriers towards the swift and effective use of interim measures, such as those connected to access to file; and
- considering whether the duty to consult on making a Market Investigation Reference within 6 months of publishing a market study notice should be changed, as it may lead to risks that the CMA is forced to make a significant decision before it has had adequate time to consider all the information available.

The evidence in the review suggests that the other provisions within scope of the review have not been associated with significant negative or unintended consequences to businesses or other parties. Moreover, it provides some, albeit limited, evidence that they have contributed towards the objectives that were expected of them. However, where relevant, the provisions will be revisited in the round as part of the broader consideration of the need for further reforms in the context of the forthcoming green paper.

I have read the PIR and I am satisfied that it represents a fair and proportionate assessment of the impact of the policy.

Signed: 

Date: 28/03/2019

Contents

Ministerial preface

In the UK, we have strong institutions to support and promote competition across the economy, as well as a robust and fair approach to investigating and handling competition issues. Just as business incumbents should never feel immune to competitive pressure to innovate and improve, so we cannot assume that existing processes, laws, policies and institutional arrangements remain the best or most appropriate.

Markets and business practices are changing all the time. Across the world, governments and competition authorities are considering how new technology, the emergence of digital markets and geopolitical changes will affect the domestic and international business environment, and how the approach to competition issues needs to keep pace.

This Government believes in the value of competition as a driver for growth, innovation and efficiency across the economy. Competition means more choice, greater convenience, higher quality and lower prices for consumers. A transparent and rules-based competition regime provides certainty for investors and encourages businesses of all sizes to feel confident that they can challenge incumbents.

In the Industrial Strategy we announced that we would publish a review of the UK's existing competition regime to consider whether it is still the right fit for today's economy and today's consumers, and where there might be opportunities for further improvement.

This publication is the first stage of that review and looks at the effectiveness of changes made to the competition regime by the Enterprise and Regulatory Reform Act 2013, fulfilling the statutory requirements set out in the Act. Amongst other changes, the Act created the Competition and Markets Authority, bringing together the Competition Commission and the competition work of the Office of Fair Trading.

The Act also aimed to increase the volume, speed and quality of competition enforcement cases and to improve the use of competition powers in the regulated sectors. It aimed to create a faster, more efficient merger regime, and to improve the speed and predictability of the market study and market investigation process.

This retrospective evaluation provides a strong foundation of evidence and analysis. It considers the performance of the current regime compared to pre-2013 arrangements – and the direction of change is broadly positive. More competition cases are being opened, merger reviews and market studies are being brought to conclusion more quickly, and stakeholder views suggest a good degree of confidence in the regime.

We do, however, need to go further and consider how well-equipped the UK's competition framework is to respond to current and future competition challenges. This will be the role of the forthcoming Competition Green Paper, which will also complement the Government's work on consumer enforcement powers, following last year's Modernising Consumer Markets Green Paper.

Recent years have seen intense debate over the apparent concentration of market power into the hands of a small number of large firms, over the perceived exploitation of consumers' good faith and loyalty, and over the challenges of assessing competition effects where services are offered at no monetary cost to users.

We will need to look across the range of institutions, powers and tools in the UK's competition regime, and to seek views from stakeholders across the economy. The Furman Review and proposals from Lord Tyrie, Chair of the CMA, have already drawn some specific conclusions and made recommendations, which we will also be considering as part of the green paper.

THE RT HON GREG CLARK MP

Secretary of State for Business, Energy & Industrial Strategy

Introduction

The Enterprise and Regulatory Reform Act 2013 (ERRA)[5] made changes to the UK's competition regime and established the Competition and Markets Authority (CMA). The changes followed a consultation in 2011 on options for reforming the competition regime[6].

ERRA includes two obligations on the Secretary of State to review parts of the regime within 5 years:

- the operation of Part 1 of the Competition Act 1998 (CA98)[7], which covers the enforcement of prohibitions against anti-competitive behaviour (section 46 of ERRA); and
- certain provisions of Chapters 1 and 2 of ERRA, relating to statutory timescales and investigatory powers in mergers and market cases, and interim measures in mergers (section 56 of ERRA).

This review fulfils these statutory obligations and evaluates the changes made in 2013 against the objectives set out in the Government response to the 2011 consultation *A Competition Regime for Growth* which led to the ERRA reforms.

This review is part of a wider Government review of the UK competition and consumer regimes. In the Industrial Strategy White Paper in November 2017, the Government committed to a review of the competition regime and to introduce proposals to reform markets which are not working for consumers and businesses. The Government subsequently published the Consumer Green Paper, *Modernising Consumer Markets*, in April 2018, which included the launch of this statutory review. There have also been proposals for reform by independent bodies. For example, the independent Digital Competition Expert Panel, chaired by Professor Jason Furman, recently presented its report on competition in the digital economy to the Chancellor of the Exchequer and the Secretary of State for BEIS. Lord Tyrie, Chair of the CMA, wrote to the Secretary of State with proposals for reform of consumer and competition law in February 2019.

Building on this previous work, and taking into account proposals in Professor Furman's review and in Lord Tyrie's letter, the evidence base in this statutory review will contribute to a Government publication later this year containing proposed reforms of the consumer

[5] http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted
[6] BIS (2011) *A competition regime for growth: a consultation on options for reform*
[7] http://www.legislation.gov.uk/ukpga/1998/41/contents

and competition regimes. These proposals will take a forward-looking view on how the system can be improved to promote competition and innovation and protect consumers.

Approach and methodology

Overview

This chapter sets out the methodology used for evaluation, the sources of evidence gathered, including both monitoring data and public and stakeholder opinion, and commentary on the limitations of the evidence used.

Scope of review

Operation of Part 1 of CA98

For this review we have considered the operation of Part 1 of CA98, including the competition enforcement aspects of the concurrency arrangements by which sector regulators can enforce CA98, with a focus on reforms introduced by ERRA, using the starting point of the reformed regime (1 April 2014) as the point for comparison.

Review of provisions of Chapters 1 and 2 of ERRA relating to markets and mergers

This part of the review focuses on the changes introduced in Chapters 1 and 2 of ERRA. These provisions cover: statutory timescales for mergers and markets (section 32, Schedule 8, section 38 and Schedule 12); information gathering powers for mergers and markets as well as the enforcement of these powers (sections 29, 36 and Schedule 11); and interim measures for merger investigations (section 30 and Schedule 7).

Method of evaluation

This review uses a before and after approach to consider the impact from the changes made in ERRA, using 1 April 2014 as the dividing date, this being the date on which the CMA came into operation, replacing the OFT/CC.

We took the criteria for comparison to be defined by the objectives set out as part of the 2012 Government response to the 2011 consultation: *A Competition Regime for Growth*. Data were used to compare the outputs of the regime (e.g. numbers, outcomes and timescales of cases) before and after 1 April 2014, other than for mergers where the lack of available data before the CMA came into operation meant the data for the CMA were

assessed against the statutory timescales set out in the ERRA reforms. The review relied on qualitative information, in the form of informed opinion from stakeholders targeted in the consultation exercise, or from respondents to the 2018 consultation *Modernising Consumer Markets*, in order to complement inferences from the data.

The review focuses on the evaluation criteria relating to the time of the reforms. An assessment of the broader concerns arising from current developments will be addressed in our forthcoming Competition Green Paper.

Sources of evidence

Monitoring data

The review uses quantitative evidence from management data and qualitative evidence from consultation and stakeholder engagement.

The data were used to measure the direct outputs of the competition regime (e.g. caseloads, decisions and timescales) before and after 1 April 2014. The CMA routinely collects management information data on its activities. Some of this is publicly available, for instance the data relating to competition enforcement cases where descriptions of all cases that are in the public domain are published on the CMA cases site hosted on gov.uk[8]. Sector regulators also publish records of cases where they have used concurrent powers to open an investigation.

Other (unpublished) data were provided on request by the CMA as part of this review. This related to the number of times powers were used in the process of an investigation or merger case, or milestones in a case – such as the date of submission of a draft merger notice. These were used in the sections of the review on mergers and markets but are not in the public domain.

The information on competition enforcement cases used in this review includes details of the dates on which a case was opened and closed, and of significant milestones (such as issuing of Statement of Objections in a CA98 case) which enabled an assessment to be made of performance against case timescales. Details of the authority taking the case, the sector in question, and whether the case was appealed and the subsequent appeal outcome, were also used. Data on competition enforcement cases were gathered to include cases that were launched from 1 January 2007 to 31 December 2018, in order to establish a reasonably long time period for assessment due to the low caseload in any

[8] https://www.gov.uk/cma-cases

individual year. Data from the Global Competition Review were used in one instance to compare outputs of abuse of dominance cases with those of other authorities[9].

Data on markets and merger cases were not available over the same time period. The data on markets include cases from 1 April 2014 to 31 December 2018 and on mergers from 1 April 2014 to 31 March 2018[10].

Where data had been gathered by BEIS analysts from the CMA case list on gov.uk, they were sent to the CMA for quality assurance.

Public and stakeholder opinions

The Government launched a public consultation through the *Modernising Consumer Markets* Green Paper published in April 2018[11]. The consultation was open for 12 weeks, from 11 April 2018 to 4 July 2018.

The consultation asked two questions for this review:

- have the 2014 reforms to the competition regime helped to deliver competition in the UK economy for the benefit of consumers; and
- does the competition regime provide the CMA and regulators the tools they currently need to tackle anti-competitive behaviour and promote competition?

Although the consultation was open to the public, only a small group of people was likely to be aware of and have the relevant knowledge to comment on the impact of the changes made to the competition regime in ERRA. The consultation was supplemented with a programme of targeted stakeholder engagement, in order to have more detailed discussions and gather more specific information on the impact of the changes in scope of the review. Three workshops were held between May and June 2018, during the period the consultation was live.

[9] https://globalcompetitionreview.com/
[10] The reduced time period for mergers data was due to the CMA being commissioned early on in the review project to gather information which was not generally recorded and therefore involved some resource intensive review of previous cases.
[11] https://www.gov.uk/government/consultations/consumer-green-paper-modernising-consumer-markets

Table 1: Summary of stakeholder workshop attendees

Workshop	Number of attendees	Description of attendees
Competition enforcers	10	Representatives of the CMA and sector regulators.
Competition law experts	26	Representatives from legal associations and law firms. All those invited were competition practitioners and were generally senior employees (e.g. partners or legal directors).
Competition academics	5	Academics with specialist knowledge of competition economics and/or regulation.

The stakeholder engagement exercise targeted competition law firms in order to represent the interests of businesses that could be affected by changes to competition law. These firms provided valuable additional contributions to the material provided by regulators.

A set of questions was developed to act as a topic guide for discussions in the workshops and was subsequently sent to attendees as a guide for them when submitting their responses to the consultation. Attendees were also able to submit responses to these questions separately to their consultation response if they so preferred. The questions are included in Annex A to this review.

The workshops lasted 2 hours each, although much of this time included wider discussion around competition issues not in scope of the review. They were chaired by a member of the Senior Civil Service and attended by policy and analytical representatives of the Consumer and Competition Policy Directorate in BEIS. External participants were assured of anonymity and that, whilst their views could be presented verbatim or in summary as part of this review, they would not be attributed to individuals or organisations in such a way as would make them identifiable. Notes of the workshops were taken and these were used to present the summaries of views that are included in this review.

Other responses were received to the Consumer Green Paper consultation, in addition to those submitted by workshop participants. In total, 25 written responses to the consultation made reference to aspects in scope of this review and so were used as evidence to inform this review. This included 7 responses from law firms, 7 from individual businesses, 4 from consumer associations, 3 from competition enforcers, 2 from legal associations, one from a university and one from a business association. The summaries of views presented in this review have sought to represent the range of views from those who participated.

Proportionality and impact on businesses

Evidence was gathered through public consultation as part of *Modernising Consumer Markets* and through targeted stakeholder engagement to supplement the information available to evaluate the changes made in ERRA.

Evidence was not gathered to carry out a detailed assessment of the ongoing cost to businesses because, whilst the statutory duty set out in Section 46 meant this review was broad in scope, the underlying policy changes made in ERRA relevant to Sections 46 and 56 were not anticipated to impose a large direct cost to businesses.

Limitations

The data presented here report the direct outputs (e.g. case numbers, outcomes and timescales) of the competition regime rather than the outcomes. The purpose of the competition regime is to promote healthy economic markets, delivering outcomes for consumers, such as innovation, lower prices and better quality goods and services. The indirect outcomes of a well-functioning competition regime would therefore be expected to be better overall economic outcomes such as higher productivity, output growth and lower consumer prices. Although these outcomes are measured in national statistics, they are affected by multiple factors and it would not be possible to separate the effect of the legislative changes in scope of this review from the other factors that contribute to general economic performance.

A particular challenge to the review came in the lack of management information available on merger cases from the period before the ERRA reforms. This meant it was not possible to carry out before and after evaluation of the time taken to complete cases and meet milestones. Instead the assessment of impact on timescales was done against the benchmark of the statutory timescales introduced in the ERRA reforms.

Another limitation of the study is that this is a review of legislation rather than a review of the operational performance of the CMA. However, the objectives set out in the Government response to the 2011 consultation led to output measures which are likely to have been significantly affected by management, general operational performance of the CMA and the nature of cases taken forward. This is particularly true in the case of the competition enforcement reforms, where the legislative changes in 2013 were relatively minor. The review has therefore sought to consider the extent to which the original objectives have been met, but the conclusions on whether this was driven by legislative changes in ERRA are limited. Therefore, this review does not try to provide conclusions on many matters of current debate, for example on whether the regime leads to under or overenforcement from the perspective of what is thought to be required today.

With respect to the qualitative information gathered in stakeholder consultation, few respondents were engaged closely enough with the competition regime to be able to give an informed view. This limited the potential pool of contributors and the diversity of opinion that can be gathered from stakeholders, and so the evidence gathered for this review was drawn from around 40 to 50 separate parties, including workshop attendees and those submitting written responses to the consultation. Whilst efforts were made to include balance in the mix of respondents, for instance between enforcers and legal representatives, academics and businesses, in practice there was considerable difference in the depth of responses from different groups. Responses from members of the legal community and the CMA were considerably more detailed and engaged across the areas in scope of the review, whilst responses from other parties tended to either focus on the performance of the regime in general or on specific aspects of interest. Much of the evidence provided came from commercial competition lawyers, and there is therefore a risk that some of the evidence may reflect their particular interests.

Review of the operation of Part 1 of the Competition Act 1998

Overview

This chapter summarises the Competition Act 1998 and the way in which competition enforcement works in the UK. It explains the context for the reforms in ERRA, including the findings of the 2011 consultation which led to ERRA and the aims of the reforms.

The chapter assesses the operation of Part 1 of CA98 against the aims of the ERRA reforms. It considers the operation of Part 1 of CA98 by the CMA and the sector regulators.

Background to the legislation

The prohibitions in CA98 aim to prevent aspects of conduct by businesses that can harm effective competition in a market. Part 1 of CA98 set out prohibitions against anti-competitive agreements and abusing a dominant position, set out in Chapters I and II of the Act.

Chapter I prohibits agreements between businesses that affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK. Examples include: price-fixing, collusive tendering, resale price maintenance, sharing price information, sharing markets and creating anti-competitive trade association rules. There may be exemptions for categories of agreement providing the agreement leads to efficiency gains which are passed on to consumers.

Chapter II prohibits conduct by one or more businesses which amounts to an abuse of a dominant position in a market and may affect trade in the UK. Abuse could be exploitative, for instance setting prices too high, or withholding capacity to produce too low a level of output. Alternatively, abuse could be exclusionary, by using a dominant position to prevent

rivals from entering or competing effectively, for instance predatory pricing[12], using tying[13] or bundling[14] to prevent rivals entering the market, providing incremental or retrospective discounts on additional purchases to exclude rivals, applying discriminatory standards to independent parties compared to those applied to affiliate companies, refusing to supply downstream rivals an input or refusing to supply upstream rivals with distribution.

Enforcement of CA98

In the UK, CA98 is applied and enforced principally by the CMA. Nine sector regulators[15] also hold powers to enforce CA98 concurrently with the CMA. The UK operates an administrative model of competition enforcement, in which a competition authority acts both as investigator of suspected infringement and adjudicator over whether an infringement has occurred. There is a right of appeal to the Competition Appeal Tribunal (CAT).

In 2015, after the ERRA reforms, it became possible for private standalone claims to be brought to the CAT under CA98. This reform is therefore out of scope of this review, although the forthcoming Competition Green Paper will consider the question of whether there has been too little private enforcement activity.[16]

Detection

The CMA obtains information about possible competition law breaches through various sources, including its own research and market intelligence, cartel members confessing to the CMA and applying for leniency[17], or through individuals or businesses complaining to the CMA about the behaviour of businesses.

Prioritisation and investigation

The CMA considers all information received on alleged breaches but cannot investigate all suspected infringements. The CMA uses its published Prioritisation Principles to decide which complaints to take forward. If the CMA considers that it has reasonable grounds for suspecting that the Chapter I or II prohibitions have been infringed, the CMA may open an investigation and use its information gathering powers.

[12] Pricing below cost to exclude a rival within the same market
[13] Making the sale of one product conditional on the purchase of another distinct ‘tied’ product
[14] Selling a package of two or more goods in fixed proportions
[15] These are: the Civil Aviation Authority (CAA), the Office of Communications (Ofcom), the Gas and Electricity Markets Authority (Ofgem), the Financial Conduct Authority, the Payment Systems Regulator, NHS Improvement, the Office of Rail and Road (ORR), the Water Services Regulation Authority (Ofwat) and the Utility Regulator (Northern Ireland Authority for Utility Regulation).
[16] Private claims against breaches of CA98 can also be brought in the Chancery Division of the High Court of England and Wales, the Court of Session and Sheriff Court in Scotland, the High Court of Northern Ireland and the Competition Appeal Tribunal.
[17] The CMA’s leniency programme can provide the opportunity for total immunity from, or a significant reduction in, any financial penalties imposed if the arrangement breaches Chapter I of CA98.

Statement of Objections

If the CMA forms a provisional view that the conduct amounts to an infringement, the CMA may issue a Statement of Objections giving the business under investigation an opportunity to know the full case against it, have access to the investigation file and respond to the case.

Decision

The CMA decides whether there has been an infringement based on the evidence gathered in the investigation. After issuing a Statement of Objections, a three-member Case Decision Group (CDG) is appointed which decides whether an infringement has occurred and, if so, the level of any financial penalty.

A CMA investigation could decide there has been an infringement or conclude there are no grounds for action if there was insufficient evidence. The CMA could close an investigation by accepting commitments from a business about its future conduct or on the grounds of administrative priorities. Where the CMA establishes that an infringement has occurred, it can impose a penalty, in line with its published guidance[18].

Rights of appeal

The following decisions are among those that can be appealed to the CAT: a decision that the Chapter I or II prohibitions have been infringed, an interim measures decision and a decision on the imposition or amount of a penalty. The CAT will consider the merits of the case as well the legality of the decision[19]. The CAT may reconsider the economic as well as legal analysis and can substitute its own decision for that of the CMA or the sectoral regulator or remit the decision in whole or in part to the original decision-maker. The CAT may impose or revoke or vary the amount of a penalty.

Policy rationale and objectives

Prohibitions against anti-competitive behaviour stem from the incentives that businesses might have to harm competition in a market for their benefit and to the detriment of consumers and rival firms.

This behaviour could include colluding with other businesses, charging excessive prices or using predatory pricing strategies that accept short-term losses in order to exclude potential rivals from the market. Such anticompetitive behaviour can reduce the competitiveness of markets and lead to harm, through higher prices to consumers and through reduced profits or forced exit by rival businesses in the same markets, and to reduced productivity[20] or innovation.

[18] *CMA's guidance as to the appropriate amount of a penalty* (CMA 73, 18 April 2018)
[19] Schedule 8, paragraph 3 of CA98
[20] See CMA (2015) *Productivity and competition: a summary of the evidence*

The aim of Part 1 of CA98 is to prevent anticompetitive behaviour and so promote more competitive markets.

How and why ERRA reformed Part 1 of CA98

2011 Consultation

Before the 2011 consultation[21], the Government was concerned that too few CA98 cases were being brought and cases were taking too long. This is an enduring concern, especially for Chapter II cases. The consultation suggested this might have been due to the burden of procedural requirements and sought views on how to reduce the burden by shortening the investigation/decision stage or the appeal stage, while maintaining fairness to parties and ensuring robust decisions.

The Government consulted on three models for competition enforcement:

- improving the existing administrative procedures;
- introducing a new administrative approach, reducing the standard of appeal from full merits to judicial review[22] while introducing procedural safeguards such as creating an 'Internal Tribunal' or making use of independent panels to make decisions on cases; or
- moving to a 'prosecutorial' model, in which the CMA would investigate and prosecute the case before a court, rather than make the infringement decision itself.

There was a widespread view in the consultation responses that the competition enforcement system was not working well[23]. Respondents shared the Government's concern over the low number of cases and raised concerns over the quality of decision making. Consultation respondents were split between those who felt that the existing administrative system could be operated to a high enough standard and those who felt that radical procedural change was required. The Internal Tribunal model was strongly opposed on the grounds that it could appear biased and come under sustained legal challenge. There was some support for developing a new administrative approach with independent panels, although there was general opposition to reducing the standard of review from full merits appeal to judicial review.

[21] BIS (2011) *A competition regime for growth: a consultation on options for reform*
[22] In judicial review, a challenge can only be brought on the basis of a limited range of public law failures, such as the decision being made illegally, being irrational and / or that the process for taking the decision involved improper procedure.
[23] Response to the consultation is summarised in BIS (2012) *Growth, Competition and the Competition Regime: Government response to consultation* p 52 - 65

Objectives of the ERRA reforms

Following the 2011 consultation, the Government decided to introduce an 'enhanced administrative approach' to competition enforcement with the aims of:

- increasing the number of CA98 cases and decisions;
- improving the speed of the process; and
- improving the robustness of decision-making and addressing perceptions of 'confirmation bias[24].

This review considers the performance of the operation of Part 1 CA98 with the specific objective of assessing whether the statutory reforms in ERRA have had a positive effect. However, any assessment here that they have had a positive effect should not be taken to mean that the objectives of having more cases, having them settled faster and enhancing the quality of decisions have been achieved in any absolute sense. Our forthcoming Competition Green Paper will provide an assessment of how well-equipped the competition regime is to deal with current and emerging challenges.

Statutory reforms to Part 1 CA98 introduced by ERRA

The following reforms were made to ERRA in order to improve competition enforcement.

Section 39: Investigations - power to ask questions

This introduced a new section 26A into CA98, giving the CMA a power to require individuals to answer questions as part of a CA98 investigation. This was to bring the powers on interviews for suspected civil cartel and other CA98 infringements in line with those in section 193 of the Enterprise Act 2002 (EA02) with respect to the criminal cartel offence[25]. The power would help the CMA in obtaining evidence orally rather than in writing.

Section 40: Civil enforcement of investigation powers

This substituted civil sanctions for the previous criminal sanctions available against parties that fail to comply with an investigation. Due to the complexity of criminal proceedings for non-compliance with investigations, the OFT had not used the criminal sanctions. The new powers gave the CMA the ability to impose a fixed penalty of up to £30,000 or a daily penalty of up to £15,000, or both, for failure to comply with an investigation.

[24] Confirmation bias refers to the perception that a body that has suspicions of wrongdoing sufficient to launch an investigation may have a behavioural bias towards confirming their suspicions by ruling that an infringement has taken place.
[25] Section 193 of EA02 sets out the powers the CMA has when conducting a criminal cartel investigation.

Section 41: Extension to the CAT of powers to issue warrants and Schedule 13: Extension to the CAT of powers to issue warrants under CA98

This allowed the CAT (as well as the High Court or the Court of Session, which already had the power) to issue warrants allowing an investigation officer to enter premises as part of an investigation. Applications for warrants authorising entry into property by force are usually heard in the magistrates' court, and CA98 was unusual in requiring the warrants to be issued by the High Court, which was less used to dealing with these applications. There had been concerns during the passage of CA98 through Parliament that giving the power to the magistrates' court to grant warrants would be at odds with the Protection of Freedoms Bill, and so judicial oversight was given to the High Court. ERRA allowed the CAT to be placed on a par with the High Court, as it would be well placed to consider CA98 cases.

Section 42: Part 1 of CA98 - procedural matters

This introduced a new section 25A giving the CMA a power to publish a notice of investigation, indicating which of the CA98 prohibitions was suspected to have been infringed, summarising the matter under investigation and identifying any businesses whose activities were being investigated and any market affected. This allowed the CMA to benefit from the absolute privilege against defamation for naming parties under investigation that derived from section 57 of CA98. The aim was to enhance the CMA's ability to trigger submissions and evidence from parties with information that could support an investigation by creating greater awareness about the existence of a case.

Section 43: Threshold for interim measures

This lowered the threshold for when the CMA could impose interim measures under section 35 of CA98. Interim measures allow the CMA to intervene once it has begun an investigation but before the investigation has concluded for the purpose of preventing harmful behaviour. Under the previous test, the CMA was able to impose interim measures where it considered that it was necessary for it to act as a matter of urgency for the purpose of preventing serious, irreparable damage to a person or category of person, or for protecting the public interest. ERRA reduced the threshold from "serious, irreparable damage" to "significant damage".

Section 44: Penalties, guidance etc.

This introduced new statutory considerations to which the CMA must have regard in fixing a financial penalty for infringement of CA98 prohibitions and required the CAT to have regard to the statutory guidance issued by the CMA[26] on the appropriate amount of a penalty when considering an appeal on the size of a penalty. This was intended to reduce

[26] Under section 38 of CA98 the CMA must prepare and publish guidance as to the appropriate amount of any penalty: see *CMA's guidance as to the appropriate amount of a penalty* (CMA 73, 18 April 2018)

incentives to appeal decisions and fines, as it provided clarity to parties on how an appeal would be considered.

Section 45: Power for the Secretary of State to impose time limits on investigations etc.

This created a power for the Secretary of State to impose time limits on the length of CA98 investigations and the making of infringement decisions.

Operation of Part 1 of CA98 since ERRA

The operation of Part 1 of CA98 can be assessed against the policy aims by reviewing the caseload, outcomes and timescales of cases. However, this approach has its limitations. Although the overall throughput of cases has increased, the total number of cases over this period is nonetheless limited – 55[27] since the reforms came in – and cases tend to have their own particular characteristics. The overall assessment of whether the goal of addressing underenforcement was achieved by these reforms must be mostly a question of judgment, albeit informed by these numbers.

This section focuses on the use of these powers by the CMA. The use of the powers by the sector regulators with concurrent powers is considered in a later section. This section does not consider enforcement by the European Commission of cases relating to UK markets although of course after EU exit the scope of potential enforcement action by the CMA and concurrent regulators will become much greater.

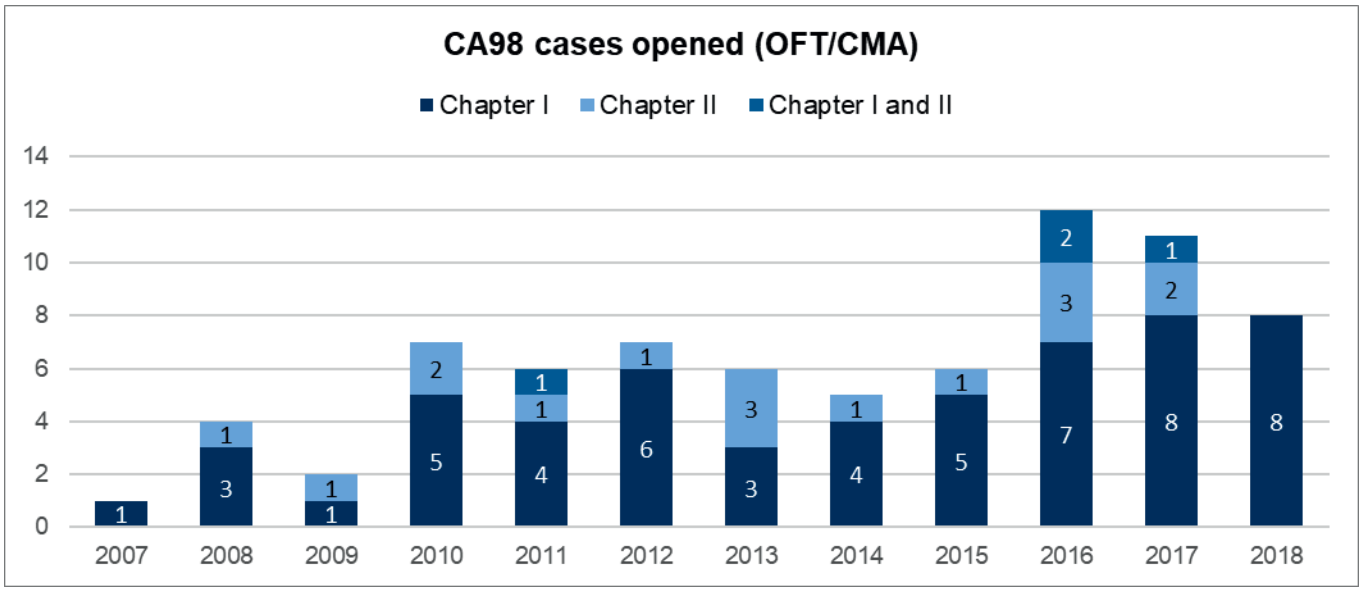
CA98 caseload (CMA)

New cases opened

The CMA has increased the number of CA98 cases opened since April 2014. The CMA opened 42 cases in this period[28], a mean average of 8.8 cases per year[29]. In comparison, the OFT opened 33 cases between 1 January 2007 and 31 March 2014, a mean average of 4.6 cases per year[30].

[27] 42 cases opened by the CMA and 13 by sector regulators.
[28] All the cases in 2014 were opened by the CMA, following its creation on 1 April 2014.
[29] This comes from dividing 42 by 4.75.
[30] This comes from dividing 33 by 7.25.

Chart 1: CA98 cases opened by year, 2007 to 2018, by type of infringement



Both before and after the ERRA reforms there were few Chapter II cases opened, with a mean average of 1.4 cases per year[31] prior to ERRA and 2.1 cases per year since[32]. Most of the increase in cases opened has involved suspected breaches of Chapter I and it is possible that the increase is due, amongst other things, to the nature of cases taken forward, which itself is a function of the CMA's case prioritisation decisions, what is discovered in the course of investigations and other contingent factors rather than the reforms being assessed here.

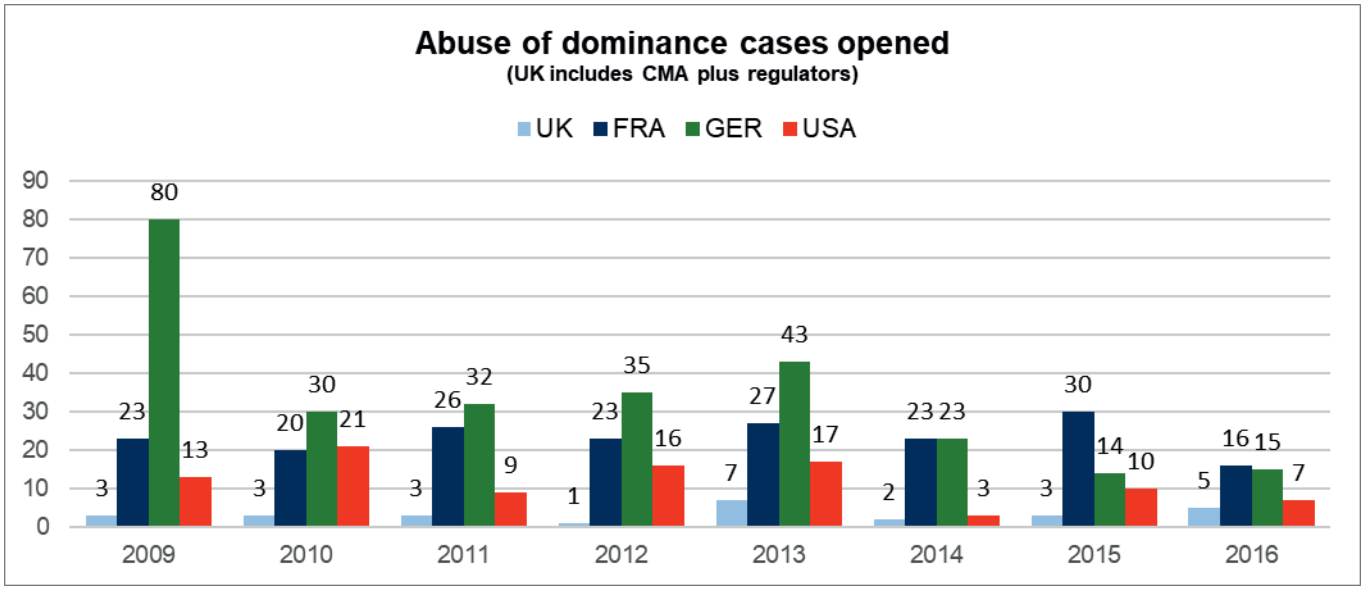
Many markets do not have dominant businesses so it is not surprising that the number of Chapter I cases exceeds the number of Chapter II cases. However, the small number of Chapter II investigations was raised as an issue during consultation for this review. Some stakeholders questioned whether it was difficult to establish that an abuse of dominance has occurred, perhaps due to the legal standard being too high, and whether this acted as a deterrent against opening an investigation. It was noted that other jurisdictions seem to be better at making abuse of dominance findings. For example, the number of Chapter II cases opened in the UK has been considerably lower than in France or Germany.

One view from the consultation was that in some cases the CMA had used its markets regime in cases that could have been appropriate for a Chapter II investigation, for example in the BAA airports and energy market investigations.

[31] This comes from dividing 10 by 7.25
[32] This comes from dividing 10 by 4.75

By the end of 2018 the CMA had seven CA98 investigations open involving Chapter II. There is no conclusive evidence to suggest that the UK is underenforcing on Chapter II cases, but such evidence would be hard to come by. However, it is striking that there has not been the increase in Chapter II cases seen for Chapter I. Our forthcoming Competition Green Paper will consider, for example, whether the rise of the digital economy should warrant a greater use of Chapter II enforcement.

Chart 2: Abuse of dominance cases opened in UK, France, Germany, USA by year[33]



Cases closed

The CMA has completed 20 of the investigations it has launched since April 2014. Of these, 12 resulted in infringement decisions and 2 in cases being closed following the CMA accepting commitments from the parties on their future behaviour. One case resulted in no grounds for action and five cases were closed due to administrative priorities.

Table 2: Outcome of closed cases (launched 1 April 2014 to 31 December 2018)

	Chapter I	Chapter II	Chapter I & II	**TOTAL**
Infringement decision	12	0	0	12
No grounds for action	0	1	0	1
Accepted commitments	1	0	1	2
Closed due to admin priorities	3	2	0	5
TOTAL	16	3	1	20

[33] Data for France, Germany and USA provided by Global Competition Review. Data for UK includes cases opened by sector regulators as well as the OFT/CMA.

In comparison, the OFT/CMA made 12 decisions of infringement out of the 33 cases launched between 2007 and the end of March 2014. One of these was to be remitted to the CMA following appeal to the CAT, although the CMA has been granted permission to appeal the CAT's judgment to the Court of Appeal[34]. Four of these cases were opened by the OFT and were still in progress at the time the CMA was formed, so the decision of infringement was made by the CMA.

Table 3: Outcome of closed cases (launched 1 January 2007 to 31 March 2014)

	Chapter I	Chapter II	Chapter I & II	**TOTAL**
Infringement decision	9	2[35]	1	12
No grounds for action	2	3	0	5
Accepted commitments	4	2	0	6
Closed due to admin priorities	8	2	0	10
TOTAL	23	9	1	33

Infringements decisions issued

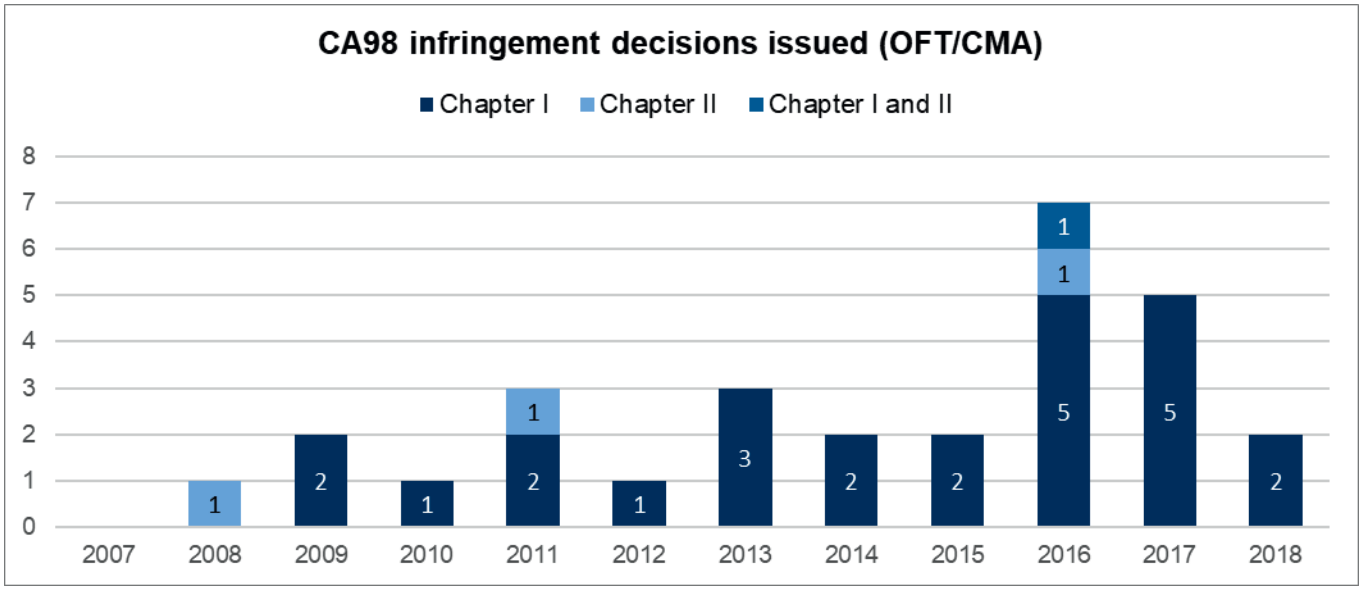
The number of infringement decisions matters for the performance of the regime because each decision can create new case law and add clarity about behaviour that will be regarded as a breach of the prohibitions. This is important in deterring anti-competitive activity. Ultimately it is not case numbers that matter but the health of competition in the economy taken in the round. Case-counting is therefore useful but a fuller assessment of the performance of the regime as a whole (antitrust, mergers, market studies and investigations taken all together), which is beyond the scope of this review, will need to take into account wider considerations.

The CMA has made 16[36] infringement decisions since 2014, including 4 cases that had been launched by the OFT. The CMA has made more infringement decisions in recent

[34] Phenytoin sodium capsules: suspected unfair pricing: [2018] CAT 11. The CMA and one of the parties (the latter on a partial basis) have been granted permission to appeal the CAT's judgement to the Court of Appeal.
[35] Includes the Chapter II infringement decision in one case which is the subject of an ongoing appeal (Phenytoin sodium capsules).
[36] See previous footnote (includes Chapter II infringement decision in Phenytoin case).

years than had been the case in the years leading up to its creation, particularly in 2016 and 2017[37].

Chart 3: CA98 infringement decisions issued by year (OFT/CMA)[38][39]



Chapter II infringement decisions are rare. Since 2007 there have been four infringement decisions made for Chapter II CA98 cases, of which one was subsequently remitted to the CMA by the CAT (although the CMA has obtained permission to appeal to the Court of Appeal). Given the low number of Chapter II cases opened, a low number of infringement decisions would be expected. When considering all cases that involved a suspected breach of the Chapter II prohibitions[40], the OFT made infringement decisions in 3 out of 10 cases launched between 1 January 2007 and 31 March 2014, while the OFT did not make any infringement decisions in the 4 cases launched after 1 April 2014 that were completed by 31 December 2018[41].

Whilst there has been some increase in overall case numbers, there has not been a step change in the level of cases. Looking at the combination of the number of cases, the level of fines and the overall length of case duration including appeals (including on an international comparative basis), some commentators suggest that the system may

[37] Annual mean averages have not been presented in this section as some of the infringement decisions made by the CMA involved cases that commenced under the OFT.
[38] These include some cases that were launched before 2007, which are not included in the table showing outcome of closed cases. For example, the 2008 infringement decision (collective boycott and alleged price fixing by certain recruitment agencies) was from a case launched in 2006.
[39] The two infringement decisions made in 2014 came before 1 April 2014.
[40] Including cases with both a Chapter I and Chapter II aspect.
[41] One of these cases was resolved by accepting commitments.

currently be under-enforcing. The forthcoming Competition Green Paper proposals will examine these claims.

Case timescales (CMA)

The timescales in CA98 cases were one of the areas of concern during the 2013 reforms.

A CA98 case has three phases: 'Phase 1' from launch of investigation to the issuing of a Statement of Objections; 'Phase 2' from Statement of Objections to the case decision; and 'Phase 3' from the issuing of an appeal to the appeal judgement, where relevant.

As most cases are not appealed, the process will involve only Phases 1 and 2 and cases can be closed either before or after the Statement of Objections by accepting commitments from the parties or because of administrative priorities.

The average duration of the 12 cases launched between 1 January 2007 and 31 March 2014 that led to an infringement decision was 36.7 months, with 3 cases lasting more than 48 months and 7 cases lasting more than 32 months. The Phase 1 investigation took an average of 20.4 months to complete.

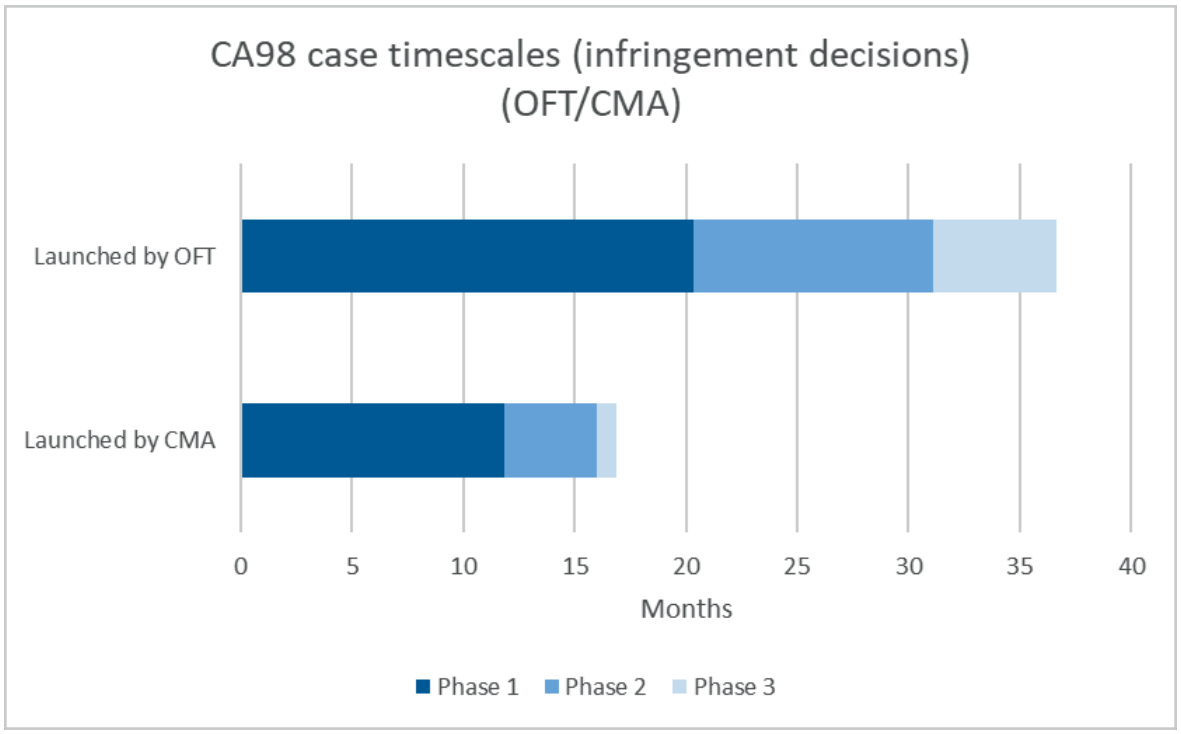
The average duration of the 12 cases launched after 1 April 2014 that led to an infringement decision was 16.9 months, with no cases lasting longer than 32 months. Six of the 12 cases were resolved in fewer than 18 months, compared to 3 of the 12 cases between January 2007 and March 2014. Both the Phase 1 and Phase 2 stages were completed in shorter timescales.

Five cases were launched by the OFT between 1 January 2007 and 31 March 2014 and completed by the CMA as they were still in progress on 1 April 2014. These cases were counted in the first of the two comparison groups described above.

Table 4: Timescales (in months) of completed CA98 investigations, OFT and CMA (infringement decisions)

	Phase 1	Phase 2	Phase 3[42]	End to end
OFT 2007-14	20.4	10.8	5.6	36.7
CMA 2014-18	11.8	4.2	0.9	16.9

Chart 4: Timescales of completed CA98 investigations, OFT and CMA (infringement decisions) (months)



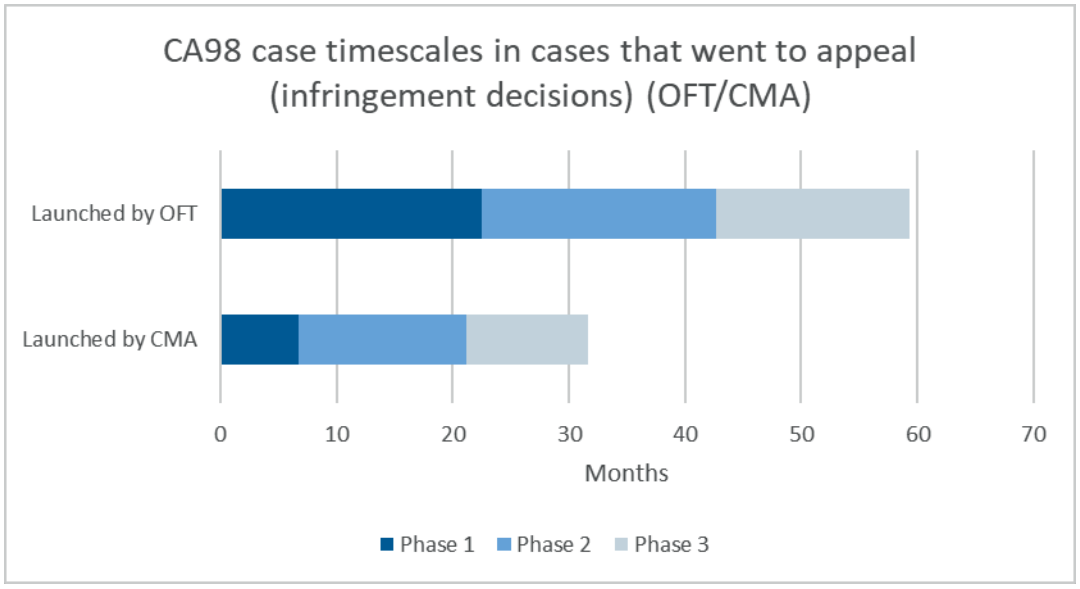
[42] Cases that did not go to appeal get a value of zero for Phase 3 timescale.

The average time for Phase 3 is distorted by the fact that most cases did not result in appeal and therefore took a value of zero for Phase 3. When considering only the cases that did go to appeal, the appeal makes up around a quarter to a third of the overall timescale.

Table 5: Timescales of completed CA98 investigations that involved appeal, OFT and CMA (infringement decisions)

	Phase 1	Phase 2	Phase 3[43]	End to end
OFT 2007-14[44]	22.6	20.1	16.7	59.3
CMA 2014-18[45]	6.7	14.5	10.4	31.6

Chart 5: Timescales of completed CA98 investigations that involved appeal, OFT and CMA (infringement decisions) (months)

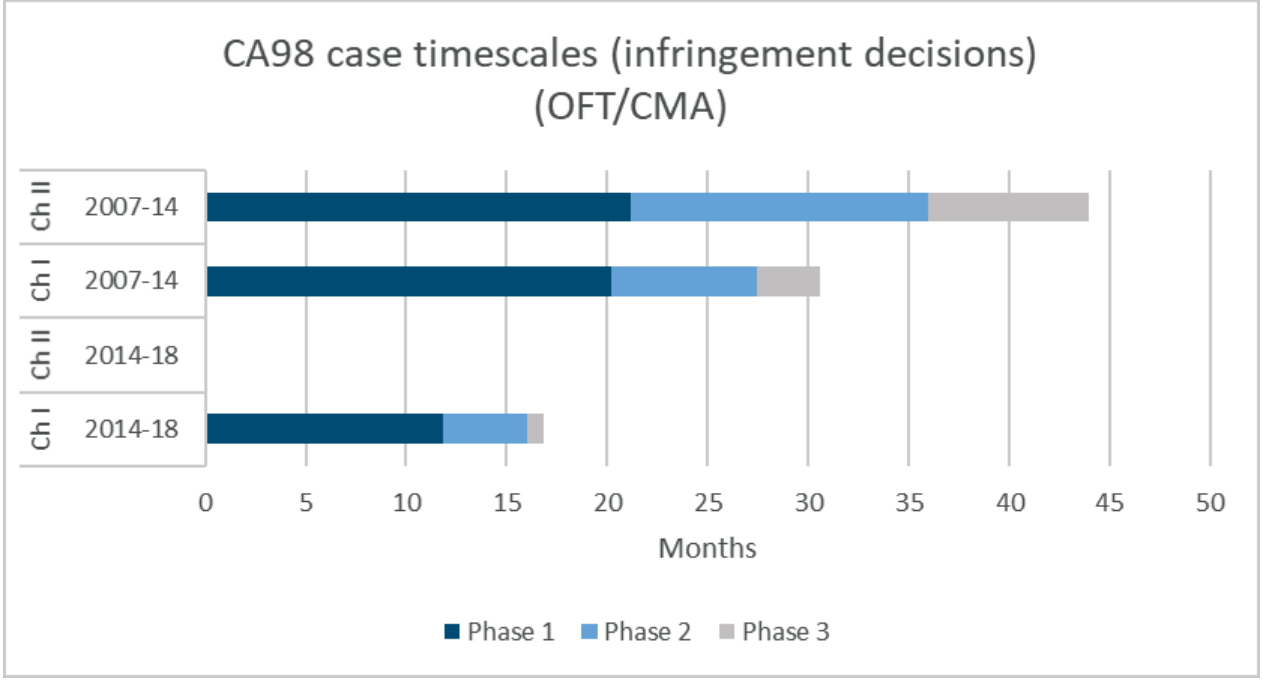


Compared to Chapter I cases, Chapter II cases might be more complex and require more time to build a case sufficient to establish infringement. Of the 12 cases launched between 1 January 2007 and 31 March 2014 that led to an infringement decision, 9 were Chapter I cases, 2 were Chapter II cases and 1 involved Chapter I and II. In contrast, all 12 cases launched after 1 April 2014 that led to an infringement decision were Chapter I

[43] Cases that did not go to appeal get a value of zero for Phase 3 timescale.
[44] Four cases only. In one case the appeal is live as it has been referred to the CJEU, but for the purposes of this assessment we have counted the date of referral as a 'completed' appeal.
[45] One case only: only the Ping case (Sports equipment sector: anti-competitive practices) was launched after April 2014 and had a completed appeal within this time period.

cases. Therefore, the improvement in timescales since 2013 may be attributable to the nature of cases taken forward.

Chart 6: Timescales of completed CA98 investigations separated by Chapter I or Chapter II, OFT and CMA (infringement decisions) (months)



Looking at Chapter I cases, there was an improvement between the cases that were launched by the OFT and those launched by the CMA, with all phases being completed more quickly, including a reduction in the average time from 20.2 months to 11.8 months for Phase 1 and from 7.3 months to 4.2 months for Phase 2. This analysis cannot fully control for any difference in the complexity of cases, however it is possible that Chapter I cases in the period after April 2014 were less complex than those in the comparison time period, which could have led to shorter timescales.

Table 6: Timescales of completed Chapter I CA98 investigations, OFT and CMA (infringement decisions)

	Phase 1	Phase 2	Phase 3	End to End
OFT 2007-14	20.2	7.3	3.1	30.6
CMA 2014-18	11.8	4.2	0.9	16.9

The changes made in ERRA are unlikely to have had a significant impact on the length of cases. It is more likely that improved internal processes, the nature of cases taken forward and case management have led to faster resolution of cases.

Stakeholders in this review had a range of views on the CMA's cases timescales, including acknowledging that timescales have improved in recent years and, while long cases are undesirable, the CMA has a duty to enforce the rules robustly, fairly and effectively.

Stakeholders raised concerns about case timescales following EU exit, as the CMA could be faced with additional enforcement cases that would have been led by the European Commission. The more complex cases could also expose the more time-consuming aspects of current procedure, such as access to file.

Quality and robustness of decision making

Effective decision making needs to avoid overenforcement (finding infringements in cases where there was no real harm) and underenforcement (failing to take action against harmful behaviour).

As there is no baseline measure of the level of anticompetitive behaviour in the economy, it is not possible to measure the amount of underenforcement. The increase in numbers of cases and infringements has many possible explanations, including a greater share of harmful behaviour being investigated and enforced against, a general increase in harmful behaviour in the economy, or the nature of cases taken forward.

An alternative possibility is that the increase in cases has been as a result of overenforcement by the CMA. If so, this should show through in successful appeals to the CAT.

Of the 13 infringement decisions made between 1 January 2007 and 31 March 2014, three were appealed to the CAT. In two of these, at least some of the OFT's judgments were overturned, leading to reduction or removal of the penalties imposed for some parties[46], whilst in the other, the CAT upheld the OFT view of the infringements but reduced the level of penalty[47].

Of the 16 infringement decisions issued following the creation of the CMA, four have been appealed. Only one relates to a case that had been launched after the creation of the CMA[48]. One resulted in the CMA's infringement decision being remitted to the CMA[49], one

[46] Dairy price initiatives: [2012] CAT 31; Tobacco manufacturers: investigation in to anti-competitive practices: [2011] CAT 41
[47] Construction Recruitment Forum: [2011] CAT 3
[48] Sports equipment sector: anti-competitive practices: [2018] CAT 13
[49] Phenytoin sodium capsules: suspected unfair pricing: [2018] CAT 11. The CMA and one of the parties (the latter on a partial basis) have been granted permission to appeal the CAT's judgement to the Court of Appeal.

resulted in the CAT upholding the infringement decision but reducing the penalty[50], one referred questions of law to the Court of Justice of the European Union and is still in progress[51] and one resulted in the CMA's decision and penalty being upheld by the CAT[52].

A low appeal rate is not a definitive indicator of effective decision making. Nevertheless, the low number of CA98 decisions overturned on appeal provides some evidence to suggest that the quality of CMA decision making has been good and the caseload in recent years does not represent overenforcement.

However, it is difficult to draw firm conclusions from this small sample size, especially as the time periods are different. One point is worthy of note. Only one of the 16 infringement decisions made by the CMA has been remitted to the CMA by the CAT, which might suggest that the CMA's decision making on infringements has been good[53]. However, the relative lack of Chapter II infringements was noted above. This meant that the CMA's decision against Pfizer in 2017 was highly significant[54]. The CMA has been granted permission by the Court of Appeal to appeal the CAT's decision in this case. The record on appeals might therefore be explained by case choice on the part of the CMA, and this may itself be influenced by features of the appeal system.

Even though the average duration of cases has fallen and the CMA's overall track record on appeal has been good, this may still come at a cost for the regime as a whole given the time and resource required to investigate and defend a case on appeal and the impact of this on case choice. These issues will be examined in our forthcoming Competition Green Paper, especially in view of the challenges noted in Professor Furman's review posed by the competitive behaviour of digital platforms.

Conclusions on effects of changes to Part 1 of CA98 as enforced by CMA

Conclusions on case outputs

The data on cases before and after the ERRA reforms suggest that the CMA has increased its CA98 caseload, issued more infringement decisions and reduced the time taken for the end-to-end process of establishing an infringement, though, as noted above, we cannot make a firm causal inference between reforms and outcomes.

[50] Sports equipment sector: anti-competitive practices [2018] CAT 13
[51] Paroxetine investigation: anti-competitive agreements and conduct: [2018] CAT 4
[52] Galvanised steel tanks: [2017] CAT 23. The appellant then appealed to the Court of Appeal, which upheld the CMA's decision.
[53] One other case (sports equipment sector: anti-competitive practices) involved a reduction in penalty, but not a remittance or overturning of the infringement decision.
[54] https://www.gov.uk/cma-cases/investigation-into-the-supply-of-pharmaceutical-products

Conclusions on specific statutory measures introduced in ERRA

The previous section reviewed the performance of competition enforcement against the aims at the time of ERRA. This section reviews the measures introduced in ERRA, the extent to which they were used and the impact they have had on competition enforcement.

Section 39: Investigations - power to ask questions

This inserted a new section 26A into CA98 to give the CMA a power to require individuals to answer questions as part of a CA98 investigation, bringing the powers for requiring interviews for suspected civil cartel and other CA98 infringements in line with those in section 193 of EA02 with respect to the criminal cartel offence. This enabled the CMA to obtain evidence orally as well as in writing in response to written information requests. Before the introduction of this power, the CMA was dependent on oral witness evidence being provided voluntarily.

The CMA saw the new powers as an important tool in enhancing its ability to gather witness evidence and better investigate cases, noting that these powers can considerably increase witness co-operation and the ability to progress a case. The CMA has made frequent use of these powers in its CA98 investigations.

In this review, the responses gathered on this topic from representatives of the legal community were positive but cautious about the potential for misuse. The ability to require individuals to answer questions under interview was seen as a “powerful incentive for individuals to agree to voluntary interviews” and the powers were “generally proportionate and fair to the parties involved” although it was expected that these powers would only be used in exceptional circumstances and that the focus of evidence collection should be on written rather than oral evidence.

Section 40: Civil enforcement of investigation powers

This inserted section 40A into CA98 to replace the previous criminal sanctions for non-compliance with an information request with the power to impose a civil financial penalty. The lengthy process and procedural burden involved in pursuing criminal sanctions had meant that the OFT had never brought a criminal case for failure to comply with a request. The new civil sanction for non-compliance has been used in one case: a £10,000 penalty imposed on Pfizer in March 2016 for failing to provide information in response to a request for information made under section 26 of CA98. The penalty was imposed just over one month from when Pfizer failed to comply with the request, suggesting it is possible for this sanction to be used promptly.

Few consultation responses to this review commented on civil financial penalties. They felt either that the potential to impose civil rather than criminal penalties had increased deterrence or made no significant impact.

Some responses to this consultation noted that information requests made to parties as part of an investigation can be a burden to businesses and so the CMA needs to exercise the powers reasonably and proportionately and not give unrealistic time frames or sanction parties that have acted in good faith.

The size of the available penalty was also raised as an issue during this consultation. For example, while the CMA considers that the power to impose administrative penalties for non-compliance with investigative requirements is an important tool, it is concerned that the current maxima (£30,000 fixed rate plus £15,000 per day) are low and out of step with comparators and are smaller than the sanctions for breach of the Chapter I or II prohibitions.

The equivalent sanction for the European Commission is a fine not exceeding one per cent of the total turnover in the preceding business year[55]. The CMA also has powers to impose a penalty of five per cent of worldwide turnover for breaches of Initial Enforcement Orders or interim orders in merger cases, as was used, for example, in the imposition of a fixed penalty of £100,000 on Electro Rent on 11 June 2018 for failing to comply with the requirements of an interim order[56].

During this consultation the CMA supported the idea of a new power to impose administrative penalties for the provision of false or misleading information, as a complement to the possibility of criminal penalties for such misconduct. The CMA considered that, although the retention of criminal sanctions was important for an appropriate serious case, the resources required to pursue a criminal prosecution were considerable and could be disproportionate.

These issues, together with a number of proposals for the strengthening of the CMA's information gathering powers, including those from Professor Furman's review and from Lord Tyrie's letter, will be considered in our forthcoming Competition Green Paper.

Section 41: Extension of powers to issue warrants to the CAT and Schedule 13: Extension of powers to issue warrants under CA98 to the CAT

These amended CA98 to extend to the CAT powers that the High Court and the Court of Session already had to issue warrants to allow the CMA to enter premises in the course of CA98 investigations. ERRA did not give the Secretary of State the power to make rules on

[55] Article 23 Regulation 1/2003

[56] https://assets.publishing.service.gov.uk/media/5b1fb924e5274a18e8bf5230/Decision_on_Penalty.pdf The CMA's penalty notice on Electro Rent was subsequently upheld by the CAT on 11 February 2019: see [2019] CAT 4. The CMA has also imposed administrative penalties under these powers in two other cases: *Ausurus/MWR* (penalty notice of 10 January 2019, imposing a penalty of £300,000 for failure to comply with an Interim Order) and *Electro Rent* (penalty notice of 12 February 2019, imposing a penalty of £200,000 for failure to comply with an Initial Enforcement Order).

the supervision of the execution, variation or subsequent discharge of the warrants. As a result, it has not been possible to develop rules for the CAT to exercise these powers and so these provisions in ERRA have not been used.

The CMA did not regard this as a significant issue in this consultation and considers that the High Court warrant application process works well for the CA98 regime. Respondents to this consultation generally felt it would be sensible to amend ERRA to enable the CAT to supervise warrants.

Section 42: Part 1 of CA98 - procedural matters

This inserted section 25A into CA98 to allow the CMA to publish a notice of investigation to identify businesses under investigation and any market affected. Absolute privilege against defamation attaches to a notice by a competition authority about a CA98 investigation[57]. The change was made to help the CMA to carry out its functions, for example by alerting third parties to the existence of an investigation and triggering evidence or submissions from parties which could help the CMA to gather evidence. This brought the UK in line with the European system in which the European Commission issues press announcements stating that it is investigating a particular sector so as to give transparency about competition enforcement.

So far the CMA has used this power once. The CMA's position is that the names of the parties under investigation would only be published in an investigation notice in exceptional circumstances, for example where leaving parties unidentified could result in significant detriment to consumers and/or other businesses, the subject is of public concern or the party's involvement in an investigation is already in the public domain or the subject of significant public speculation[58].

Respondents to the consultation supported the CMA's approach. The CMA considers it important for this power to be retained as there could be situations in which naming the parties under investigation might be important in order to gain additional evidence or submissions or could be in the public interest.

Section 43: Threshold for interim measures

This changed the threshold in section 35 CA98 for the CMA or a regulator to impose interim measures during an investigation. Under the previous test, the CMA could impose interim measures where it considered that it was necessary as a matter of urgency to prevent serious, irreparable damage to a person(s) or for protecting the public interest. The threshold was changed from "serious, irreparable damage" to "significant damage" to

[57] Under section 57 of CA98, absolute privilege against defamation attaches to any advice, notice or direction given, or decision made by the CMA, in the exercise of its functions under Part 1 of the Act.
[58] *Guidance on the CMA's Investigation procedures in Competition Act 1998 cases* para 5.7

make it easier to intervene where there could be harm while an investigation was in progress.

The OFT only once tried to use interim measures under the previous threshold, against the London Metal Exchange in 2006, but this order was withdrawn following an appeal to the CAT[59]. The CMA has not so far used the power. It has conducted two investigations in which it considered imposing interim measures, finding in one case that the threshold was not satisfied, and closing the other when it accepted commitments.

Respondents to this consultation noted that there were likely to be few cases where interim measures would be appropriate and there were no suggestions to change the threshold.

The Furman report in to digital competition noted the special challenges posed by fast-moving technological markets where irreversible damage to competitive market structure may be done rapidly. The report recommended that to facilitate greater and quicker use of interim measures to protect rivals against significant harm, the CMA's processes should be streamlined, and that the review applied by the CAT to interim measures should be changed to more limited grounds. This will be examined in our forthcoming Competition Green Paper.

Section 44: Penalties, guidance etc.

This amended section 38 of CA98, introducing a requirement for the CAT to have regard to the CMA's guidance on penalties when it is reviewing penalties on appeal. Previously the CAT had adjusted penalties on a number of occasions. In cases where a penalty had followed an infringement decision issued between 2007 and 2013, penalties were adjusted downwards on appeal on five occasions.

[59] London Metal Exchange – interim measures direction http://webarchive.nationalarchives.gov.uk/20140402164445/http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/london-metal-exchange

Table 7: Penalties adjusted following appeal to the CAT (infringement decision 2007 to 2013)

Case	Date of infringement decision	Amount of penalty[60]	Amount of penalty following appeal
Abuse of dominance by National Grid through exclusivity contracts for provision and maintenance of domestic-sized gas meters (infringement decision by Ofgem)	Feb 2008	£41.6m	£30m (subsequently reduced to £15m on appeal to Court of Appeal)
Construction firms colluding with competitors on building contracts through bid-rigging (reduction following appeals by 25 of the 103 firms found to have infringed)	Sep 2009	£129.5m	£63.9m
Collective boycott and price fixing by certain recruitment agencies	Sep 2009	£39.27m	£8.14m
Tobacco manufacturers and retailers engaged in unlawful practices in relation to retail prices for tobacco products in the UK	Apr 2010	£225m	Zero – decision quashed by the CAT
Various supermarkets and cheese processors co-ordinating increases in consumer prices for dairy products	Aug 2011	£49.51m	£45.61m (reduction by £3.9m in Tesco's fine)

[60] Following leniency if applicable

Since the change, there have been four CA98 appeals in the CAT, of which three related to cases that had been launched before the creation of the CMA[61]:

- *GlaxoSmithKline PLC v Competition and Markets Authority* – some questions have been referred to the CJEU and so decisions on the penalties will be made following judgement from the CJEU[62];
- *Pfizer Inc. and Pfizer Limited v Competition and Markets Authority* - the CMA's finding of a breach of Chapter II and the penalties imposed were set aside. The CMA has been granted leave to appeal to the Court of Appeal[63];
- *Balmoral Tanks Limited and Balmoral Group Holdings Limited v Competition and Markets Authority* - the CMA's finding of a breach of Chapter I was upheld, as was the penalty of £130,000[64]; and
- *Ping Europe Limited v Competition and Markets Authority* - the finding of a breach of Chapter I was upheld, but the penalty of £1.45m on Ping was reduced to £1.25m. The CAT considered "in the round" that this was a "fair and proportionate" penalty, having found that the CMA had erred by treating director involvement as an aggravating factor in the case[65].

This change made in ERRA was not commented on by respondents to this consultation. The CAT has said that it has always had regard to CMA guidelines in its decisions. There are too few cases, and they are too specific in nature, to infer anything about the direction of travel towards the objective that this reform envisaged. The question of fining powers in general will be examined in our forthcoming Competition Green Paper.

Section 45: Power for Secretary of State to impose time limits on investigations.

This introduced a power for the Secretary of State to impose time limits on the length of CA98 investigations and the making of infringement decisions. Given the reduction in length of CA98 investigations, this backstop power has not been used. We will examine in our forthcoming Competition Green Paper the question of timescales to decisions over the entire cycle, including those proposed by Professor Furman and in Lord Tyrie's letter.

[61] GlaxoSmithKline, Pfizer and Balmoral.
[62] [2018] CAT 4
[63] [2018] CAT 11. The CAT did make some preliminary comments on the amount of the penalty in the judgment. While noting that it did not need to reach a conclusion on penalties, it said that if it had needed to come to a decision on the level of penalties to be applied to Pfizer, it would have given the appropriate uplift for deterrence close scrutiny (see para. 459-461 of the judgment).
[64] [2017] CAT 23
[65] [2018] CAT 13 para 254

Enforcement of CA98 by sector regulators

Background on concurrent competition powers

There are nine sectoral regulators with concurrent competition powers[66].

- the **CAA** (Civil Aviation Authority), in respect of air traffic services and airport operation services
- **Ofcom** (Office of Communications), in respect of communications (telecommunications, broadcasting, spectrum and postal services)
- **Ofgem** (Gas and Electricity Markets Authority), in respect of electricity and gas in Great Britain
- the **FCA** (Financial Conduct Authority), in respect of financial services (full concurrent powers since April 2015 via the Financial Services (Banking Reform) Act 2013)
- the **PSR** (Payment Systems Regulator), in respect of participation in payment systems (concurrent powers under the Enterprise Act 2002 since 1 April 2014 and concurrent powers under the Competition Act 1998 since 1 April 2015)
- **NHS Improvement** (previously Monitor which became part of NHS Improvement from 1 April 2016), in respect of healthcare services in England (NHS Improvement does not have a duty to promote competition but will act to prevent anti-competitive behaviour where this is against patients' interests)
- the **ORR** (Office of Rail and Road), in respect of railways and the road network
- **Ofwat** (Water Services Regulation Authority), in respect of water and sewerage services in England and Wales
- **Utility Regulator** (also known as the Northern Ireland Authority for Utility Regulation), in respect of electricity, gas, and water and sewerage services in Northern Ireland.

[66] The regulators also have powers to make market investigation references under section 131 of the Enterprise Act 2002, although this lies outside the scope of this review of the operation of Part 1 of CA98.

The regulated sectors provide essential services to virtually all consumers (such as water, gas, electricity and the NHS) or are essential parts of the infrastructure of the UK economy (such as railways, communications, airports and air traffic control and financial services). Many of these sectors were nationalised monopolies until a programme of privatisation in the 1980s and 1990s transferred ownership from the state to private providers so as to develop more competitive markets.

Ex-ante regulation in regulated sectors

The sector regulators were established to protect the interests of consumers following privatisation, as the markets in these sectors were not competitive at the time (and some were natural monopolies that were not susceptible to market competition). The regulators were given enforcement powers, including direct ex-ante powers to remedy non-competitive market structures, for example through enforcing licence conditions, service standards or price controls in order to serve as a proxy for market competition.

However, the use of ex-ante regulation can involve burdens that create barriers to entry and reduce the scope for innovation in regulated sectors. The regulators were therefore given a mandate to encourage competition, where it was possible, so that effective competition would develop and reliance on ex-ante regulation would reduce.

Competition enforcement in regulated sectors

To supplement the ex-ante regulatory powers, the sector regulators were given powers to enforce competition law (and to make market investigation references) concurrently with the main competition authority (OFT or CMA). These concurrency arrangements developed over time, having origins in some regulators being given powers to make monopoly references under the Fair Trading Act 1973. The competition enforcement powers were formalised in CA98.

Caseflow in regulated sectors

There have been few competition enforcement cases in regulated sectors. This could be because regulators believe that their ex-ante regulatory tools are a quicker, more cost-effective and less resource-intensive way of improving outcomes for consumers than enforcement action under CA98. Regulators might also lack experience in bringing CA98 cases and be at a disadvantage when challenging defendants with legal teams who are experienced in fighting CA98 cases.

It is not easy to identify whether the low level of enforcement activity in regulated sectors is because of underenforcement or a low level of anticompetitive behaviour. The regulatory structures could limit the scope for regulated firms to breach competition law.

A key issue for competition in the regulated sectors is who is best placed to pursue CA98 cases. Sectoral regulators bring knowledge of their sector but do not have the CMA's

experience in bringing CA98 cases. Regulators might be more likely than the CMA to prioritise a competition case in their sector, given that the CMA has a broader remit and might face competing enforcement priorities. Co-operation between authorities, including sharing of staff and expertise, can lead to better enforcement outcomes.

How and why ERRA reformed the operation of Part 1 of CA98 with respect to sector regulators

2011 consultation

At the 2011 consultation, the Government was concerned about the low number of CA98 cases in the regulated sectors. There had only been two infringement decisions by 2011: by the ORR against English Welsh and Scottish Railways (2006)[67] and by Ofgem against National Grid (2008)[68]. Both decisions followed abuse of dominance investigations into breaches of the Chapter II CA98 prohibition.

There was a concern that regulators preferred to use their regulatory powers rather than their competition powers, as they had more experience of using the regulatory powers. There were also concerns about a lack of competition expertise in some sector regulators, due to the small number of cases. The Government recommended retaining the concurrency arrangements but consulted on proposals to improve the co-operation between regulators and the CMA.

Most consultation respondents agreed that sector regulators should keep their concurrent powers, with a small number of respondents preferring the CMA to have sole responsibility for competition enforcement.

Government response

Following the consultation, the Government introduced reforms to improve the use of competition powers in the regulated sectors and improve co-ordination between competition authorities[69].

[67] https://webarchive.nationalarchives.gov.uk/20140402162958/http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/ews-rail
[68] https://webarchive.nationalarchives.gov.uk/20140402160039/http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/ofgem
[69] BIS (2012) *Growth, competition and the competition regime – Government response to consultation* p 77 - 85

Statutory reforms

Schedule 14: The primacy provision

These amendments gave the sector regulators a more explicit duty to consider, before using their regulatory powers, whether it would be more appropriate to use CA98 enforcement powers. Previously only some regulators had a duty to consider competition enforcement powers before using regulatory powers.

Section 51: Giving the CMA powers to decide which authority should lead on a case and to take cases from sector regulators

This allowed regulations to be made to allow[70] the CMA to decide which body should lead on a case, and to take on a case if it considered that this would promote competition for the benefit of consumers. The CMA and sectoral regulators were also required to share information about cases, so as to improve the case allocation process and promote better co-operation on cases. These changes aimed to give the CMA a larger leadership role in the regulated sectors and ensure it could act as a backstop authority to take forward a case if a regulator was not capable of bringing the case effectively.

Schedule 4 (16): Requiring the CMA to publish an annual report covering the use of competition powers in the regulated sectors

This required the CMA to publish an annual report on how the concurrency arrangements have operated. The aim was to increase transparency in the performance of competition enforcement in regulated sectors and give the CMA and regulators an incentive to work together.

Section 52: Giving the Secretary of State the power to remove concurrent competition functions from individual regulators

This power provided for the removal of concurrent powers from a regulator if this would improve enforcement.

Other recommendations

The Government response also recommended that the CMA and sector regulators worked together more closely. This led to the first Strategic Steer to the CMA[71] requiring the CMA to focus on "*playing a leadership role with regulators that have competition powers, especially those that are new to the concurrency regime*". The CMA was required to

[70] Section 51 of ERRA empowered the Secretary of State to make regulations providing for this – subsequently done via the Competition Act (Concurrency) Regulations 2014, reg 5 and reg 8.
[71] *Government's response to the Consultation on the Strategic Steer to the Competition and Markets Authority; December 2015*. This was the first Strategic Steer directed toward the CMA rather than its predecessors.

"*encourage those regulators to make greater use of their competition powers*", and to partner with regulators to "*use effective competition tools to promote changes in markets rather than prescriptive licensing conditions and regulatory requirements*".

The UK Competition Network (UKCN) was established, bringing together the CMA and regulators to encourage dialogue, sharing of information, best practice and expertise, and enhance co-operation on enforcement[72]. The Strategic Steer required the CMA to focus on "*building a strong dialogue with sectoral regulators using the UK Competition Network to ensure that the overall competition regime is co-ordinated and regulatory practices complement each other*".

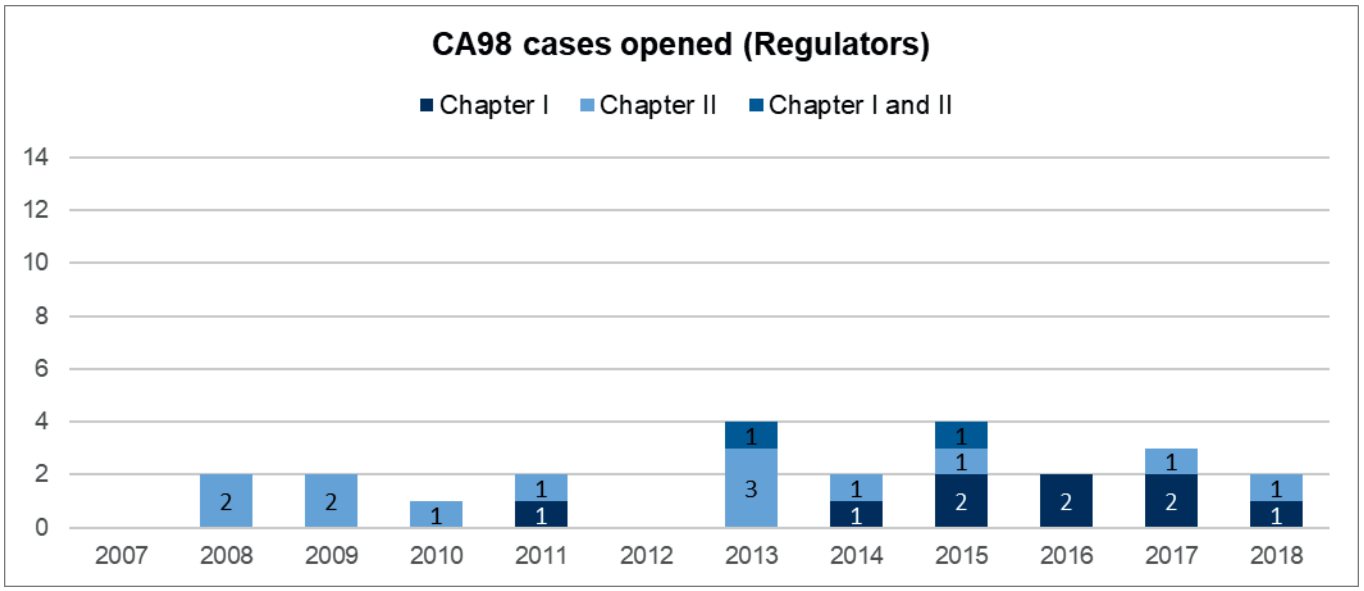
Operation of concurrency arrangements since ERRA

CA98 caseload taken by regulators

The caseload taken by regulators remains low but has increased. Thirteen new CA98 cases were opened by regulators between 1 April 2014 and 2018, at an average of 2.7 cases per year[73]. In comparison, 11 new CA98 cases were opened between 1 January 2007 and 1 March 2014, at an average of 1.5 cases per year[74]. The CMA noted in its annual concurrency report 2017 that "while progress has been made on the delivery of cases, the number of new cases remains below the level that we would like to see[75]".

[72] *UK Competition Network Statement of Intent*, December 2013
[73] This comes from dividing 13 by 4.75 years.
[74] This comes from dividing 11 by 7.25 years.
[75] CMA (2017) *Annual concurrency report 2017* p 3

Chart 7: CA98 cases opened by regulators, by year[76]



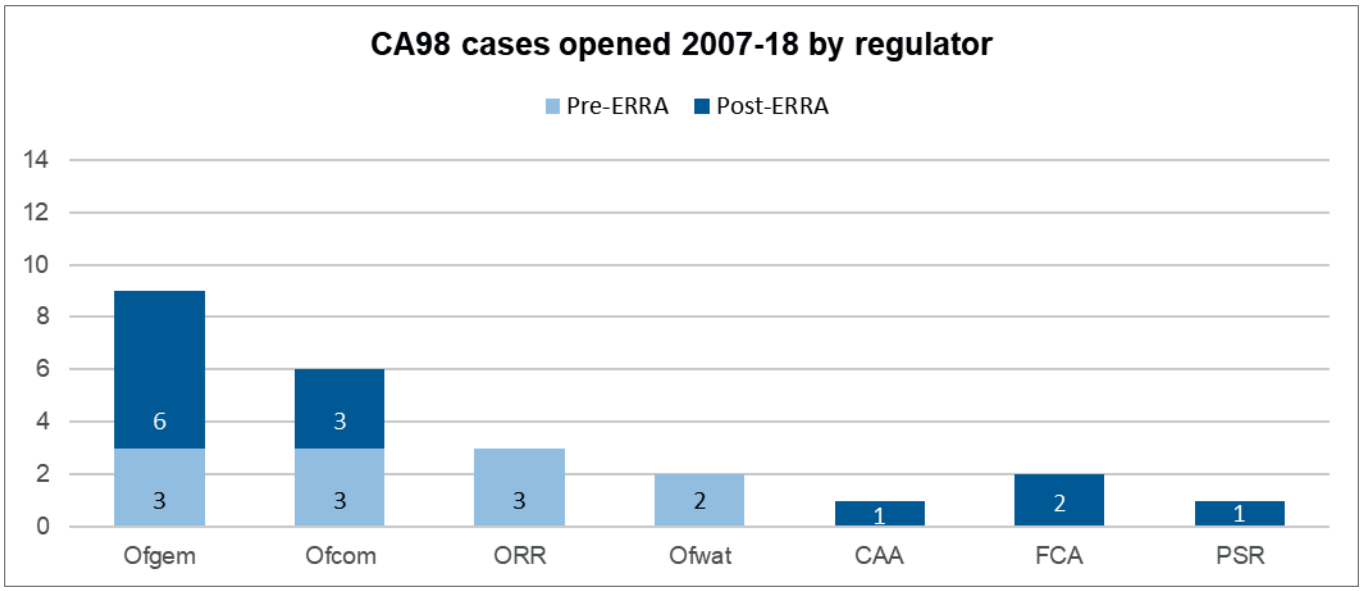
In the period following ERRA, three regulators launched CA98 cases for the first time – the CAA, FCA and PSR. The FCA obtained full concurrent powers in April 2015 and has since opened 2 new CA98 investigations. Ofgem opened most new cases, launching 6 new investigations between 2014 and 2017. Since obtaining concurrent powers, all the sector regulators have opened at least one case, apart from the Utility Regulator and NHS Improvement.

CMA cases in the regulated sectors

The CMA has launched investigations into 4 CA98 cases in the regulated sectors[77]. In addition, the CMA took over an investigation launched by Ofgem into suspected anti-competitive agreements in online paid advertising in the energy sector, following a decision to transfer the case[78].

[76] Both cases in 2014 were launched after 1 April.
[77] In private ophthalmology, conduct in transport sector (facilities at airports), price comparison websites in home insurance and suspected anticompetitive agreements in the financial services sector.
[78] The transfer was due to communications between Ofgem staff and representatives of some parties under investigation encouraging the parties to change their behaviour in relation to bidding on search advertising keywords relevant to Ofgem. These communications took place before the investigation was opened, but created a potential risk that Ofgem's impartiality in the case could have been called into question, therefore the CMA was better placed to continue with the investigation.

Chart 8: CA98 cases opened by regulators, 2007 - 18[79]



Cases closed by regulators

By 31 December 2018[80], the regulators had completed 7[81] of the 13 investigations launched after 1 April 2014. These investigations resulted in two infringement decisions, and one was settled by accepting commitments from the parties about their future behaviour.

[79] Note that the CAA did not receive concurrent competition enforcement powers for airport operation services until 2013 (having had concurrent powers in air traffic services since 2001), the FCA and PSR did not obtain concurrent enforcement powers until 2015.
[80] On 21 February 2019, the FCA issued an infringement decision against three asset management firms: the first infringement decision that the FCA has issued since receiving concurrent powers to enforce CA98. This fell outside the reporting period covered in this review.
[81] One of the 7 investigations involved 2 decisions: the CAA case into car parking at East Midlands Airport issued an infringement decision for the Chapter I part of the investigation and closed the Chapter II part of the investigation on administrative priorities.

Table 8: Outcome of closed cases (regulators) (launched 1 April 2014 to 31 December 2018[82])

	Chapter I	Chapter II	Chapter I & Chapter II	**TOTAL**
Infringement decision	1	1	0	2
No grounds for action	0	0	0	0
Accepted commitments	0	1	0	1
Closed due to admin priorities	3	0	0	3
Transferred to CMA	1	0	0	1
Transferred to Euro. Commission	1	0	0	1
TOTAL	6	2	0	8

All the 11 cases launched between 1 January 2007 and 31 March 2014 have been closed. None of these cases led to an infringement decision[83]. Three cases were resolved after accepting commitments, five cases found no grounds for action and three were closed due to administrative priorities.

[82] This totals 8 as it contains two decisions for one investigation: the CAA case into car parking at East Midlands Airport issued an infringement decision for the Chapter I part of the investigation and closed the Chapter II part of the investigation on administrative priorities. Only 7 separate investigations launched after 1 April 2014 have been completed.

[83] In February 2008 Ofgem issued an infringement decision in a case against National Grid for abuse of dominance through exclusivity contracts for the provision and maintenance of domestic-sized gas meters. This case was launched in October 2004 and therefore does not fall within the period under review.

Table 9: Outcome of closed cases (regulators) (launched 1 January 2007 to 31 March 2014)

	Chapter I	Chapter II	Chapter I & Chapter II	**TOTAL**
Infringement decision	0	0	0	0
No grounds for action	0	5	0	5
Accepted commitments	0	2	1	3
Closed due to admin priorities	1	2	0	3
TOTAL	1	9	1	11

Infringement decisions issued by regulators

By 31 December 2018, only four infringement decisions had been issued by sector regulators[84], although a fifth was issued by the FCA[85] in February 2019, falling outside the period for this review. Of the four previous infringement decisions, two were made before ERRA. The two infringement decisions made between 1 April 2014 and 31 December 2018 were imposed by the CAA in the East Midlands International Airport car parking case (2015)[86], and by Ofcom against Royal Mail (2018)[87].

Potential explanations for the low level of CA98 enforcement by regulators

There are several possible explanations for the low level of enforcement, as follows. The evidence gathered in this review has not allowed us to come to any conclusion about which is most likely.

Direct regulatory powers are easier or more appropriate to use

The complexity of a CA98 investigation and the difficulty of proving an infringement means these powers can be resource-intensive and time-consuming. Cases can take many months or years to complete and uncertainty about the outcome of a case can leave regulatory issues unresolved until the case is closed. Where a regulator has other tools at its disposal it might decide that consumer detriment can be resolved more effectively and swiftly by using regulatory powers. In its 2016 review of the UK competition regime, the National Audit Office observed that “regulators may still find it easier and more effective, at

[84] Two of these came from cases that were launched before 2007 and are therefore not included in the data presented above.
[85] https://www.fca.org.uk/news/press-releases/fca-issues-its-first-decision-under-competition-law
[86] https://www.caa.co.uk/Commercial-industry/Airports/Economic-regulation/Competition-policy/East-Midlands-airport-car-parking-competition-case/
[87] https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01122

least in the short term, to use their regulatory powers instead of their competition powers"[88].

In 2016/2017 the CMA looked at whether regulators were reluctant to use competition powers. It concluded that they were keen to use their CA98 enforcement powers where appropriate and did not find evidence that regulators had been preferring to use their regulatory powers in circumstances where competition enforcement would have been appropriate.

Regulators face constraints of capacity and expertise

CA98 cases need regulators to have specialist teams of lawyers, economists, accountants and experienced investigators in order to tackle well-resourced defendants. Regulators vary in size and experience at undertaking CA98 cases, and the low volume of cases means that some regulators have not built up much experience in running cases.

The 2016/17 CMA project found that regulators faced resource constraints and practical concerns about cases, in particular how to develop good CA98 case leads, how to manage the case file efficiently, how to prioritise resources between CA98 and other regulatory tools and how to ensure staff had the expertise to conduct CA98 cases. Responses from regulators to the stakeholder engagement as part of this review made similar points.

Following the CMA's review, measures were taken in order to address these problems, including the CMA sharing insights on how it had improved delivery of CA98 cases, short secondments to the CMA for staff from the regulators and engaging in discussions with regulators at an early stage of CA98 cases to discuss case planning and substantive issues.

Low underlying level of anticompetitive behaviour in regulated sectors

In the evidence gathered for this review some stakeholders argued that the low level of enforcement reflected a low level of anticompetitive behaviour in the regulated sectors. One legal stakeholder argued that cases had been closed by accepting commitments that resembled sector-specific regulatory requirements (e.g. specifying terms and structures of access to the regulated party's services and facilities or regulating its contractual arrangements). Other cases had been closed due to administrative priorities because the investigation had been superseded by other regulatory developments or a resolution of the dispute that had triggered the investigation.

[88] NAO (2016) *The UK competition regime* p 25

Impact of specific reforms introduced in ERRA with respect to the operation of Part 1 CA98 by sector regulators

The primacy provision

Respondents to this review believed that the regulators had followed the duty to consider, before using regulatory powers, whether it would be more appropriate to use CA98 enforcement powers. This was also noted in the CMA's 2017 review[89]. In this review, regulators generally considered the duty had worked well, providing useful discipline which was now embedded in their decision-making processes.

One regulator felt that, due to the narrow phrasing of the duty, it was rarely triggered and so queried its value as a way of forcing consideration of competition enforcement. One stakeholder felt that regulators were incentivised to pursue some cases which did not merit investigation, for instance where the consumer detriment was likely to be small, and pointed out that cases had been closed on the grounds of administrative priorities after making an unnecessary use of resources. Another stakeholder argued that, given that sectoral regulation was about access to an essential facility or service, the terms and pricing of that access, and resolution of disputes relating to that access, it was difficult to justify promoting general competition law over sectoral regulation.

Giving the CMA powers to decide which authority should lead on a case and to take cases from sector regulators

The CMA has not so far exercised its power to take a case from a regulator, although in one case the CMA agreed to a case being transferred from Ofgem in order to avoid questions of impartiality about Ofgem acting as case investigator[90]. In another case, the CMA opened an investigation into suspected breaches of Chapter I of CA98 through the use of "most favoured nation" (MFN) clauses by price comparison websites in relation to home insurance products. This involved provision of financial services in which the FCA holds concurrent enforcement powers, but the case was taken by the CMA because of its experience of considering MFN clauses, the wide range of sectors in which such clauses might be in use and the broader competition policy implications of such clauses. The FCA provided support to the CMA in this case, enabling the CMA to benefit from the FCA's sector expertise.

Regulators felt that the CMA had exercised its leadership role fairly and early concerns that this might have led to an adversarial relationship proved to be unfounded. The CMA

[89] CMA (2017) Annual concurrency report 2017 p 24 - 25

[90] Investigation into third party intermediaries/price comparison websites: communications between Ofgem staff and representatives of some of the parties under investigation encouraging those parties to change their behaviour in relation to bidding on search advertising words could have led to Ofgem's impartiality being questioned, so it was considered that the CMA was better placed.

has supported regulators' casework, for instance by providing know-how and expertise on substantive and procedural matters, going beyond the requirement in the concurrency arrangements for the supporting authority to provide the investigating authority with comments on key documents such as draft Statements of Objection and decisions. One regulator said its work had been "significantly improved by the challenge presented by the CMA, and their willingness to share their expertise in competition enforcement and markets work", and that discussions around case allocation had been "constructive and helpful".

Requiring the CMA to publish an annual report covering the use of competition powers in the regulated sectors

The CMA met its legal obligation by publishing annual concurrency reports in each year from 2015 to 2018. In addition, the CMA produced a "baseline" concurrency report in 2014. The reports are comprehensive records of activity relating to promoting better competition in the regulated sectors and cover the use of direct regulatory powers and markets work as well as competition enforcement. The reports provide transparency and promote effective monitoring and evaluation of the impact of regulatory intervention in the regulated sectors that go beyond the remit of this review. Regulators noted that the requirements to supply the CMA with content for the report place a considerable administrative burden on them, and the CMA has decided to reduce the length of future reports by removing the chapters for each regulator and focusing on competition work than regulatory activity.

Giving the Secretary of State the power to remove concurrent competition functions from individual regulators

The Secretary of State has not made use of the power to remove concurrent competition functions from an individual regulator.

Conclusions on operation of Part 1 of CA98

Costs and benefits of reforms introduced in ERRA

ERRA impact assessment

The impact assessment produced for the ERRA reforms did not attempt to quantify the impact of the reforms to competition enforcement[91]. Unquantified assessments were made of the two policy options which were not taken forward: to move to a prosecutorial model or to bring administrative cases before a panel (such as an internal tribunal).

The assessment of the policy option that was taken forward – to retain and enhance the administrative model – suggested that it might be possible to increase the speed and number of CA98 cases, and that some of the proposals would mitigate the risk of confirmation bias. The conclusions on case outputs described above suggest that performance improved and the concerns noted in the impact assessment did not materialise. However, we have not established a causal link between reforms and results.

Costs and benefits of specific statutory measures

Some of the statutory reforms are likely to have had no impact due to not being used: the power for the CAT to issue warrants, interim measures and the power for the Secretary of State to introduce timescales on CA98 investigations.

There is also no reason to believe that the CMA's power to publish the notice of an investigation has led to any direct costs to business as the CMA has used this only once.

The civil fining powers for failure to co-operate with an investigation were applied to one non-compliant business and would not have led to any costs to compliant businesses.

There may have been a small administrative cost associated with the section 39 power to interview individuals as part of an investigation, due to the administrative time of staff involved in providing evidence. While the CMA made frequent use of these powers, given that there have only been around eight CA98 cases opened each year, it is unlikely that the total cost to the economy of the time spent on such interviews would be large.

[91] BIS (2012) *A competition regime for growth: A consultation on options for reform: Impact Assessment*

Costs and benefits of concurrency reforms introduced in ERRA

ERRA impact assessment

The impact assessment produced for the ERRA reforms did not quantify the proposals on concurrency but gave a narrative assessment of impact[92]. This concluded that the proposals would increase co-operation, enable greater transfer of knowledge and provide flexibility in the use of resources between the CMA and regulators. As described above, there is evidence that these effects started to occur, particularly in the two years before this review.

CMA annual impact assessment

Since 2015, the CMA has produced an annual assessment of the financial benefit to consumers from its work, including on competition enforcement. The estimate is reported as a three-year rolling average based on the performance over the previous three financial years.

The first assessment estimated the benefit to consumers between 2012 and 2015 (covering the final two years of the OFT and Competition Commission and the first year of the CMA) from competition enforcement was £65m[93]. The 2017 assessment estimated the benefit over the first three years of the CMA (2014 to 2017) to be £138m[94]. A significant proportion of these benefits came from the Phenytoin case[95], which was subsequently overturned on appeal and these benefits were excluded from the average in the 2018 impact assessment, which estimated the average benefit between 2015 and 2018 to be £105m[96].

Performance of the operation of Part 1 of CA98

When measured against the aims of the reforms in ERRA, there has been some improvement in the use of powers under Part 1 of CA98 since ERRA was introduced.

There has been an increase in caseload and timescales for cases have reduced. However, these provide an incomplete measure of improvement, since many other factors could account for them, for example the CMA's case management improvements and case choice practices, as well as the nature of cases taken forward. The CMA has seen

[92] BIS (2012) *A competition regime for growth: A consultation on options for reform: Impact Assessment* p 96 - 99
[93] CMA impact assessment 2014/15 p 6 - 7
[94] CMA impact assessment 2016/17 p 9
[95] The CMA has been granted permission to appeal this decision by the Court of Appeal.
[96] CMA impact assessment 2017/18 p 11

one of its infringement decisions remitted for reconsideration, but the CAT's judgement is currently subject to an appeal before the Court of Appeal.

The impact of the changes in ERRA is likely to have been small and not the main driver of performance. It is more likely that the improvements noted will have been due to the nature of cases taken forward, improved internal processes and management practices in the CMA and a greater appetite to bring cases.

Statutory measures introduced in ERRA

The impact of the measures introduced in ERRA has been relatively small, with some of the changes either as yet unused or used infrequently.

There is slight evidence that the following measures may have met their aims:

- the power in section 39 to require individuals to answer questions as part of a CA98 investigation has been used frequently by the CMA and has helped in the effective collection of evidence;
- the amendment in section 42 that permits the CMA to publish a notice of investigation, identifying undertakings whose activities are being investigated and any market affected, has only been used once. However, the rationale for this power remains sound and concerns that the power may be overused have not materialised; and
- the requirement in section 44 for the CAT to have regard to the CMA guidance on penalties when reviewing the amount of any penalty imposed has been used in two cases.

This review surfaced specific measures which could benefit from further improvement to enable them to work more effectively:

- the civil enforcement of investigation powers introduced by section 40 enabled the CMA to apply a quick and effective sanction in the single case where they were used. However, reform of the maximum penalty could ensure the powers are consistent with those available in merger cases and with those in other jurisdictions; and
- the amendments to interim measures in section 43 do not appear to have resolved concerns about using the powers in cases where there is ongoing harm in a market whilst a case is in progress. Further reform might be necessary to ensure the procedural burden does not prevent the CMA from acting promptly to apply interim relief.

One measure was found to have been unworkable:

- the power to enable the CAT to issue warrants to allow the CMA to enter premises in the course of an investigation has not been used as the power provided by ERRA does not give the Government the power to make rules governing the supervision of the execution, variation or subsequent discharge of the warrants. However, this does not appear to have caused a problem in practice as the CMA has not reported difficulties in seeking warrants from the High Court.

One measure has not so far been used:

- the power in section 45 that enabled the Secretary of State to impose statutory time-limits on CA98 investigation, was intended to be used in the event that performance on case timescales was unsatisfactory, but case timescales have improved since 2014.

Concurrency

The concurrency arrangements introduced in ERRA have worked in enabling regulators to focus on competition outcomes in their sectors. The improved mechanisms for institutional co-operation have been well received. Concerns remain over the small number of CA98 investigations being opened and findings of infringements.

The statutory changes in ERRA have worked satisfactorily and are not associated with negative or unintended consequences to businesses or other parties:

- the primacy provision in Schedule 14 remains a useful way to ensure regulators consider using their competition powers before exercising their regulatory powers;
- the powers in section 51, which enable the CMA to decide which authority should lead on a case and to take cases from sector regulators, are regarded as being exercised sensibly and helping to improve case allocation; and
- the annual concurrency report, produced under Schedule 4(16), has been a useful record of performance and the CMA is addressing concerns about the burden on the regulators of producing the report.

One measure has not been used:

- the section 52 power for the Secretary of State to remove concurrent competition functions from individual regulators.

Overall

While this review has found some improvement in the speed and number of cases, questions remain about the effectiveness of the UK's competition enforcement regime. The abuse of dominance provisions have rarely been exercised and there has been little evidence of the ability of the enforcement provisions to address concerns about issues

such as excess pricing. This review highlights that the end to end process for cases remains lengthy and the level of enforcement action by both the CMA and the sector regulators raises questions about the impact of any deterrent effect. The CMA has highlighted constraints on its ability to impose interim measures and the standard of review and has proposed solutions. We will consider these proposals in more detail as part of the package of reforms to the consumer and competition regimes later this year.

Review of provisions of Chapters 1 and 2 of ERRA relating to markets and mergers

Overview

This chapter covers the changes introduced by ERRA in relation to markets and mergers.

The chapter explains how the markets regime operates. It then explains the context for the ERRA reforms, including the 2011 consultation and the aims of the reforms.

The chapter then presents the evidence on the effects of the changes and assesses the reforms against their aims.

Background to the legislation

Section 56 of ERRA contains a duty to review certain provisions of Chapters 1 and 2 of ERRA. These provisions cover: statutory timescales for mergers and markets (section 32, Schedule 8, section 38 and Schedule 12); information gathering powers for mergers and markets as well as the enforcement of these powers (sections 29, 36 and Schedule 11); and interim measures for merger investigations (section 30 and Schedule 7).

Markets

Background

The CMA may investigate markets that do not appear to be functioning properly, even where there is no suspicion of a breach of competition law. This allows the CMA to assess the functioning of a market as a whole rather than a single aspect of it or the conduct of particular firms within it. The powers are set out in Part 4 of the Enterprise Act 2002 (EA02), as amended by ERRA.

The markets regime has two phases:

- a market study (Phase 1) considers whether a market "has or may have effects adverse to the interests of consumers" and what steps can be taken to remedy, mitigate or prevent these effects; and
- if the CMA suspects that any feature of a market prevents, restricts or distorts competition, it can make a market investigation reference (MIR), referring all or part of the market for a full investigation (Phase 2). In a market investigation the CMA assesses whether there is an adverse effect on competition (AEC). If the CMA finds there is an AEC, it will consider how this should be remedied, for example orders or undertakings on suppliers, and it can also make recommendations to Government on changes to regulation and legislation.

Before the CMA was created in 2014, the OFT was responsible for market studies and for making MIRs and the Competition Commission carried out market investigations. Since 2014, the CMA has been responsible for both. Sector regulators can carry out market studies and make MIRs to the CMA.

How and why ERRA introduced reforms

2011 consultation

The 2011 consultation identified concerns that the market process was too slow. This could delay remedies to improve competition and create uncertainty for investors about the outcome of an investigation.

Respondents to the 2011 consultation favoured time limits for all stages of the markets regime. They wanted faster references to Phase 2 and believed the CC took too long to complete Phase 2 investigations and decide on remedies. The Government therefore reformed the statutory timescales in the markets regime and, to encourage faster resolution of cases, the CMA's powers for information gathering were extended at Phase 1.

Statutory reforms in ERRA

The reforms in ERRA affected only those cases launched on or after 1 April 2014.

Section 38, Schedule 12: Statutory timescales

This required the CMA to publish its proposed decision on whether to make an MIR within 6 months of launching a market study. If the CMA provisionally intends to make an MIR as a result of a market study, it must start a consultation on this decision at the same time. The CMA must also consult if it proposes not to make an MIR if any parties have made

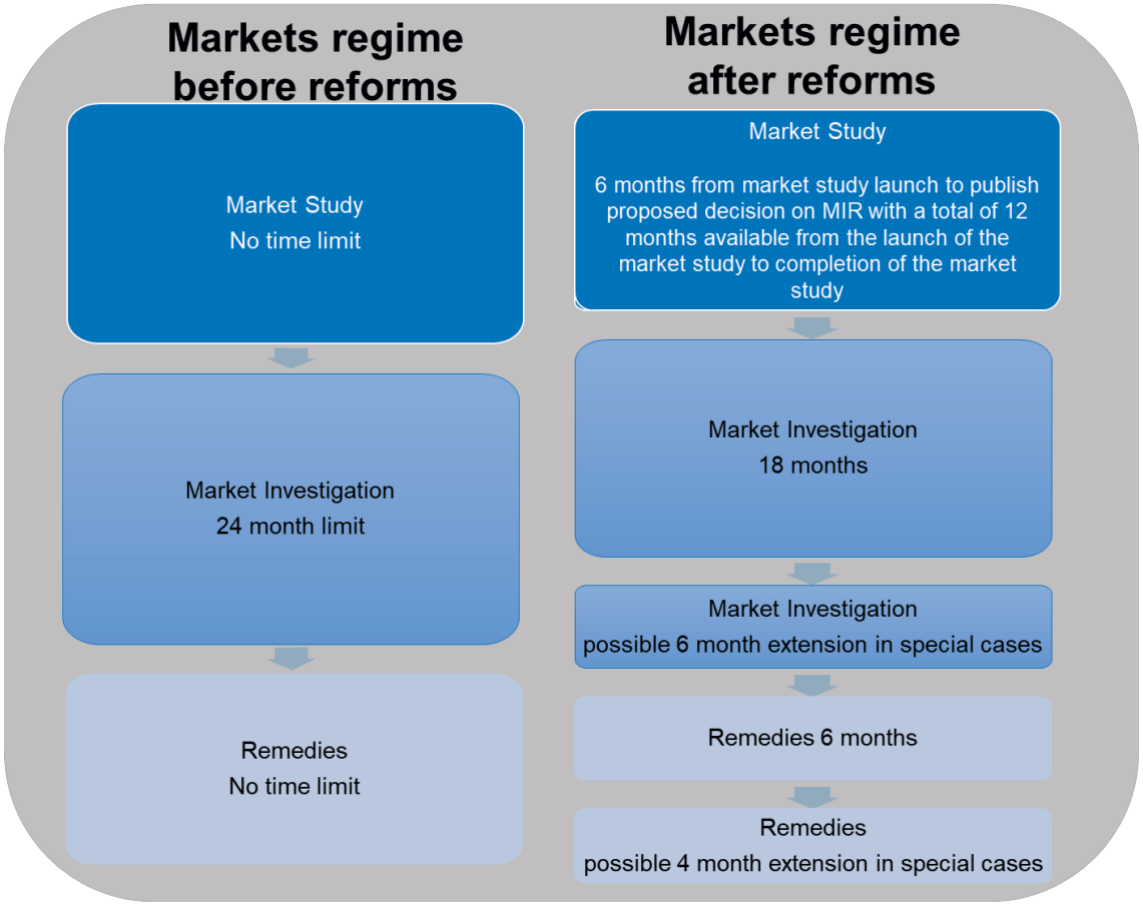
representations that an MIR should be made[97]. A notice outlining the intention not to make an MIR must be published if no representations are received but there is no consultation. The CMA must within 12 months of the publication of a market study notice publish a market study report giving its findings and any action it proposes to take. Any MIR must be made at the same time.

The statutory maximum time for the completion of Phase 2 was reduced from 24 months to 18 months. The ability to extend this time by up to 6 months was allowed where there were special reasons[98] why the report could not be completed within 18 months.

The CMA was required to accept final undertakings or make final orders implementing its decision on remedies within 6 months of publishing its decision at the end of a market investigation. This 6-month period can be extended once by up to 4 months if there are special reasons for doing so.

[97] The CMA can ignore any representations that are frivolous or vexatious (s.131A(3) EA02).
[98] The power to extend the timetable is most likely to be used in complex cases (for example, where there are multiple parties, issues and/or markets). *Market Studies and Market Investigations: Supplemental guidance on the CMA's approach. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/624706/cma3-markets-supplemental-guidance-updated-june-2017.pdf*

Figure 1: Diagram illustrating changes to the markets regime process



Section 36, Schedule 11 - investigation powers

Before ERRA, the OFT had powers to require persons to give evidence and provide documents and information but could only require the information where it already believed it had the grounds to make an MIR. This prevented it from gathering information during the early stages of a market study where it was not certain that an MIR was probable.

ERRA therefore extended the CC's investigation powers available at Phase 2 to give the CMA powers which could be used across the entire markets regime. It allowed the CMA, or the Secretary of State, to use the investigatory powers during Phase 1 as well as in any period of monitoring and enforcement relating to remedies implemented either following a market investigation, or undertakings in lieu (UIL) implemented instead of a reference. The CMA can use information gathering powers under section 174 of EA02[99] to help it make decisions on whether to launch a market investigation during the market study, even if it

[99] Schedule 11 amended s.174, inserted 174A-D and repealed s.175-176

did not feel it already had sufficient reason to do so. The CMA cannot use information gathering powers before starting a market study by publishing a market study notice.

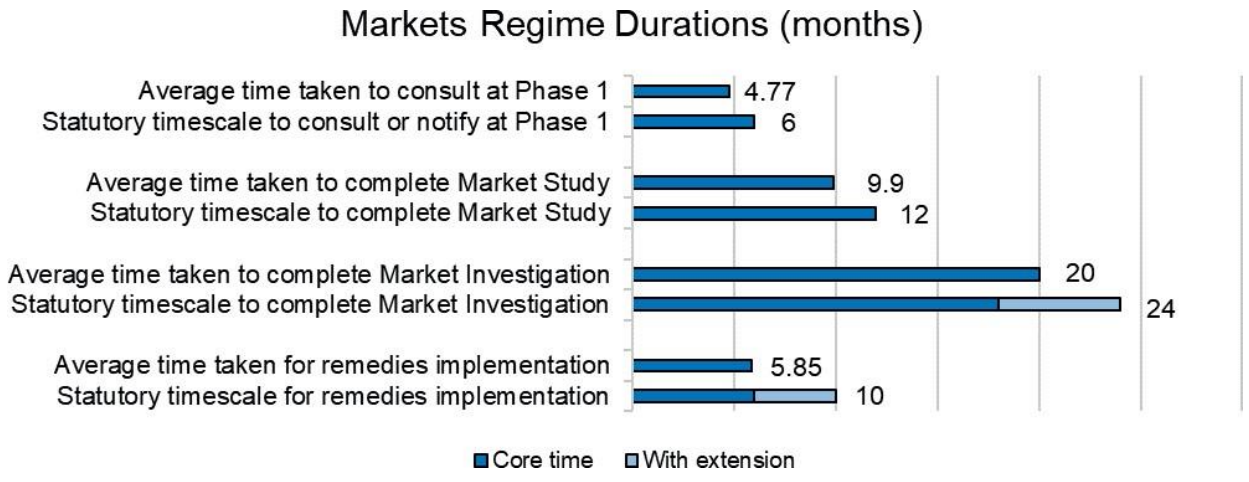
Previous criminal fining powers under section 175 of EA02 for non-compliance with an information request from the OFT were repealed. The civil fining powers for failing to comply with an information request at Phase 2 were extended to Phase 1, aligning the enforcement of information gathering powers for the markets process with those for the mergers process. Penalties for non-compliance could continue to be imposed up to four weeks after the purposes for which the investigatory powers were being exercised ceased to apply. Fining powers for false or inaccurate information remained a criminal offence.

Evaluation of impact of ERRA changes

Statutory timescales

The CMA has met all the statutory timescales in ERRA for market studies, market investigations and the implementation of remedies following a market investigation. The CMA started a consultation or published a notice on its proposed decision to make an MIR for all market studies within 4.8 months on average and concluded each market study within 9.9 months on average. On average, market investigations were completed and reported within 20 months and remedies or final undertakings were implemented within 5.9 months.

Chart 9: Summary of CMA case milestones with statutory timescales



Source: CMA website data

Table 10: Markets regime, timescales

	Average time taken to consult at Phase 1	Statutory timescale to consult or notify proposals on whether to make an MIR at Phase 1	Average time taken to complete Market Study	Statutory timescale to complete Market Study	Average time taken to complete Market Investigation	Statutory timescale to complete Market Investigation	Average time taken for remedies implementation	Statutory timescale for remedies implementation
Markets regime durations (Months)	4.77*	6	9.9	12	20	18 (with possible 6 month extension)	5.85	6 (with possible 4 month extension)

** The date of consultation for the care homes market study was interrupted by the lead up to the UK general election and hence prohibited publishing matters of political significance. The CMA was unable to consult on this market study within this time. In order to comply with section 131B(3) of the Enterprise Act 2002 (the Act) by 1 June 2017 the CMA therefore used a separate announcement to indicate their intended decision regarding making an MIR on this case by the statutory deadline. The formal consultation process began two weeks after. The data in this table incorporates the delayed date.*

Source: CMA website data

Market studies

Since 1 April 2014, the CMA has opened seven market studies: statutory audit services (open), funerals (open)[100], heat networks (closed), care homes (closed), legal services (closed), digital comparison tools (closed), personal current account & SME banking (closed). The CMA also worked on and concluded the residential property management services market study; however, this was launched by the OFT prior to the ERRA reforms and therefore was not bound by the new 6-month deadline to consult on making an MIR[101].

The CMA has met its duty to consult on making an MIR within 6 months of publishing the market study notice in all 7 cases it has opened since 1 April 2014 (5 closed and 2 still open). During this review period, there has only been 1 MIR and 1 provisional MIR (currently in consultation) resulting from CMA market studies since 1 April 2014 (the personal current account & SME banking market study, where the CMA consulted within 3.5 months and the funerals market study, where the CMA consulted within 6 months).

The average time taken for the CMA to consult on its proposed decision for each of these five market studies was 4.8 months. The longest case (care homes) took 6 months (6.4

[100] The funerals market study was open during the review period but was subsequently closed on 28 March 2019

[101] CMA transitional arrangements https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270254/CMA14_Transitionals_Guidance.pdf

months including the 2016 pre-election purdah period) and the shortest took 2.3 months (statutory audit services).

Each market study was concluded within the 12-month statutory time limit. The average length of all cases was 9.9 months with the longest being 11.9 months (care homes and digital comparison tools) and the shortest 7.1 months (personal current account & SME banking).

Table 11: Duration of market studies launched by the CMA (cases closed before 13 December 2018)

Market Studies					
	Date Launched	**Outcome at 6 Month Stage**	**Duration from Launch to Update paper / Interim Report (months)**	**Total Duration of Market Study (months)**	**Final Decision**
Statutory audit services	**09/10/2018**	No proposed MIR	2.3	On-going	N/A
Funerals	**01/06/2018**	MIR proposed	6.0	On-going**	N/A
Heat networks	**07/12/2017**	No proposed MIR	5.1	7.5	Recommendations
Care homes	**02/12/2016**	No proposed MIR	6.4*	11.9	Recommendations
Digital comparison tools	**29/09/2016**	No proposed MIR	5.9	11.9	Recommendations
Legal services	**13/01/2016**	No proposed MIR	5.8	11.1	Recommendations
PCA / SME banking (retail banking)	**04/04/2014**	MIR proposed	3.5	7.1	MIR

Source: CMA website data

**The CMA published a notice to not make an MIR on the Care Homes market study however due to the UK general election in 2016 it was unable to commence the formal consultation period by the statutory deadline. Including this delay, the formal consultation began 6.4 months after the market study was launched. The CMA did meet the statutory deadline however, due to its extra announcement.*

*** The funerals market study was subsequently closed outside the review period on 28 March 2019.*

Market Investigation Reference (MIR)

Before the ERRA reforms there was a belief that if a market study was not going to lead to an MIR, there could be a loss of urgency in concluding the case. Previously, cases not

resulting in an MIR tended to last longer than 12 months. The reforms in ERRA aimed to ensure that cases not likely to result in an MIR were closed in a timely manner. Despite the small sample size (4 cases), we can see that, following ERRA, all cases have been concluded within 12 months and one within 7.5 months.

One possible issue is that the statutory timescales for Phase 1 can require the CMA to make a decision regarding an MIR too early in the process. The CMA's internal procedures require agreement on the MIR decision in advance of the 6-month deadline. If the CMA Board takes a different view to the case team's recommendation or requires further evidence, there is little time to produce new submissions for approval. This could also affect businesses since they might need to respond to information requests to tight deadlines.

Some commercial lawyers expressed concerns in this review that market studies have become increasingly front-loaded, placing significant pressure on businesses to provide information quickly. The relatively tight timetable for consulting on an MIR also makes it difficult for the CMA to consider using alternative measures that might be as effective and less resource intensive than a full market investigation, such as a set of recommendations and/or undertakings in lieu (UIL) of a market investigation. The 6-month deadline makes this route difficult as the CMA would need to start UIL negotiations at an early stage of the market study.

Some commercial lawyers were concerned that time pressures in the first half of Phase 1 might increase the likelihood of the CMA making an MIR, so as to use Phase 2 to resolve issues that could not be dealt with in time at Phase 1. There is however no compelling evidence that there has been an increase in the likelihood of MIRs being made since ERRA. Out of five complete market studies covered in this review period since ERRA, the CMA has only made one MIR. The CMA has consulted on making an MIR in an additional market study (funerals market study).

Another issue raised by commercial lawyers was that the statutory timescales in market studies had led to an increase in "pre-launch" work by the CMA to informally gather information to help it decide whether to launch a market study. It is difficult to quantify the duration of "pre-launch" time since it is informal and not recorded. The impact on businesses should be limited since the CMA is unable to exercise its information gathering powers under section 174 EA02 before the market study notice is issued. The CMA state that their "pre-launch" work consists of assessment of issues, scoping and preparation, rather than the type of work permitted in a market study.

Despite these concerns, there was support from commercial lawyers for retaining the statutory timescales, particularly the requirement to conclude a market study within 12 months, in order to maintain discipline on investigation timescales.

Market investigations

The reforms in ERRA reduced the statutory deadline for the CMA to complete a market investigation from 24 months to 18 months. The reforms provided the option to extend an investigation by 6 months (to 24 months in total) where there were special reasons why the investigation could not be completed and reported within 18 months.

The CMA has closed and published a final report on five market investigations: investment consultants, energy, retail banking, payday lending and private healthcare. The revised statutory timescales only applied to the most recent market investigations (investment consultants, energy and retail banking) since the MIRs for these were made after the ERRA reforms.

Two of the three market investigations within scope of the reforms have made use of the option to extend by 6 months (energy and retail banking). The energy market investigation was completed and reported on in 24 months, retail banking in 21.1 months, and investment consultants in 14.9 months.

Commercial lawyers raised a concern that remedies implemented following a market investigation were considered too early in the investigation and that this could result in less well-evidenced remedies or that CMA inquiry groups might try to consider the benefits or features of a remedy and then steer the consultation to support this.

In its response to consultation[102], the CMA said that the ability to consider remedies at an earlier stage in the process would not cause presumptive decisions on the outcome of an AEC. Instead, this would allow parties to have an opportunity to give their views to the CMA at an earlier stage rather than wait for the Notice of Possible Remedies.

It is not yet clear whether the 18-month statutory timescale for market investigations has had a positive effect based on the few cases completed to date. There was no support from commercial lawyers in this review for further reducing the length of market investigations.

Views gathered at stakeholder workshops for this review suggested that, whilst in 2011 the need to place constraints around excessively long markets cases was seen as a priority, concerns have since emerged around the trade-offs involved in any further move to reduce the time taken in market investigations.

[102] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/624762/market-investigations-review-cma-consultation-response.pdf

Table 12: Duration of Market Investigations launched by the CMA (cases closed before 31 December 2018)

Market Investigations					
	Duration (months)	**Launched by**	**Closed by**	**Date of MIR**	**Date of Final Decision**
Investment consultants	14.9	CMA	CMA	14/09/2017	12/12/2018
Energy	24.0	CMA	CMA	26/06/2014	24/06/2016
Retail Banking	21.1	CMA	CMA	06/11/2014	09/08/2016
Payday Lending	20.0	CC	CMA	27/06/2013	24/02/2015
Private Healthcare	23.9	CC	CMA	04/04/2012	02/04/2014
Aggregates	23.9	CC	CC	18/01/2012	14/01/2014
Private Motor Insurance	23.9	CC	CC	28/09/2012	24/09/2014
Statutory Audit Services	23.9	CC	CC	21/10/2011	16/10/2013
Movies on Pay-TV	24.0	CC	CC	04/08/2010	02/08/2012

Source: CMA website data

Implementation of remedies

The ERRA reforms placed a statutory obligation on the CMA to accept final undertakings or make a final order within 6 months of publishing the final report of a market investigation, with the possibility of extending this for up to 4 months, in certain circumstances. During this phase, the CMA will consult on its proposed final order or final undertakings from parties. This statutory timescale was designed to ensure that the CMA swiftly implements remedies after the end of Phase 2 of the market investigation.

The CMA has issued a final order or accepted final undertakings in 4 market investigations closed since its formation, however only two (the energy and retail banking market investigations) have been subject to the new statutory timescales. In both cases, the timescales for implementing remedies were met: in 5.9 months for the energy investigation and 5.8 months for the retail banking investigation.

Table 13: Duration of remedies implementation

Implementation of Remedies Following a Market Investigation				
	Duration (months)	**Managed by**	**Date of Final Report**	**Date of Final Decision or Acceptance of Final Undertakings (if both, the later)**
Investment consultants	N/A	CMA	12/12/2018	Open
Retail banking	5.8	CMA	09/08/2016	02/02/2017
Energy	5.9	CMA	24/06/2016	20/12/2016
Payday lending	5.6	CMA	24/02/2015	13/08/2015
Private healthcare	6.0	CMA	02/04/2014	01/10/2014
Aggregates	7.2	CC	14/01/2014	21/08/2014
Private motor insurance	5.8	CC	24/09/2014	18/03/2015
Statutory audit services	11.3	CC	16/10/2013	26/09/2014
Movies on Pay-TV	N/A	CC	02/08/2012	No AEC found

Source: CMA website data

The timescales for implementing remedies were considerably shorter than the 14.3 months on average cited in the impact assessment produced for ERRA[103]. In some cases, long timescales before ERRA were caused by challenges to the remedies decisions and, to a lesser extent, the CC reprioritising its resources once the 24-month timeframe for an MIR had been met. The introduction of a statutory timetable for remedies was designed to encourage timely implementation of remedies and, at least on the small sample size of two cases available for this review, this has been delivered.

Investigatory powers

Under EA02, the OFT had powers to require persons to provide documents and information but only where it already believed it had the power to make an MIR. This had prevented the OFT from gathering information during the early stages of a market study. With the introduction of statutory timescales, reforms to investigatory powers in ERRA gave the CMA information gathering powers to help it carry out functions relating to a case

[103] BIS (2012) *A competition regime for growth: A consultation on options for reform: Impact Assessment* p 82

which the CMA or the Secretary of State is considering referring, including any period of UILs, or where a reference has been made. The CMA was also given powers to impose civil fines on parties failing to comply with information requests. The CMA is, however, not permitted to use compulsory information gathering powers before issuing a market study notice.

Investigatory powers have been used on all CMA market studies since the reforms in 2014. Although there is no comprehensive data available on the use of these powers at Phase 1, the CMA is confident they have been used during each market study they have launched. The CMA believes that these powers have been useful in delivering market studies to the new timetables and providing incentives for parties to provide information voluntarily.

The CMA has used its compulsory information gathering powers to gather confidential information that might not otherwise have been provided voluntarily in market studies. The awareness that the CMA has statutory powers to obtain information in market studies has encouraged parties voluntarily to supply information.

Compulsory information gathering powers have proved necessary where the CMA wishes to obtain information in a market study and the business concerned considers that there is a legal (statutory or otherwise) prohibition on voluntarily disclosing information. For example, in the audit market study the CMA used these powers to obtain information where there were concerns that an information provider lacked a clear gateway voluntarily to provide the information to the CMA.

The question of information gathering powers will be considered broadly in our forthcoming Competition Green Paper, alongside a broader consideration of Professor Furman's and Lord Tyrie's recent proposals in so far as they relate to the markets regime.

Mergers

Background

Mergers can increase productivity and improve the competitiveness in international markets but can also result in detriment to competition by reducing the number of sellers in a market, removing the rivalry between previously competitor firms that have merged and allowing the merged firm to raise prices. The CMA's role in merger control is to assess whether a proposed merger would lead to a substantial lessening of competition (SLC) within any market for goods or services.

In the UK, there is no requirement to notify mergers to the CMA. The CMA has jurisdiction to examine a merger (including acquisitions and joint ventures) where two or more enterprises cease to be distinct and either the UK turnover of the acquired enterprise exceeds £70m or the two enterprises supply or acquire at least 25 per cent of the same goods or services supplied in the UK (or a substantial part of it) and the merger increases that share of supply. For certain sectors relevant to national security the thresholds are lower.

If parties choose to notify the CMA about a merger and the CMA believes it has the jurisdiction it will engage with parties to gather the information necessary for it to conduct a Phase 1 review. Once a Phase 1 review is launched, a 40 working day time limit begins. If parties do not voluntarily notify the CMA, the CMA has up to 4 months from the date on which details of completion of the merger were made public to refer the merger for a Phase 2 investigation (this includes time for a 40 working day review of the merger once the CMA decides it has sufficient information to conduct this 40 working day review).

The UK merger control regime operates a two-stage process. In Phase 1 the CMA seeks to determine whether the merger might result (or has resulted) in an SLC. If so, the CMA has a duty to launch an in-depth assessment (Phase 2) or allow parties the chance to offer suggestions to remedy any competition concerns identified (known as undertakings in lieu (UIL)) and so resolve the case at Phase 1. If the CMA does not accept the UILs offered, it will launch a Phase 2 investigation of the merger.

At Phase 2 (generally limited to 24 weeks), a CMA panel conducts an in-depth investigation to assess whether the merger is expected to result (or has resulted) in an SLC. If an SLC is found or expected, the CMA decides upon the remedies required. It is important to note that the tests for a merger to be cleared at Phase 1 and Phase 2 are different. The tests are constructed so that at Phase 1 the duty to refer arises where the CMA has a reasonable belief that there is a realistic prospect that the merger will result in an SLC. At Phase 2, the CMA has to decide on the balance of probabilities whether the merger has resulted, or may be expected to result, in an SLC.

How and why ERRA introduced reforms

2011 consultation

The Government consulted on ways to streamline the merger system. There were concerns that the process was too slow, particularly in comparison to other countries[104]. The Government therefore introduced statutory timescales for Phase 1, the negotiation of UILs and the implementation of remedies following a Phase 2 investigation. To help the CMA meet the statutory timescales, investigatory powers were extended across the merger control process.

The Government also consulted on how to improve the voluntary merger regime. Although most respondents were opposed to moving to mandatory notification, there were concerns that, where businesses had not notified the CMA about a merger and had started to integrate the businesses, it was difficult for the CMA to intervene and implement remedies. The Government therefore decided to maintain the voluntary regime but strengthen the CMA's power to suspend integration.

Objectives of the ERRA reforms

The Government's objectives were to create a more efficient, quicker and streamlined merger regime, and to strengthen merger control by ensuring that mergers that were already completed or part-completed could be addressed through strengthened interim measures.

Statutory reforms in ERRA

This review includes data on 252 merger cases which opened on or after 1 April 2014 and closed on or before 31 March 2018. In the case of investigatory powers (information requests under section 109 of EA02) the review covers requests sent up until 31 December 2018.

Section 32, Schedule 8: Statutory timescales

This section introduced a 40-working day deadline[105] for Phase 1 reviews, a timetable for negotiating UILs as well as for the implementation of remedies following a Phase 2 investigation.

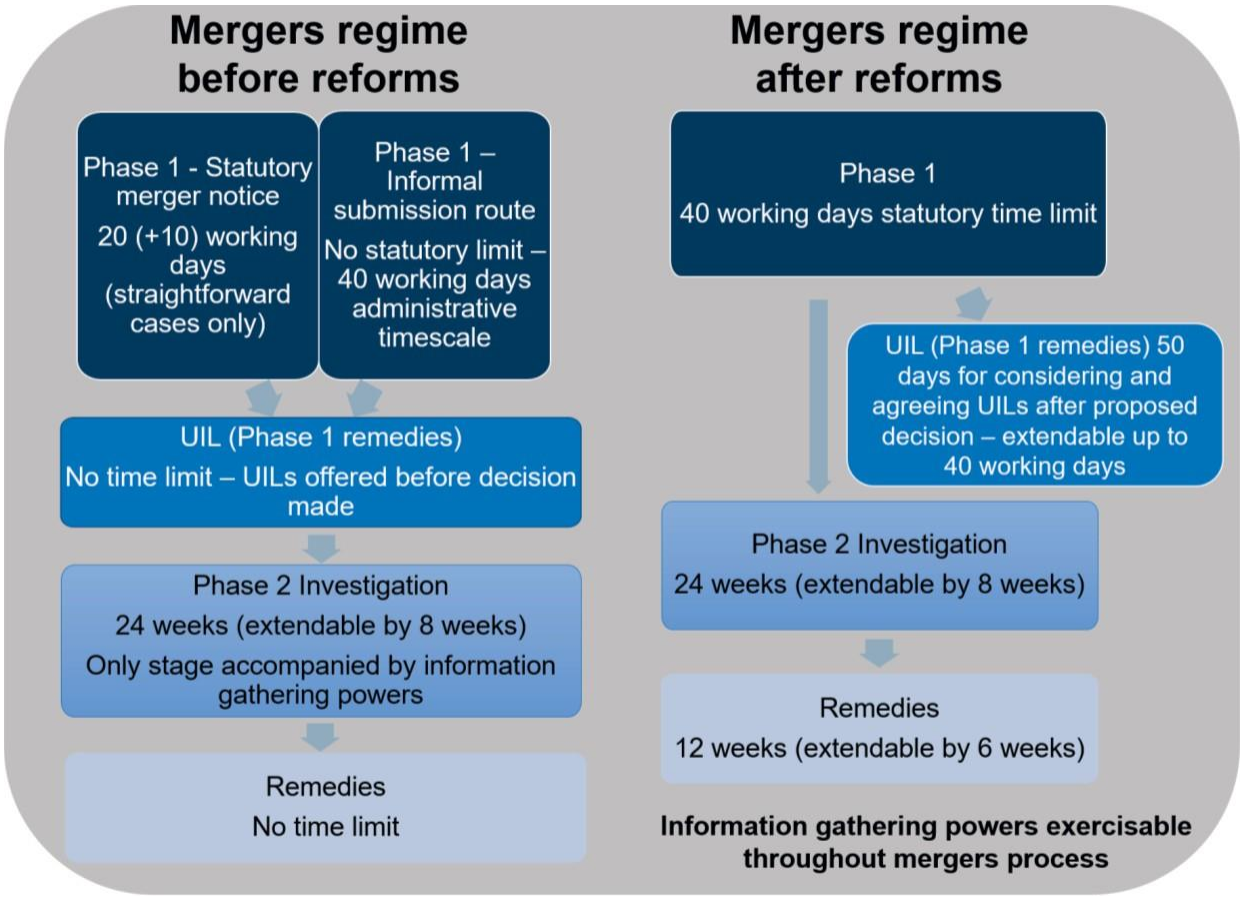
There was also a change to the process for negotiating UILs after Phase 1. Previously, parties would offer UILs before seeing the OFT's decision, meaning they would sometimes offer UILs without understanding fully the competition issues identified in Phase 1. Following the reforms, parties were able to offer UILs only after they had seen the CMA's reasoned decision that the duty to refer would arise but for the possibility of acceptable

[104] KPMG (2007) *Peer Review of Competition Policy*
[105] Subject to the exceptions contained within section 34ZB EA02

UILs being offered. The reforms require the CMA to consider and either agree UILs or refer to Phase 2 within 50 working days from date of the Phase 1 SLC decision, although this can be extended by 40 working days in special circumstances.

This section introduced a time limit of 12 weeks from the publication of the final report in Phase 2 cases for the CMA to either make a final order or accept undertakings (remedies implementation). The CMA was given the ability to extend this by up to 6 weeks in special circumstances. No change was made to the timescale for a Phase 2 investigation.

Figure 2: The full merger process before and after 1 April 2014



Section 29: Investigatory powers - information gathering

This section gave the CMA a single set of information gathering powers that could be used consistently across the merger control process. The changes allowed the CMA to use the powers where it would help it in carrying out any functions relating to a matter which is the subject of, or is the possible subject of, a reference (completed or anticipated merger), i.e. to help the CMA during Phase 1 as well as Phase 2. The CMA was given the ability to use these powers before the 40 working day initial period of a Phase 1 merger review, if the functions for which it is exercising the powers fall into the permitted purposes above. For example, if the CMA has reason to believe that a merger may be in the process of being completed and it is preparing to launch an investigation, it may want to exercise its information gathering powers for the purposes of preventing pre-emptive action being taken by the parties, before starting the 40 working day review.

The CMA can request the information or documents are produced within a specified timeframe. If the parties do not respond by the deadline, the CMA can suspend the statutory timescales under EA02.

Section 30, Schedule 7: Interim measures

This section strengthened the CMA's ability to suspend the integration of companies involved in a merger during a Phase 1 investigation.

This section changed the mechanism through which, at Phase 1, the CMA can prevent pre-emptive action from taking place in completed and anticipated mergers. Previously, in completed mergers, main parties were often unwilling to sign up to initial undertakings (referred to as "hold separates") until they had agreed derogations with the OFT from its standard template of undertakings. This process could be slow and parties could continue to integrate until undertakings were in place. This section enabled the CMA to halt the integration of companies and to consider whether any further integration should be allowed through derogations.

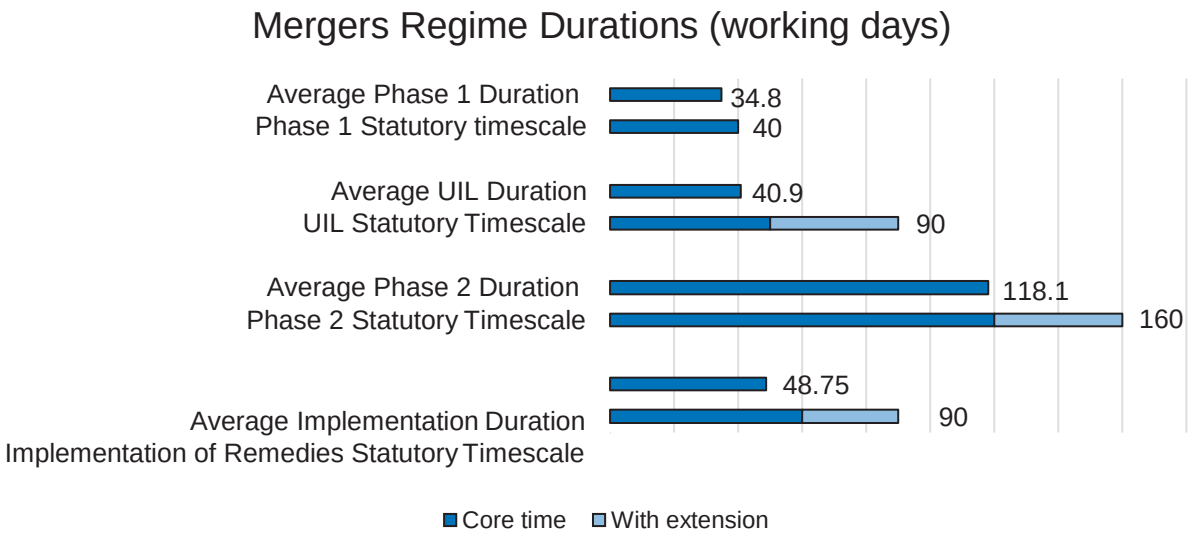
The CMA may issue an initial enforcement order when it suspects that two or more enterprises have ceased to be distinct (completed mergers) or where arrangements are in progress or contemplation that will result in two or more enterprises ceasing to be distinct (anticipated mergers). The amendments clarified that interim measures can require merging parties to reverse steps that have already been taken (or to reverse the effects of such steps) where the CMA has reasonable grounds for suspecting that pre-emptive action has or may have occurred.

Evaluation of impact of ERRA changes

Statutory timescales

The CMA has met the statutory requirements to conclude Phase 1 merger reviews within the 40 working day deadline in every case. The CMA met the statutory requirement to conclude the negotiation of UILs within 50 working days (10 weeks) with a possible 40-working day extension (an extra 8 weeks) in all cases. The CMA has met the statutory timescale for remedies implementation and provided its final order or accepted final undertakings in all 9 Phase 2 merger investigations in which it required remedies.

Chart 10: Summary of CMA case milestones with statutory timescales



Source: CMA management information

Table 14: Merger control timescales

Average Duration of Merger Control Stages (Working days)	Average Phase 1 Duration	Phase 1 Statutory timescale	Average UIL Duration	UIL Statutory Timescale	Average Phase 2 Duration	Phase 2 Statutory Timescale	Average Implementation Duration	Implementation of Remedies Statutory Timescale
	34.8	40	40.9	50 (+ possible 40 working day extension)	118.1	120 (+ possible 40 working day extension)	48.75	60 (+ possible 30 day extension)

Source: CMA management information

40-working day limit at Phase 1

Out of the 252 Phase 1 merger cases in scope of this review, the average duration for cases with a 40-working day deadline was 34.8 days.

The CMA has also reviewed a higher proportion of cases considered to be 'less complex'[106] within 35 working days. In 2014/2015 the CMA delivered 23 per cent of 'less complex' Phase 1 merger cases within 35 working days; this figure has increased each year since the reforms and in 2017/2018 stood at 91 per cent of cases[107].

Table 15: The proportion of less complex merger reviews at Phase 1 completed in under 35 working days

CMA merger control	2014/15	2015/16	2016/17	2017/18
% of Phase 1 investigations completed in 40 working days	100%	100%	100%	100%
% of less complex merger cases cleared within 35 working days	23%	74%	81%	91%
Average number of working days across all Phase 1 cases	37	34	34	34

Source: CMA annual reports (2014-2018)

Some commercial lawyers raised concerns that, whilst the statutory timescales had been met and the formal process was quicker following the ERRA reforms, this might have been because of longer pre-notification discussions before the start of the Phase 1 process.

Pre-notification discussions take place when merging parties engage with the CMA before formal notification, for example on the contents of a draft notification[108]. The CMA uses this time to advise parties of the type of information the case team needs so that parties can consider this when submitting their merger notification. The CMA encourages parties to engage in discussions at least two weeks before the intended date of notification.

Some stakeholders were concerned that CMA case teams have showed an increased tendency to ask questions in pre-notification, some of which, in the opinion of these respondents, could have been addressed in the 40 working day initial period. It was suggested by the same stakeholders that asking questions in pre-notification can be a good way to streamline processes; however, it was clear that some commercial lawyers believed that the new timescale could create scope for the CMA to defer starting the clock

[106] The CMA's annual report 2017/2018 treats 'less complex' merger cases as those that do not require an issue meeting and/or review meeting.
[107] CMA annual reports 2014-2018. Page 46 of annual report for 2015-2016 and page 47 of annual report for 2017-2018.
[108] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2_Mergers_Guidance.pdf

in order to manage its own workload. The CMA believes that any questions asked in pre-notification are appropriate requests for information which are needed for it to conduct a thorough and swift Phase 1 review.

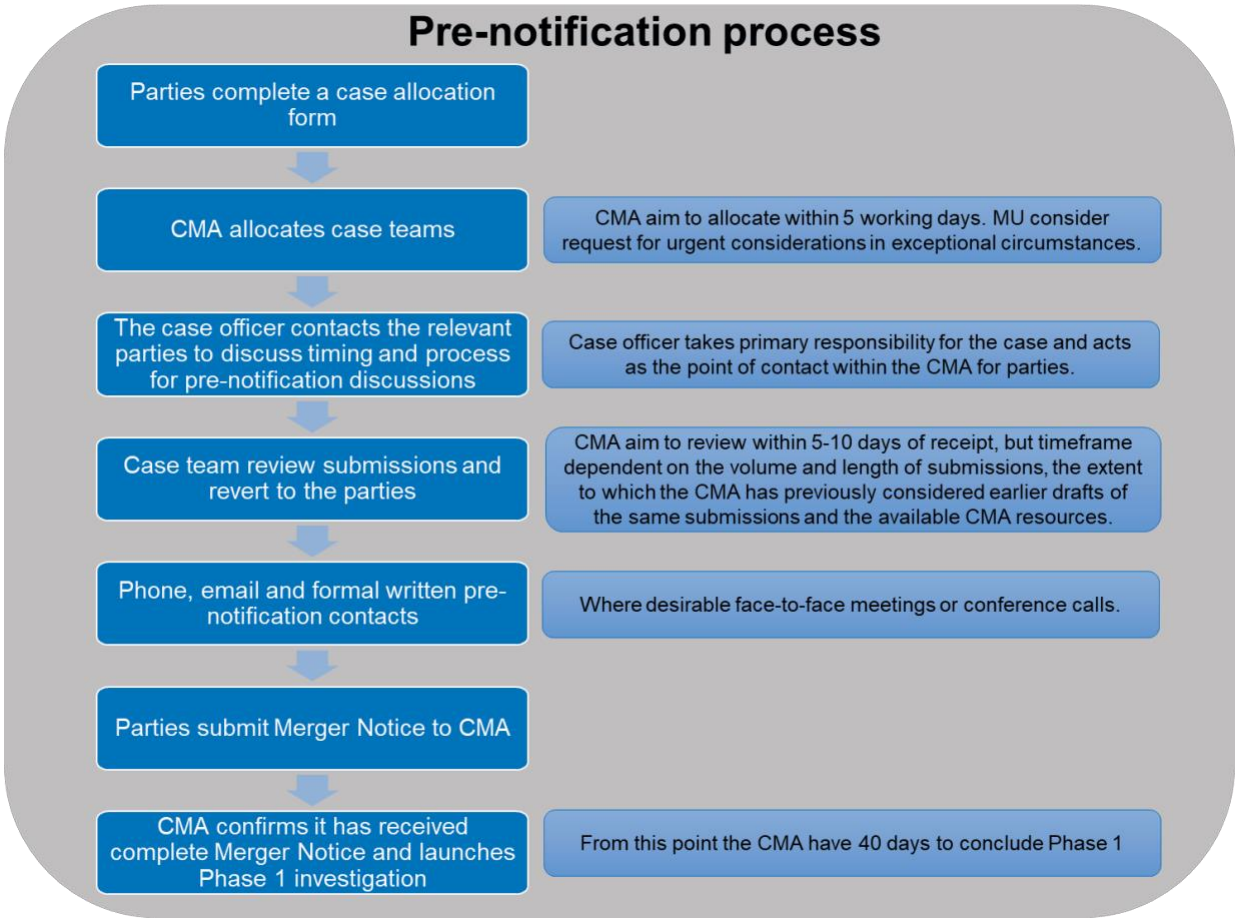
Estimating the length of pre-notification discussions is difficult as there is no established starting point. As a proxy we have used the date at which the draft merger notice is submitted to the CMA as the start of pre-notification discussions and the beginning of the 40-working day review period as the end date of pre-notification. Under this definition, 60 per cent of all merger cases involved some degree of pre-notification. The mean average time that parties have spent in pre-notification was 33.5 working days. The median time in pre-notification was 29 working days. The full extent of pre-notification could however be hidden from this estimate since the date at which parties first contact the CMA regarding a merger is unknown publicly. Therefore, there is a possibility that the estimate used in this review does not reflect the true time parties spend in pre-notification.

Table 16: Pre-notification time

Pre-notification time	
Total cases	252
Number of cases with pre-notification time	153
Proportion of cases with pre-notification time	60.7%
Mean average pre-notification duration (working days)	33.5
Median average pre-notification duration (working days)	29

Source: CMA management data including cases opened on or after 1 April 2014 and closed on or before 31 March 2018

Figure 3: Pre-notification process, Phase 1 merger review



Despite concerns from some commercial lawyers, it is commonplace for other competition regimes to hold off commencing the formal review until all the necessary evidence has been gathered. The length of pre-notification discussions can also depend on the speed at which parties reply to CMA information requests and can be reduced by parties submitting detailed information in the first instance. Some commercial lawyers acknowledged the prevalence of pre-notification in other regimes, particularly in relation to the European Commission's EU Merger Regulation regime, which has similar discussions with parties in pre-notification. Implementing a statutory timescale for Phase 1 merger reviews has created greater predictability for parties seeking to merge through a reduction in the time taken to formally review the merger, thus achieving the original objectives of the reform.

Another view from commercial lawyers was that the reduced timescales could have led to an increased likelihood of Phase 1 reviews being referred to Phase 2. This perceived increase in the likelihood of a merger going to Phase 2 could result from the CMA having less time to gather sufficient evidence to be certain that the merger could not be resolved at Phase 1. It is difficult to establish robustly whether this is the case since it is not possible to see what would have happened if the CMA spent longer at Phase 1.

Out of 252 Phase 1 merger cases reviewed, the CMA referred 29 to Phase 2, from which 12 were unconditionally cleared (5 per cent of the overall population of Phase 1 mergers). This does not suggest that the incidence of unnecessary referrals is particularly high.

There are intentionally different tests for referring a merger at Phase 1 and blocking the same merger at Phase 2, therefore it is possible for referrals to be correctly made at Phase 1 which are subsequently cleared unconditionally at Phase 2. This is part of the UK merger control system which seeks to cast a sufficiently wide net in order to catch anticompetitive mergers while minimising the burden on businesses.

Table 17: Breakdown of the outcomes from Phase 2 investigations post 1st April 2014.

Phase 2 outcome	Number of cases	% of Phase 2 cases
Forthcoming	1	3.4%
Prohibition	1	3.4%
Report to SoS	1	3.4%
Cancelled	6	20.7%
Remedies	8	27.6%
Clearance	12	41.4%
Total	**29**	**100.0%**

Source: CMA management data

Undertakings in lieu

ERRA introduced a statutory requirement for the CMA to consider and agree UILs or refer cases to Phase 2 within 50 working days from the end of the Phase 1 review, with the option to extend this by a further 40 working days in special circumstances. The reforms also meant that parties were given the reasons for an SLC decision before making a UIL offer.

The CMA has met these statutory requirements. Out of 252 Phase 1 cases, 51 explored the possibility of UILs, of which 29 were either accepted, referred or cancelled within 50 working days; the remaining 22 were resolved within the extension period.

Phase 1 cases were referred within 13 working days of the SLC decision on average, whilst cases where UILs were accepted were completed in 58 working days of the SLC decision on average.

The reformed approach to UILs, in which parties offer UILs only after seeing the CMA's reasoned decision that the duty to refer would arise unless acceptable UILs were offered, was considered to have been positive, as parties no longer waste time and resources

developing UILs which seek to address competition concerns which do not feature in the CMA's SLC decision.

Table 18: UIL case decisions

UIL Case Duration	
Total number of Phase 1 cases	252
Number of Phase 1 cases resulting in UIL offered	51
Number of cases with UIL negotiated within the 50 working day (10-week) statutory timescale	29
Number of cases with UIL negotiated using 40 working day (8-week) extension time	22

Source: CMA management information

Table 19: UIL process duration

Outcome of undertakings in lieu offering	Statutory timescale: 50-90 working days	Mean average duration (working days)
Accepted	50 working days (40 working day optional extension)	58
Referred	50 working days (40 working day optional extension)	13

Source: CMA management information

12-week time limit following the publication of the Phase 2 report to make final order or accept undertakings

ERRA introduced a 12-week time limit for the implementation of remedies following a Phase 2 merger investigation. This is the period from the publication of the CMA's final report in Phase 2 to the date of either a final order or acceptance of final undertakings. An optional extension of up to 6 weeks was also provided.

The CMA met the statutory deadline for implementation of remedies for all cases since the reforms were introduced. On average, the CMA has been able to provide its final order or accept final undertakings within 9.8 weeks for all nine Phase 2 merger investigations for which it requested remedies.

Table 20: Phase 2 decisions ending in remedies

Case Title	Date of Phase 2 final report	Decision Phase 2	Implementation duration (Weeks / working days, wd) Final report - Final undertakings	Date of final undertakings or final order	Cases referred from European Commission (under section 34A EA02)
Euro Car Parts/Andrew Page	31/10/2017	Remedies	10 (50 wd)	12/01/2018	
Cygnet Health Care and UHS/adult services division of Cambian Group	16/10/2017	Remedies	8.2 (41 wd)	12/12/2017	
Diebold/Wincor Nixdorf	16/03/2017	Remedies	7.2 (36 wd)	10/05/2017	
Arriva Rail North/Northern Rail Franchise	02/11/2016	Remedies	7.2 (36 wd)	22/12/2016	1
Ladbrokes/The Coral Group	26/07/2016	Remedies	10.8 (54 wd)	11/10/2016	
Iron Mountain/Recall	16/06/2016	Remedies	11.6 (58 wd)	07/09/2016	
Celesio/Sainsbury's Pharmacy	29/07/2016	Remedies	11.2 (56 wd)	18/10/2016	1
Reckitt Benckiser/K-Y brand	12/08/2015	Remedies	11.8 (59 wd)	04/11/2015	

Source: CMA management information

Some limited information on timescales for remedies implementation was included in the 2012 impact assessment[109]. Remedies were implemented in 8 cases from 2007/08 to 2009/10, with the time taken for remedies implementation ranging from 8 weeks to over 2 years and 2 months. Only 2 cases were resolved in fewer than 12 weeks. Compared to this data, the implementation of remedies was carried out more quickly following the ERRA reforms.

Investigatory powers

The ERRA reforms enabled the CMA to use the power under section 109 of EA02 to request that parties submit documents and information in Phase 1 as well as in Phase 2. This review includes the use of section 109 notices sent to main parties and third parties during Phase 1 reviews from 1 April 2014 to 31 December 2018.

Over the first 4 years since 1 April 2014, the CMA issued 135 section 109 notices to main parties and 4 to third parties over 88 out of 252 cases. From 1 April 2018 to 31 December 2018, the CMA issued a further 46 notices to main parties and 2 to third parties over an unspecified number of cases.

Over the 4 years since the ERRA reforms, section 109 notices were used in roughly one third of all Phase 1 cases. The use of the powers was relatively consistent over these 4 years, with an average of 34 requests issued each year in Phase 1. 80 per cent of these

[109] BIS (2012) *A competition regime for growth: final impact assessment* p 32

information requests involved completed cases. The powers were used rarely to request information from third parties – four times in the first 4 years and twice since.

Table 21: Use of information gathering powers under Section 109 of EA02 in Phase 1 merger control

Use of section 109 information gathering powers	2014/15	2015/16	2016/17	2017/18	1/4/18-31/12/18
S109 issued in Phase 1 (including merger intelligence committee's enquiry letter sent to initiate completed cases)	35	27	31	42	46
S109 issued for anticipated Phase 1 cases	7	5	6	5	8
Number of Phase 1 cases involving a S109	29	18	19	22	16
Number of Phase 1 anticipated cases involving a S109	5	4	4	5	7
Number of S109 to third parties	1	2	0	1	2

The period of review for the use of section 109 powers covers cases opened on or after 1 April 2014 and those closed on or before 31 December 2018. Source: CMA management information

Stopping the clock

Parties subject to section 109 information requests must respond in an accurate and timely fashion. Where a party does not comply with the information request within the deadline specified, the CMA can 'stop the clock' and extend the statutory timescale in which to complete the review.

The number of occasions where the statutory clock was stopped due to parties failing to meet a deadline has been low – nine times in 252 cases, six of which involved anticipated mergers and three of which involved completed mergers. The mean and median average duration of a 'clock stop' in working days for anticipated mergers was 17.2 (mean) and 15 (median). For completed mergers, the mean and median duration of a 'clock stop' in working days was 24 (mean) and 25 (median). For the nine Phase 1 merger cases under examination in this review, the date at which the statutory clock was delayed was after the date at which the formal 40-working day Phase 1 review was launched.

One commercial law firm suggested the CMA might be able to take advantage of this power by issuing parties with information requests with unreasonable deadlines in order to 'stop the clock' and give the CMA case teams additional time to complete the review. However, the CMA did not consider that it had issued requests with unreasonable deadlines, stating that it will only issue reasonable and necessary information requests. The CMA must apply information gathering powers proportionately and any decision to use the information gathering powers is reviewable in the CAT.

Table 22: Incidence of 'clock stops'

Clock Stops		
	Anticipated mergers	**Completed mergers**
Number of cases (total)	156	96
Number of cases where clock stops used	6	3
Percentage of cases where clock stops used	3.8%	3.1%
Mean average duration of clock stops in working days	17.2	24.0
Median average duration of clock stops in working days	15	25
Total number of cases	252	

Source: CMA management information

Table 23: Phase 1 merger cases with a delay to the statutory clock

Case title	Anticipated/ Completed	Date of Phase 1 launch (Day0)	Phase 1 working days (including clock stops)	Article 4(4) or Article 9 referral from EC to CMA (45 WD deadline)	Statutory period suspended	Statutory period resumed	Length of clock stop(s) in working days
Heineken UK/ Punch Taverns	A	16/02/2017	75	1	20/02/2017	24/03/2017	39
Celesio/ Sainsbury's Pharmacy	A	09/09/2015	66	1	10/09/2015	12/10/2015	22
Continental/ Veyance Technologies	A	04/07/2014	62		08/08/2014	10/09/2014	22
Müller UK & IRL/dairy operations of Dairy Crest	A	20/03/2015	53	1	24/03/2015	08/04/2015	8
MasterCard/ Vocalink	A	17/10/2016	49	1	27/10/2016	08/11/2016	6
Refresco/ beverage manufacturing business of Cott	A	27/10/2017	45		05/12/2017	13/12/2017	6
AAH Pharmaceuticals/ MASTA and Sangers (McKesson/UDG Healthcare)	C	03/03/2016	77	1	08/03/2016	03/05/2016	37
Arriva Rail North/Northern Rail Franchise	C	27/01/2016	70	1	01/02/2016	07/03/2016	25
LN-Gaiety/Isle of Wight Festival	C	05/07/2017	50		28/07/2017	11/08/2017	10

Source: CMA management information

Interim measures

ERRA strengthened the ability of the CMA to suspend the integration of companies involved in a merger during a Phase 1 investigation by enabling the CMA to pause the integration immediately by means of an Initial Enforcement Order (IEO) and then consider whether further integration should be allowed through derogations. Following the ERRA reforms, the CMA was no longer required to negotiate undertakings with parties in advance of the IEO being imposed. This allowed the CMA to act more quickly to prevent further integration of parties where it could be harmful for competition, while the merger

review is conducted. Parties can apply for specific derogations from the IEO and the CMA can accept or decline these, subject to appeal in the CAT.

The CMA has made significant use of IEOs in Phase 1, particularly for cases concerning completed mergers. During the period of review[110], the CMA had issued 100 IEOs, 92 of which were in completed cases and 8 of which were in anticipated cases. The use of IEOs has been more frequent in completed cases since these are cases where the CMA begins from a position of relatively little information about the merger and there is greater uncertainty about its anti-competitive effects. As noted above, the CMA has been active imposing administrative penalties on parties it considered to have breached interim orders, including IEOs[111].

Table 24: Number and percentage of Phase 1 merger cases using IEOs which are either anticipated or completed cases

Phase 1 merger reviews where IEOs have been used		
	Number	**Percentage of total cases**
Completed cases with IEOs	92	37%
Anticipated cases with IEOs	8	3%
Total	100	40%

Source: CMA management data

IEOs are used on a precautionary basis and it would not be expected that those cases where an IEO has been imposed would be any more likely to be prohibited. Most merger cases where an IEO was issued are subsequently cleared at Phase 1 (63%). Out of 100 Phase 1 cases where an IEO was issued, 63 were cleared, 6 were immediately referred to Phase 2 and 10 were referred to Phase 2 after the CMA rejected UILs offered by parties. From this group of 16 cases that went to Phase 2, 1 case subsequently led to a prohibition of the merger at Phase 2: this is the only Phase 2 case covered by the period of review that has been prohibited.

[110] IEOs used in merger cases open on or after 1 of April 2014 and closed on or before 31 March 2018.
[111] See footnote 56: https://assets.publishing.service.gov.uk/media/5b1fb924e5274a18e8bf5230/Decision_on_Penalty.pdf The CMA's penalty notice on Electro Rent was subsequently upheld by the CAT on 11 February 2019: see [2019] CAT 4. The CMA has also imposed administrative penalties under these powers in two other cases: *Ausurus/MWR* (penalty notice of 10 January 2019, imposing a penalty of £300,000 for failure to comply with an Interim Order) and *Electro Rent* (penalty notice of 12 February 2019, imposing a penalty of £200,000 for failure to comply with an Initial Enforcement Order).

Table 25: Number of Phase 1 and Phase 2 outcomes which have involved an IEO at Phase 1

Cases with IEOs	Phase 1 outcome	Phase 2 outcome
Cleared	63	7
Found not to qualify (FNTQ)	2	0
Cases referred to Phase 2	6	N/A
UILs accepted	19	N/A
UILs rejected and case referred	10	N/A
Cancelled	0	2*
Forthcoming	N/A	2
Prohibition	N/A	1
Remedies	N/A	4
Total	**100**	**16**

* One case was cancelled during the UIL offering process and the other was cancelled after a reference was made.

Source: CMA management data

The CMA had, not, during the review period, used its power to require that parties reverse integration steps or the effect of integration[112]. There have been occasions where the CMA has invited parties to unwind certain integration, but the formal powers had not been used.

The CMA considers the changes made to interim measures in ERRA have significantly increased their ability to prevent consumer detriment from anti-competitive mergers during the review process. Before the 2014 reforms, the process for unwinding or preventing further integration of parties subject to a completed merger case was slow. Merging parties in a completed case had little incentive to agree to initial undertakings quickly. The OFT was often compelled to use its lighter touch option (negotiate initial undertakings) rather than issue an IEO immediately.

Commercial lawyers had mixed views about the changes to interim measures. Some acknowledged that the changes have helped the CMA act more quickly and protect consumers. Others warned against the over-use of IEOs and that they could become burdensome for parties if not used appropriately. Some commercial lawyers gave support

[112] However, it has subsequently used this power – see Tobii/Smartbox, order of 28 February 2019, available at https://assets.publishing.service.gov.uk/media/5c77aab5ed915d354edffdc0/Unwinding_Order_Tobii_Smartbox.pdf Under section 72 (3B), section 80 (2A) and section 81 (2A).

for the CMA's approach to using interim enforcement on completed mergers and only in exceptional circumstances for anticipated cases.

There was, however, a common desire for the CMA to issue clearer guidance concerning the possible applications of IEOs, particularly about the circumstances where a prohibition on closing may be imposed and advice on the steps parties can take to avoid such an order.

Some commercial lawyers felt that in some cases the CMA had exercised IEOs in a relatively inflexible way. They argued that, in more straightforward cases, there should be a more flexible and 'common-sense' approach to IEOs, especially concerning the CMA's approach to reviewing requests for derogations. One commercial lawyer thought the CMA was slow to release parties from IEOs even when it was arguably appropriate to do so. The CMA adopts an approach where an 'initial state of play' (ISOP) meeting is held with their economists 15 days after the formal Phase 1 review is launched. At this meeting, IEOs already imposed are reviewed and can be lifted if considered appropriate.

Another commercial lawyer suggested that the CMA had tended to over scrutinise some requests for derogations whereas other requests had been granted in a fairly straightforward way.

By enabling the CMA to first intervene and negotiate derogations later, the reforms have been effective at improving the robustness of the UK's voluntary notification system. The reforms have helped the CMA prevent detriment to consumers by acting swiftly to prevent the development of anticompetitive activity during the merger review.

Costs and benefits of reforms introduced in ERRA

Markets

The 2012 impact assessment estimated that the additional impact on businesses from the changes to the markets regime would be zero. The impact assessment said that, while information gathering powers in Phase 1 could increase costs to business, much of the information would be gathered anyway (for instance at Phase 2).

In practice, there may have been cases that did not progress to Phase 2 for which information would have been gathered at Phase 1 only because the ERRA reforms had taken place, whereas prior to ERRA it would not have been possible to gather information until the case progressed to Phase 2. However, it is difficult to assess the administrative burden of responding to information requests in markets cases. Due to the relatively small number of market studies that take place each year, only a small number of parties each year will be subject to information gathering requests and it has not been possible to quantify the impact on businesses.

When discussing the issue of administrative burdens with stakeholders, the main concern was the speed with which parties were required to respond and the trade-off between the need of businesses to see swift completion of market studies and the additional time pressure that would be passed on to businesses through any further tightening of the CMA's timescales. There was also a concern to protect the robustness of CMA decision making in market studies given the remedies imposed at the end of a market investigation, and to ensure that parties had sufficient opportunity to provide evidence for consideration. Responding to an information request in a market study is not simply an 'administrative burden' but an opportunity for parties to make representations to a process.

Mergers

The 2012 impact assessment did not quantify the impact of introducing statutory timescales. It noted that there would be benefits to businesses of swifter review of mergers, but it also noted that there could be more cases referred to Phase 2 than needed to be, due to the CMA having less time to obtain sufficient information to clear cases in Phase 1 and that there could be longer pre-notification discussions.

The impact assessment did not quantify the impact from changes to interim measures.

The only cost estimated in the original impact assessment was for information requests sent to third parties during Phase 1. It assumed that mandatory information requests sent to main parties in Phase 1 would not introduce a new cost since parties had always tended to offer information on a voluntary basis. It was assumed that there would be a cost to third parties associated with the administrative burden of responding to information requests since previously third parties would not voluntarily submit information. In general,

since most merging parties already provided information voluntarily, the estimate on additional costs of this regulation was low.

The original impact assessment estimated the total cost to businesses of changes to the section 109 information gathering powers would be £13k to £140k per year. This assumed that information requests were received by 5 third parties per case, 1.7 of which typically responded and hence incurred a cost.

Since ERRA, there have 6 information requests issued to third parties in Phase 1. There have not been any requests which involved a large number of parties, unlike before ERRA. Following the methodology in the previous impact assessment as closely as possible, we estimate the total cost to businesses each year from this regulation to be from £60 to £600.

This review has not attempted to estimate the cost to main parties resulting from mandatory information requests due to the assumption highlighted in the original impact assessment that parties had previously submitted information voluntarily given the incentives for parties to have the merger review completed quickly.

Conclusions

Impact of ERRA changes to the markets and mergers regimes

For most of the measures in scope, the evidence considered in this review suggests that the following statutory measures have met the aims and are not associated with significant negative or unintended consequences to businesses or other parties:

- the reforms to statutory timescales appear to have worked well to provide discipline on CMA casework and increase the speed of cases in both markets and mergers;

- the 40 working day deadline to complete a Phase 1 review has, in the views of various commercial lawyers, increased the duration of pre-notification discussions prior to the formal review. On average, the formal Phase 1 process has not taken longer than 40 working days and, in less complex cases, has taken less time to complete since the ERRA reforms, thus providing greater clarity and certainty for businesses and deal timetables;

- the extension of information gathering powers to Phase 1 in markets and merger cases has supported the CMA in being able to gather more evidence at an early stage of the process and increased the speed of casework; and

- the changes to interim measures in merger cases have enabled the CMA to intervene swiftly in order to prevent harmful effects occurring.

The evidence suggests there may be merit in revisiting the changes to statutory timescales in the markets regime which required the CMA to start consulting on making an MIR within 6 months of publishing a market study notice.

Overall, while the evidence suggests the changes introduced under ERRA have had a positive effect on the markets and mergers regimes, there are external factors which suggest a need for wider reform. For example, following EU exit, the CMA will take on responsibility for investigating the UK impact of large mergers which have previously been dealt with exclusively by the European Commission. In respect of these mergers, the CMA will be required to work in parallel with other jurisdictions, including the EU, and this may require changes to current procedures. Also, the markets regime remains a lengthy process and, even with the ERRA reforms to time limits, the period from the CMA launching a market study to the imposition of remedies where an adverse effect on competition has been identified, has been at least three years. This can lead to delays in remedies to consumer detriment and seems ill-suited to potentially fast-moving digital markets. Furthermore, unlike mergers, the two phases of the markets regime involve substantively different tests and this raises questions about whether the existing arrangements are sufficiently flexible to enable the CMA to tackle consumer detriment in a timely and effective manner. We therefore propose to review the CMA's market studies and investigations powers further as part of the wider package of reforms to the consumer and competition regimes.

Annex A: Questions used in targeted stakeholder engagement

Section A: Antitrust

Civil financial penalties (Ss. 40, 44)

1. To what extent do you believe the imposition of (or threat to impose) civil financial penalties on parties that do not comply with certain formal requirements during investigations has acted as a deterrent against non-cooperation?

2. Have there been any negative impacts from the removal of the previous criminal sanctions that were replaced by the civil financial penalties? Could there be any reason to argue that the former criminal powers would be more effective than civil penalties?

Warrants (S. 41 and Schedule 13)

3. According to the 2016 consultation: *UK competition regime: options for further reform*, the power provided by ERRA did not actually give the Government the power to make rules governing the supervision of the execution, variation or subsequent discharge of the warrants, meaning it has not been possible to craft a workable set of rules for the CAT to exercise powers in relation to warrants. Do you believe the Government needs to amend ERRA to ensure it has a comprehensive power to make rules allowing the CAT to exercise judicial supervision of all aspects of warrants in competition investigations?

Absolute privilege in relation to notices regarding the existence of a CA98 investigation (S. 42)

4. To what extent has the power to publish a notice regarding the existence of a CA98 investigation with absolute privilege from defamation triggered evidence or submissions which assisted the evidence gathering process?

Lower threshold for interim measures (S. 43)

5. To what extent has the lower threshold for introducing interim measures prevented anticompetitive conduct during the time an investigation is being carried out, before the final decision?

Interview powers (S. 39)

6. To what extent have the powers to require certain individuals to answer questions as part of an antitrust investigation (subject to certain safeguards) helped to make it easier and quicker to bring antitrust cases and prosecute infringements of CA98? Are these powers proportionate and fair to parties involved?

General impact of changes to the antitrust regime

7. Overall, how would you assess the impact of the changes made in ERRA in terms of the functioning of the antitrust regime with respect to the following factors:

   a) timeliness of interventions;

   b) cost and use of resources, including procedural burden to parties;

   c) ability to complete rigorous evidential analysis;

   d) quality and robustness of decision making;

   e) fairness to parties involved;

   f) any other area on which you would like to comment.

General operation of the antitrust regime

8. Overall, how would you assess the current operation of Part 1 of CA98, in respect of any issue not specifically referred to in questions 1 to 7?

Section B: Markets and Mergers

Statutory timescales for markets (S. 38 and Schedule 12)

9. What was the impact of the introduction of a 6 month timescale for phase 1 market studies? Consider the impact on any changes in behaviour, such as causing work to be shifted to a 'pre-launch' period. Does the 6 month timescale provide sufficient time to make a well-informed assessment around whether a market requires a MIR?

10. What was the impact of the introduction of an 18 month timescale (with ability to extend time frames in the case of exceptionally complex cases)? Did this cause the CMA to streamline its processes or conclude investigations in a more timely manner?

11. In response to the 2016 consultation on options to reform the competition regime, the CMA suggested that a model in which the CMA carried out more straightforward / narrowly scoped market investigations in 12 months and more complex / broader inquiries in 18 months (with the CMA Board considering at the point of reference the appropriate timescale) may lead to more streamlined and quicker investigations in appropriate cases. Do you agree with this view or do you have any alternative suggestions for amendments to the statutory timescales in market studies or investigations?

12. What was the impact from the requirement to accept final undertakings or make a final order within 6 months of the date of publication of its market investigation report?

Statutory timescales for mergers (S. 32 and Schedule 8)

13. What was the impact of the introduction of a statutory time limit of 40 working days for phase 1 merger investigations? Did they lead to longer pre-notification discussions? Does the 40 day timescale provide sufficient time to make a well-informed assessment around whether a merger requires a Phase 2 referral? Did they lead to positive impacts on CMA behaviour e.g. creating a greater focus or lead to the streamlining of processes in order to complete cases in a more timely manner/streamlining processes? Are there any examples of phase 2 reviews which you subsequently felt were unnecessary and could have been cleared at phase 1 in the absence of the 40 day limit?

14. What was the impact of the introduction of a statutory timescale of 12 weeks for the implementation of remedies at the end of phase 2 merger investigations?

Investigation powers in markets and mergers (Ss. 29, 36 and Schedule 11)

15. What has been the impact of the changes to investigatory powers that gave the CMA a single set of powers that can be used consistently across markets and merger cases?

Interim measures for merger investigations (S. 30 and Schedule 7)

16. What has been the impact of the strengthened powers with respect to interim measures, that made it easier to suspend the integration of companies involved in a merger during a Phase 1 investigation? To what extent has this prevented consumer detriment during an investigation?

General impact of changes to the markets and mergers regimes

17. Overall, how would you assess the impact of the changes made in ERRA in terms of the functioning of the markets and mergers regime with respect to the following factors:

    a) timeliness of interventions;

    b) cost and use of resources, including procedural burden to parties;

    c) ability to complete rigorous evidential analysis;

    d) quality and robustness of decision making;

    e) fairness to parties involved;

    f) any other area on which you would like to comment.

Section C: Concurrency

General views on concurrency arrangements

18. Overall, how would you assess the current operation of the concurrency arrangements? How does this compare to the situation before 2014? Please consider the following issues:

    a) the requirement for sector regulators to consider whether use of their competition law powers was more appropriate before taking enforcement action under sector-specific regulatory powers;

    b) the quality of co-operation between the CMA and regulators through the UK Competition Network;

    c) the obligation of the CMA and regulators to consult each other about case management decisions involving concurrent sectors and ability of the CMA to take CA98 cases from regulators;

    d) the requirement to publish an annual “concurrency report”

    e) any other area on which you would like to comment.

Section D: Additional issues

Institutional design

19. Would it be advantageous to change the competition regime to a "prosecutorial system" where the CMA and regulators holding concurrent enforcement powers would investigate and prosecute antitrust cases before a court rather than adjudicate on cases?

Decision making and use of panels

20. Overall, how would you assess the current operation of the panel system in phase 2 markets and merger cases? Please consider the following issues:

    a) whether the current arrangements for the separation of decision making are appropriate;

    b) whether decision-making groups should be entirely made up of independent panel members or involve some CMA staff;

    c) the constitution of panel membership: experience of panel members, the duration of their appointment and time commitment required;

    d) the mechanisms for governance and accountability;

    e) any other area on which you would like to comment.

The markets regime

21. Overall, how would you assess the current operation of the markets regime? Please consider the following issues:

    a) the overall value of maintaining a markets regime;

    b) whether the current timescales are appropriate;

    c) the extent of procedural burden on parties involved;

    d) the mechanisms for governance and accountability;

    e) the effectiveness of remedies;

    f) any other area on which you would like to comment.

Any other issues

Please comment on any other issues related to the competition regime that are not covered in the questions above.

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