

# **The risks of non-notification in a voluntary merger control regime:**

## **The UK experience**

**Colin Raftery**  
**Director of Mergers**

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## Background

Brief history of voluntary regime in the UK

## Choices for merging parties

“Route-map” of UK voluntary regime

## Key risks of non-notification

### Unanticipated investigations:

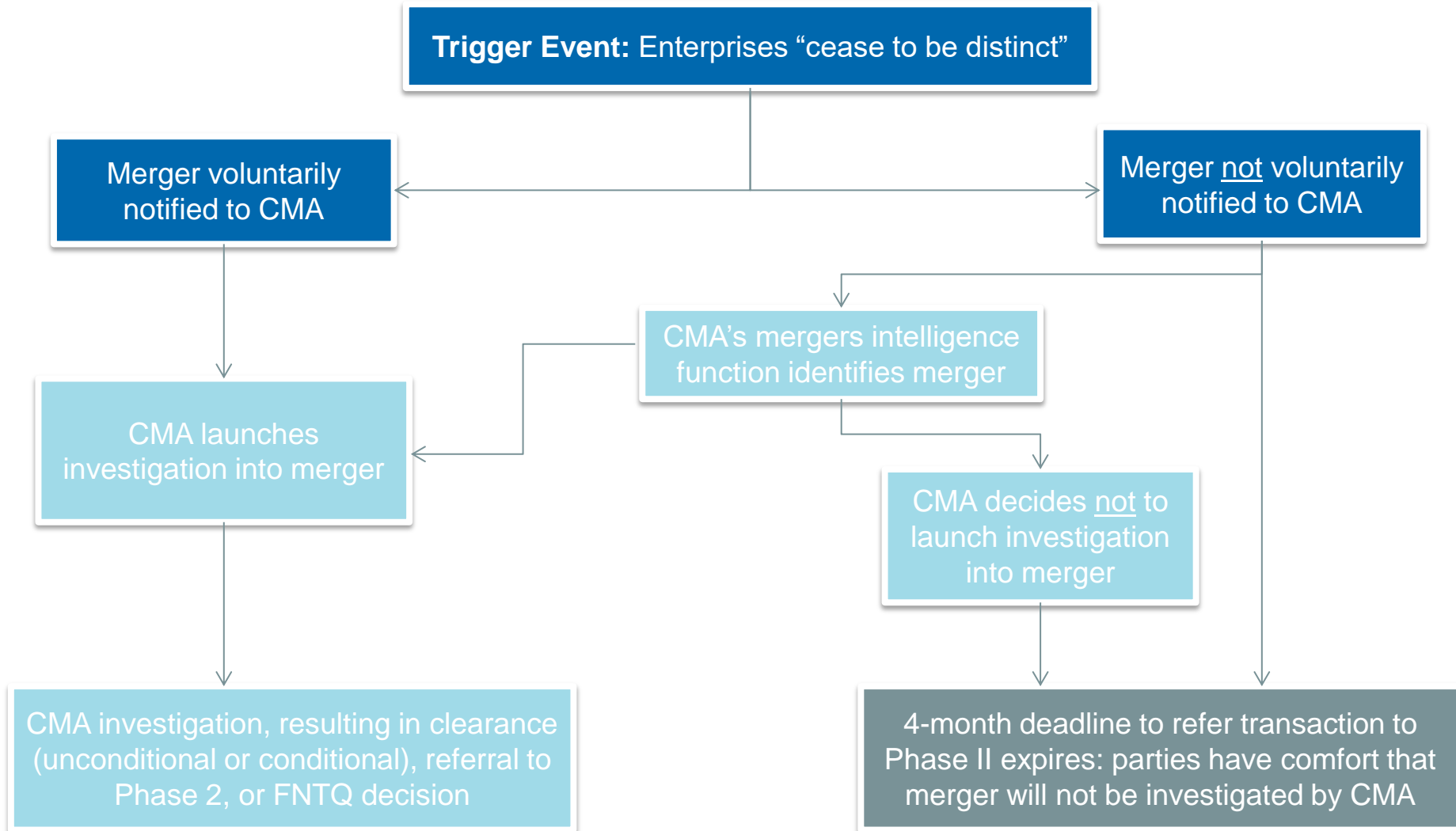
The CMA’s mergers intelligence function

### Freezing integration:

The use of initial enforcement orders

- UK merger control first put on statutory footing in 1965, with “modern” regime coming into force in 2003
- Regime has always been “voluntary”
  - No requirement on merging parties to notify
  - But authority under statutory duty to keep UK merger activity under review
- “Pros and cons” of voluntary merger control regime considered in 2000-01 and 2011-12 consultations
  - Key issues: flexibility and reduction of unnecessary burdens vs. increased certainty and reduction of risks around unwinding
  - Majority of respondents strongly in favour of maintaining voluntary regime on both occasions

# “Route-map” of UK voluntary regime



# The CMA's mergers intelligence function

- CMA has a statutory duty to obtain, compile and keep under view details of merger activity
- Threshold question: is there a reasonable chance that the test for reference to a Phase 2 investigation will be met?
- CMA's Mergers intelligence team reports on non-notified merger activity to Mergers Intelligence Committee (**MIC**)
- MIC decides whether to:
  - Call a case in (by sending a statutory enquiry letter)
  - Gather further information (either from public sources or by sending non-statutory information requests to parties)
  - Take no further action at this stage

# The CMA's mergers intelligence function

Case outcomes			
Period	2014-15	2015-16	2016-17
Cases reviewed by MIC	602	608	695
Cases called in by MIC	21	14	13
<i>% of all CMA Phase 1 cases</i>	26%	23%	23%
MIC cases resulting in Phase 1 clearance	12	7	9
MIC cases resulting in Phase 1 remedies	0	4	1
MIC cases resulting in Phase 1 <i>de minimis</i> clearance	3	1	1
MIC cases resulting in referral to Phase 2	2	1	2
MIC cases subject to CRM*	12	8	8
<i>% of MIC cases subject to CRM</i>	55%	57%	62%
<i>% of all CMA Phase 1 cases subject to CRM</i>	29%	38%	49%
MIC cases resulting in SLC**	5	6	4
<i>% of MIC cases resulting in SLC</i>	32%	43%	31%
<i>% of all CMA cases resulting in SLC</i>	20%	38%	30%

\* CMA's "CRM" (Case Review Management) process is used in cases that raise more significant competition issues in Phase 1 proceedings

\*\* CMA assesses mergers against a "substantial lessening of competition" (SLC) test

# The use of initial enforcement orders (IEOs)

## Why used?

- Orders that prevent merging parties from taking “pre-emptive action” (*i.e.*, action that might prejudice the outcome of the CMA’s investigation or impede remedies)
- Enhanced regime introduced in 2013 to strengthen enforcement within voluntary system

## When used?

- Normally imposed in completed mergers (*e.g.*, in 30/30 cases in 2016/17)
- Imposed only exceptionally in anticipated mergers (*e.g.*, 0/27 cases in 2016/17)
- Imposed as early as possible (*i.e.*, when a merger is notified or called-in)

## What is covered?

- No further integration after IEO imposed, including restrictions on exchange of confidential or proprietary information
- Ability to unwind existing pre-emptive action (although not yet used in practice)
- Derogations granted where necessity can be justified (*e.g.*, 91 granted in 2016/17)

## Enforcement?

- Merging parties required to produce regular compliance statements
- Monitoring Trustee or Hold-Separate Manager can be appointed to monitor compliance
- Penalties for failing to comply with IEO (up to 5% of turnover)