

Mergers: Exceptions to the duty to refer

Draft for consultation

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Introduction - Exceptions to the duty to refer

1. If the Competition and Markets Authority (CMA) believes that it may be the case that a relevant merger situation may lead to a substantial lessening of competition (SLC), then it is under a duty to refer the merger for in-depth (phase 2) investigation.¹
2. However, in certain circumstances the CMA has a discretion not to make a reference despite the fact that there is a realistic prospect that the merger will lead to a SLC in a market or markets in the United Kingdom.² These are:
 - when the markets concerned are not of sufficient importance to justify a reference;
 - in the case of anticipated mergers, when the arrangements concerned are insufficiently far advanced, or insufficiently likely to proceed, to justify a reference; or
 - when any relevant customer benefits arising from the merger outweigh the SLC concerned and any adverse effects of the SLC concerned.
3. Each of these exceptions to the duty to refer is considered in further detail below.
4. This guidance forms part of the advice and information published by the CMA under section 106 of the Act. It should be read alongside [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2\)](#) and the Office of Fair Trading (OFT)/Competition Commission (CC) publication [Merger Assessment Guidelines \(CC2/OFT1254\)](#).
5. This guidance updates and replaces Mergers: Exception to the duty to refer in markets of insufficient importance (CMA64); and Chapters 1, 3 and 4 of [Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance \(OFT1122\)](#)..
6. This guidance sets out the CMA's current practice (and intended future practice) but may be revised from time to time. Where there is any difference in emphasis or detail between this guidance and other guidance produced by the CMA, the most recently published guidance takes precedence.

¹ Sections 22(1) and 33(1) of the Enterprise Act 2002 (the Act).

² Sections 22(2) and 33(2) of the Act.

Markets of insufficient importance ('de minimis')

Introduction

7. Under sections 22(2)(a) and 33(2)(a) of the Act the CMA may decide not to refer a merger for an in-depth 'phase 2' investigation if it believes that the market(s) to which the duty to refer applies is/are not of sufficient importance to justify a reference. This exception is designed to avoid references being made where the costs involved would be disproportionate to the importance of the market(s) concerned.
8. The CMA considers that the market(s) concerned will generally be of sufficient importance to justify a reference (such that the exception will not be applied) where its/their annual value in the UK, in aggregate, is more than £15 million.
9. By contrast, where the annual value in the UK of the market(s) concerned is, in aggregate, less than £5 million, the CMA will generally not consider a reference justified unless a clear-cut undertaking in lieu of reference is in principle available.
10. Where the annual value in the UK, in aggregate, of the market(s) concerned is between £5 million and £15 million, the CMA will consider whether the expected customer harm resulting from the merger is materially greater than the average public cost of a phase 2 reference (currently around £400,000).
11. The CMA will base its assessment of expected customer harm on: the size of the market concerned; its view of the likelihood that a SLC will occur; its assessment of the magnitude of any competition that would be lost; and its expectation of the duration of that SLC.
12. The CMA will also take account of the wider implications of its decisions in this area, and will be less likely to exercise its discretion, and therefore more likely to refer, where the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question.
13. Although the CMA considers that the primary purpose of the de minimis exception is to avoid disproportionate public expense following a finding that a merger gives rise to the realistic prospect of a SLC, the CMA also sets out at the end of this chapter a number of ways in which it may use the de minimis exception to reduce the burden of merger control at earlier stages of review (see paragraphs 51 to 60 below).

Adoption of a broad cost/benefit analysis for ‘de minimis’

14. The primary purpose of the de minimis exception is to avoid references being made where the costs involved would be disproportionate to the size of the market(s) concerned. However, the Act does not specify what criteria the CMA should consider in exercising this discretion, but leaves the matter to the judgment and expertise of the CMA.
15. The CMA applies the discretion with regard to a broad cost/benefit analysis. That is, the CMA takes the view that it is proportionate – and therefore justifiable – to refer a merger where the CMA considers that the benefits of that reference, in terms of preventing or remedying the customer harm that would otherwise result from the merger if at phase 2 the CMA found a SLC, materially exceed the public costs of the reference.
16. When considering the cost of a reference, the CMA considers it appropriate to take account only of the public costs (ie the costs to the CMA) of a phase 2 reference, and not those costs that might be incurred by the parties.
17. The average public cost of a phase 2 reference is, at present around £400,000. The CMA therefore considers whether, in broad terms, the benefit of a reference in terms of the potential customer harm saved (taking account of the fact that not all references result in an anti-competitive finding) is materially greater than £400,000.
18. The expected customer harm that directly results from the individual merger under consideration will be a function of a number of factors: the size of the market, the likelihood that the SLC will actually occur, the magnitude of competition that would be lost by the merger, and the duration of the SLC. Prevention or remedy of an anti-competitive merger by the CMA at phase 2 would therefore avoid this harm. The CMA will also have regard to the wider implications for future cases of any decision that it takes to exercise its de minimis discretion.

Guidelines on the availability of ‘de minimis’: applicable thresholds

19. The CMA takes into account a range of factors (discussed in this guidance) in using its judgment as to whether or not to exercise its discretion in a particular case. However, recognising the value of predictability, the CMA has sought to provide guidance on when the exception will generally not apply, and when it would be more likely to apply.
20. By way of upper threshold, the CMA considers that the market(s) concerned will generally be of sufficient importance to justify a reference (such that the

exception will not be applied) where its/their annual value in the UK, in aggregate, is more than £15 million. This is because the benefits of a phase 2 reference would be expected to outweigh the public costs where the market(s) concerned have an aggregated turnover above £15 million.

21. Conversely, the CMA considers that where the annual value in the UK of the market(s) concerned is, in aggregate, less than £5 million (and where the CMA considers there are no clear-cut undertakings in lieu in principle available – see paragraph 27) a reference to phase 2 will generally not be justified.³ The CMA would expect to refer a merger where the value of the market(s) concerned was less than £5 million only exceptionally, and where the direct impact of the merger in terms of customer harm was particularly significant and/or where the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question (see paragraphs 46 and following below).

Application of the cost/benefit analysis

22. In all cases where the value of the market(s) concerned is below £15 million, the CMA will consider whether a reference, overall, would be proportionate on the basis of a broad cost/benefit analysis. In making this assessment, the CMA will typically consider three issues:
- First, whether undertakings in lieu could in principle be offered by the merging parties to remedy in a clear-cut way any SLC concerns created by the merger.
 - Second, whether the customer harm potentially resulting from the actual merger under investigation is likely materially to exceed the costs of a reference, taking account: the size of the market, the likelihood that the SLC will actually occur, the magnitude of competition that would be lost by the merger, and the duration of the SLC.
 - Third, whether a reference would be proportionate when account is taken of the wider implications of the decision in question.

These three considerations are each discussed below.

³ It is not possible, given the cost/benefit approach the CMA adopts, to identify a 'safe harbour' in terms of market size below which the de minimis exception will always be applied. Furthermore, providing a firm 'safe harbour' threshold risks being inconsistent with the CMA's proper exercise of its discretion in the light of the facts and circumstances of each case.

23. Whilst the CMA believes that it is informative to consider the potential scale of customer harm that could result from the merger – and which would be prevented by a reference – the CMA is aware that the costs and benefits associated with merger references are inherently difficult to estimate accurately in advance. For this reason, although seeking broadly to estimate the customer harm that would be expected to result from a merger may be useful directionally, this cost/benefit assessment is ultimately a judgment for the CMA to make in a particular case depending on the relevant facts and circumstances.

Interaction between ‘de minimis’ and potential undertakings in lieu of reference⁴

24. This section explains how the CMA’s exercise of its de minimis discretion is affected by its ability to accept undertakings in lieu of reference to phase 2.

Legislative framework

25. Sections 22 and 33 of the Act require the CMA to consider as a first question whether it is under a duty to make a reference to phase 2. If it is, the CMA must then decide whether to apply certain exceptions to the duty to refer, including the de minimis discretion. Only where it decides not to apply any available exception (such that it would otherwise actually make a reference), the CMA may alternatively accept undertakings in lieu of reference offered by the parties under section 73(2) of the Act.
26. Although the Act is clear on the sequence of questions that the CMA must ask itself, the Act leaves open to the CMA the considerations it may take into account in exercising its de minimis discretion. Consequently, it is open to the CMA, when exercising its de minimis discretion, to have regard to all relevant considerations, including whether the potential customer harm in the case in question could be avoided, without the need for a reference, by the provision of clear-cut undertakings in lieu.

⁴ See Completed acquisition by Dunfermline Press Limited of the Berkshire regional newspapers business from Trinity Mirror plc (4 February 2008).

Proportionality of a reference where undertakings in lieu of reference are in principle available

27. The CMA's general policy is not to apply the de minimis exception where clear-cut undertakings in lieu of reference could be offered by the parties to resolve the competition concerns identified, for the following reasons:
- The aim of the de minimis exception is to avoid the cost of a reference where this is not proportionate to the harm identified. Undertakings in lieu of reference avoid the risk of customer harm identified by the CMA – yet at the same time avoid in full the costs of a reference.
 - Even where the market(s) concerned is/are small in size, parties should remain incentivised to offer clear-cut undertakings in lieu to remedy concerns or to design their transactions so as to avoid anti-competitive effects (sometimes known as a 'fix it first' approach).
 - The costs of a reference in an individual case⁵ are outweighed by the long-run, aggregated benefit of remedial action in similar cases at the phase 2 stage.
 - In any given case where the prospect of a reference arises, it is ultimately for the parties to decide whether to offer undertakings in lieu or to pursue their case in phase 2. The CMA cannot impose a first-phase remedy via order (as it can in appropriate phase 2 cases) and the CMA's approach as to whether or not to apply the de minimis exception does not remove the parties' choice as to whether to offer undertakings in lieu.

CMA's assessment of when undertakings in lieu are in principle available

28. The CMA's judgment as to whether undertakings in lieu are available (at the time of considering the de minimis exception) is an 'in principle' one that does not depend on the actual offer, if any, of undertakings in lieu (or indeed whether the CMA believes they are likely to be offered). The actual offer of undertakings in lieu is a separate question relevant only to the subsequent exercise of the CMA's ability to accept undertakings under section 73(2) of the Act and is not relevant at this stage of the CMA's consideration.

⁵ That is, in any given case where the CMA considers that undertakings in lieu of reference are 'in principle' available (such that the de minimis exception is not applied) but are not in fact offered by the parties (such that a reference actually follows and the public costs of a reference are incurred).

29. In practical terms, therefore, the CMA will consider whether the de minimis exception should be applied before any consideration is given to whether or not the parties have in fact offered undertakings in lieu of reference to phase 2.⁶
30. Cases that the CMA considers are in principle suitable for resolution by undertakings in lieu are typically those where the part of the transaction that raises concerns can be divested to an independent third-party purchaser. The de minimis exception is therefore unlikely to be applied to this type of case.
31. By contrast, the CMA will not consider that undertakings in lieu are in principle available where the CMA's competition concerns relate to such an integral part of a transaction that to remedy them via a structural divestment would be tantamount to prohibiting the merger altogether.⁷
32. Nor will the CMA consider for these purposes that undertakings in lieu are in principle available where the minimum structural divestment that would be required to ensure the remedy was effective would be wholly disproportionate in relation to the concerns identified. It is not the role of the undertakings in lieu process effectively to invite parties to abandon their own transactions. On the contrary, the logic of first-phase remedies is to resolve competition concerns clearly whilst allowing the transaction, albeit in modified form, to proceed.⁸
33. The CMA will take a conservative approach to assessing whether undertakings in lieu are in principle available. To the extent that there is any doubt as to whether undertakings in lieu would meet the 'clear-cut' standard, it will not be included in the 'in principle' assessment.⁹ In other words, it must be clear that the competition concerns in the case in question are obviously such as to make the case a candidate for resolution by undertakings in lieu.¹⁰

⁶ See [CMA2](#), paragraphs 7.46 & 8.2.

⁷ See Anticipated acquisition by BOC Limited of the packaged chlorine business and assets carried on by Ineos Chlor Limited (29 May 2008), paragraph 111 and Completed acquisition by Idox plc of Grantfinder Limited (2 September 2010), paragraph 100.

⁸ See Completed acquisition by General Healthcare Group of control of four Abbey hospitals and de facto control over Transform Holdings Limited, previously part of the Covenant Healthcare Group (14 September 2010), footnote 37.

⁹ For example, in the Completed acquisition by Capita Group plc of IBS OPENSsystems plc (19 November 2008), paragraph 112, the OFT discounted as an 'in principle' remedy at this stage the divestment of IBS's revenue and benefits software services business on the basis that this would raise concerns as to whether it was clearly and effectively separable from the remainder of IBS (for example, by reason of shared software/codes). It recognised that such concerns might ultimately be surmountable, but considered it appropriate for it to take a cautious view of the workability of a structural remedy for these purposes.

¹⁰ As a result of this conservative approach, the CMA has on occasion considered seriously undertakings in lieu that have actually been offered by the merging parties having previously considered that, in its view, the case was not an obvious candidate for resolution by way of undertakings in lieu (such that it should not exclude

Assessment of the expected customer harm from the merger

34. Where the annual value in the UK of the market(s) concerned is in aggregate less than £15 million, and the CMA concludes that clear-cut undertakings in lieu of reference are not in principle available, it will consider whether the merger impact is expected materially to outweigh the public costs of a reference. In assessing the customer harm of an individual merger, the CMA will generally pay close attention to the interaction of four key variables:
- the size of the market;
 - the likelihood that the SLC will actually occur;
 - the magnitude of competition lost by the merger; and
 - the duration of the SLC.
35. The fact that one of these factors may point towards or against exercise of the discretion should not be regarded as decisive in any individual case. The CMA considers these factors in the round as part of its overall assessment of whether the expected impact of the merger in terms of customer harm is likely to materially exceed the public costs of a reference.

Size of the market

36. In line with the wording of the Act, the starting point for the CMA's considerations is the size of the market(s) concerned. For the purposes of applying the de minimis exception, the market concerned is the affected market.¹¹ The smaller the size of the market(s) concerned, the more likely it is that the CMA will apply the 'de minimis' exception (in any event the market(s)

application of de minimis on this ground). Clearly this situation can occur only where the CMA does not apply the de minimis exception, such that there would be a phase 2 reference absent acceptable undertakings in lieu. See Anticipated acquisition by BOC Limited of the packaged chlorine business and assets carried on by Ineos Chlor (29 May 2008), paragraph 128 and footnote 54 and Anticipated acquisition by Reckitt Benckiser of the K-Y brand from Johnson & Johnson (19 December 2014), paragraphs 260–266 and reference decision in the same case discussing undertakings in lieu offered by the Parties (7 January 2015).

¹¹ This may be a subset of the relevant market as defined for the purposes of the competition assessment (see the CMA's [Merger Assessment Guidelines](#), paragraph 5.2.1) where it is clear that the size of any customer detriment will be experienced by only a proportion of the relevant market. See, for example, National Express Group / Intercity East Coast Rail franchise (20 December 2007), paragraph 83 (where the OFT disregarded rail revenue given that the theory of harm related only to merger effects on coach services) and Anticipated acquisition by FMC corporation of the alginates business of ISP holdings (U.K.) Limited (30 July 2008), paragraph 71 (where the exceptionally differentiated position of the largest customer meant that its purchases should not be included for calculation of the size of the market concerned for the purposes of the de minimis exception).

will be expected to fall within the £15 million threshold¹²). The CMA applies the following principles in determining the size of the market:

- Only markets in relation to which the CMA concludes there is a realistic prospect of a SLC qualify as ‘markets concerned’.¹³
- The size of the market concerned is the sum of all suppliers’ annual turnover in the UK in that market (and not solely the annual turnover of the parties).
- Where the test for reference is met in multiple markets, the relevant figure will be the aggregate size of all such markets.
- If the geographic scope of any market concerned is wider than the UK, turnover generated outside the UK will not be taken into account.¹⁴
- The CMA considers that, when considering market size for these purposes, it should not view the market statically, but should take into account any factors which indicate that the market size may be significantly expanding or contracting in the foreseeable future.¹⁵
- As a general statement, in lumpy markets,¹⁶ the CMA considers it artificial to consider the value of contracts for one particular year only as the market size, as this may inflate or underestimate the true annual value of the overall market. In such circumstances, the CMA is likely to err on the side of caution in determining the annual size of the market and obtain a more representative figure by considering the annual value over a number of years.¹⁷

¹² Where the annual value of the market(s) concerned only very marginally exceeds £15 million, the CMA may consider whether the de minimis exception should be applied: see Completed acquisition by Global Radio UK Limited of GCap Media plc (8 August 2008), paragraph 232 where the OFT was considering the market size under the previous £10 million threshold.

¹³ For example, in Completed acquisition by Stagecoach Bus Holdings Limited of Cavalier Contracts Limited (18 September 2008), paragraph 98, the market size for de minimis purposes was the projected revenue associated with the Cambridge Guided Busway (which was the only overlap in respect of which the OFT found a realistic prospect of a SLC).

¹⁴ This reflects the fact that the Act is concerned with a SLC within any market or markets in the UK for goods and services (sections 22 and 33 of the Act).

¹⁵ See Anticipated acquisition by Spectris plc of Lochar Ltd (29 January 2009), paragraphs 120–126.

¹⁶ That is, where short-term fluctuations in market shares can be dramatic as large contracts are won and lost.

¹⁷ See Completed acquisition by Capita Group plc of IBS OPENSsystems plc (19 November 2008), paragraph 119, where the OFT stated that it was not persuaded that the number of contracts coming up for renewal in one particular year alone was the correct way to ascertain the annual market size for the purposes of de minimis. Although the OFT accepted that the relevant market could be characterised at the time of the merger by a relatively limited number of contracts expected to come up for renewal in the short term, it noted that this situation could change going forward.

CMA's belief regarding the likelihood of a SLC

37. The CMA will take into account the strength of its belief regarding the likelihood that the merger will have an anti-competitive effect when deciding whether to exercise the de minimis exception. As the Court of Appeal ruled in *IBA Health*,¹⁸ the CMA's duty to refer can in principle be triggered by a belief as the likelihood of a SLC that may be no higher than 'more than fanciful' at one end of the spectrum but may alternatively extend to, at the other extreme, a very high degree of confidence.
38. The CMA considers it appropriate to attach weight to the belief it holds regarding the likelihood of a SLC. This is because customers in the relevant market will receive no direct benefit if a benign merger is subject to in-depth scrutiny and is then cleared, a scenario which becomes increasingly likely the lower the likelihood that a SLC will occur.
39. In a number of cases in which the CMA has applied the de minimis exception to date, the CMA therefore attached weight to the fact that its belief as to the likelihood was merely on the 'may be the case' standard, rather than on the 'is the case' (more likely than not) standard.¹⁹

Magnitude of competition lost by the merger

40. In all cases in which the CMA has concluded that its duty to refer is met, it follows that it must believe that any lessening of competition is potentially 'substantial' in scale. However, above this threshold, the magnitude of the CMA's substantive competition concerns will vary between different cases.
41. The CMA's assessment of the magnitude of competition that could be lost by the merger essentially acts as a proxy for the extent of the price effect (for example, whether the merger could lead to a 5, 15 or 30% price increase) or equivalent non-price effect.²⁰ Where there are factors that would directly constrain any price increase in the market (even if insufficient to prevent a realistic prospect of a SLC from arising at all) these will be relevant in this context.²¹

¹⁸ *IBA Health v OFT* [2004] EWCA Civ 142.

¹⁹ See, for example, *Anticipated acquisition by Prince Minerals Limited of Castle Colours Limited* (6 May 2009), paragraph 67.

²⁰ In assessing the magnitude of competition that would be lost if the SLC posited actually materialises, the CMA will take into account evidence that the amount of competition between the parties has been more limited: see *Anticipated acquisition by Orbital Marketing Services Group Ltd of Ocean Park Ltd* (14 November 2008), paragraph 81.

²¹ See *Completed acquisition by Stagecoach Bus Holdings Limited of Cavalier Contracts Limited* (18 September 2008), paragraph 100, where the OFT considered that any price increases resulting from the merger may not be

42. By way of general illustration, where the CMA considers each merging party to be the only significant competitor to the other (a 'two to one' merger) or one of only two (a 'three to two' merger), the merger would typically be expected to lead (absent countervailing competitive constraints) to large price increases and/or quality or innovation cutbacks.
43. In considering the magnitude of competition concerns that could result from a merger, the CMA will take account of evidence of coordination between competitors (including hard-core breaches of Chapter I of the Competition Act 1998) in one or more of the markets in question and whether the merger may increase the impact of any such coordination. In addition, when considering the magnitude of competition lost by the merger, the CMA will have regard to whether a substantial proportion of the likely detriment would be suffered by vulnerable customers.

Durability of the merger's impact

44. The CMA will consider the likely durability of the merger effect as part of its assessment of the overall impact of the merger on the market in question.
45. The CMA may consider whether any barriers to entry into the market are substantial and durable. For example, the CMA may not be sufficiently confident that entry would be timely, likely and sufficient such as to prevent competition concerns from arising in the first place,²² but may believe that barriers to entry are such that effective new entry is likely ultimately to occur.²³ Equally, the CMA may consider that the durability of a merger's impact will be limited because technological or market transformation will render merger effects relatively short-lived.

Consideration of the wider implications of a 'de minimis' decision

46. The CMA believes that it is appropriate for it to take account of the wider implications of any decision that it takes to exercise its de minimis discretion for its treatment of future cases.

that significant given the limited ability of Stagecoach to cause a price increase on multi-operator tickets, the constraint on Stagecoach's own tickets posed by multi-operator tickets, and the role played by the Council in limiting and vetoing price increases.

²² See [Merger Assessment Guidelines](#), paragraph 5.8.3.

²³ See in this respect Anticipated acquisition by FMC corporation of the alginates business of ISP Holdings (U.K.) Limited (30 July 2008), paragraph 74, in which the OFT stated that it was possible that entry could take place in the medium to long term, and as such it did not consider that the negative impact of the merger would definitely persist for the foreseeable future.

Replicability of merger and 'de minimis' decisions

47. The CMA will be less likely to apply the 'de minimis' discretion where it believes that the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question.
48. Research for the OFT by Deloitte in 2007²⁴ clearly confirms the view that individual merger decisions (as well as the existence of the mergers regime as a whole) can have a significant impact in the relevant sector by determining whether future anti-competitive transactions are pursued.
49. Consistency of treatment requires that the application of the de minimis discretion by the CMA in one case should mean that the discretion is also applied to an analogous future case in the same sector where competitive conditions are comparable. Where the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question, the CMA's de minimis decision could be 'replicable' also. This could mean that the exercise of the CMA's discretion in one case could cumulatively lead to aggregate customer harm far in excess of the costs of referring the individual problematic merger at hand.

Economic rationale

50. In considering the wider implications of a particular decision whether to exercise the de minimis discretion, the CMA may also have regard to the economic rationale behind an individual transaction.²⁵ In particular, the CMA will be less likely to apply the de minimis discretion where there is evidence that the merger in question is solely or primarily motivated by the acquisition of market power.²⁶ For example, a firm decides to acquire its only competitor active in one or more small local markets for the principal purpose of eliminating competition and reaping monopoly profits post-merger.

²⁴ *The deterrent effect of competition enforcement by the OFT: a report prepared for the OFT by Deloitte* (OFT962, November 2007).

²⁵ See Anticipated acquisition by Orbital Marketing Services Group Ltd of Ocean Park Ltd (14 November 2008), paragraph 85, where the OFT took into account the fact that customers did not raise concerns about the merger and were, in some cases, supportive of it for reasons of ensuring security of supply.

²⁶ See paragraph 78 of the Completed acquisition by Stagecoach Group plc of the East Midlands Franchise (4 February 2008) (which focused on the particular nature of rail franchise awards and the general lack of an anti-competitive rationale for rail franchise bids), in contrast to paragraph 125 of the Anticipated acquisition by BOC Limited of the packaged chlorine business and assets carried on by Ineos Chlor Limited (29 May 2008).

Use of the ‘de minimis’ exception to reduce the costs of first-phase review

51. The CMA considers that the primary aim of the de minimis discretion is to avoid the public cost of a phase 2 investigation where the market(s) concerned is/are not of sufficient importance to justify the making of a reference. However, the CMA is also mindful of the value of reducing the overall costs of first-phase review where this is possible without compromising the performance of the CMA’s duties under the Act and/or the rights of private parties (merging parties and third parties).
52. The CMA considers that the availability of the de minimis discretion can, in some circumstances, also serve to eliminate, or reduce, the costs of a first-phase review in three ways:
- First, by the CMA taking into account the existence and operation of the discretion when deciding whether to send an enquiry letter.
 - Second, through the provision of informal advice on the application of the discretion.
 - Third, through consideration of whether the discretion is applicable in suitable cases at an early stage of the CMA’s review.

These three measures are discussed below.²⁷

Consideration of ‘de minimis’ when sending enquiry letters

53. The CMA will have regard to the potential applicability of its de minimis discretion in deciding whether or not to send an enquiry letter to trigger an own-initiative investigation.²⁸
54. Where the CMA is confident on the basis of available information that any market(s) potentially concerned by a merger would be of insufficient importance to justify a reference, regardless of the magnitude, likelihood or duration of any SLC caused by the merger, and taking into account any wider effects of a decision whether or not to apply the de minimis exception to such a merger, then the CMA is likely to conclude that there is no sensible

²⁷ The procedures for the CMA’s decision-making process, including application of the de minimis discretion, are set out in full in [CMA2](#). However, the CMA considers it useful in this context to highlight these points that relate to the de minimis discretion.

²⁸ For further information and guidance on the CMA’s process for launching own-initiative investigations and the mergers intelligence functions relating to this see [CMA2](#), paragraphs 6.5–6.8 and 6.15–6.19 and [Guidance on the CMA’s mergers intelligence function](#) (17 June 2016, CMA56).

justification for it to call the case in for a first-phase review. In practical terms, for the CMA to be confident this is the case, it would generally need to be very clear that the annual value of any market(s) potentially concerned would be below £5 million and that there would not be any clear-cut undertakings in lieu of reference available if the duty to refer were to be met.

55. This consideration does not eliminate the possibility of the CMA investigating a case of its own initiative and ultimately deciding to apply the de minimis discretion to it. As is clear from the discussion in paragraphs 22 and following above, whether to apply the de minimis discretion will – in markets of less than £15 million – often turn on factors that become clear only after an investigation by the CMA.

Availability of informal advice on ‘de minimis’

56. The CMA (via the Mergers Group) will offer informal advice on the potential application of the de minimis exception, subject to the caveats generally applicable to such advice.²⁹
57. Of particular relevance in the context of de minimis is the fact that the CMA relaxes its normal requirement that the request for informal advice relates to a transaction that raises a genuine issue as to referral where the party seeking informal advice is a private enterprise that is unable to afford external competition law advice.³⁰

Consideration of de minimis at an early stage by the CMA

58. When a merger is notified to the CMA, either voluntarily by the parties or following receipt of an enquiry letter from the CMA, the CMA will consider at an early stage of its investigation whether the case is a candidate for application of the de minimis discretion. Indeed, where appropriate, the CMA will engage with parties during any pre-notification phase on what information might be helpful in following the CMA to assess whether a merger is appropriate for application of the de minimis exception.
59. In cases where it becomes clear to the CMA during its investigation that the market(s) concerned is/are of insufficient importance to justify a reference to phase 2, and that there would not be any clear-cut undertakings in lieu of reference available if the duty to refer were met, then the CMA is likely to move towards a decision not to refer on the basis of the de minimis exception.

²⁹ See [CMA2](#), paragraphs 6.25–6.38.

³⁰ See [CMA2](#), paragraph 6.30.

60. This will include scenarios where it would obviously be quicker and more efficient to determine that the discretion would be applied than it would be for the CMA to reach the requisite level of belief that the transaction in question does not in fact trigger the duty to refer (that is, that it should be unconditionally cleared). In such circumstances, the CMA would discuss with the parties whether they would be willing to waive their procedural rights to a full investigation³¹ (including an issues letter and issues meeting) to the extent that the CMA is minded to apply the de minimis discretion.³² In such cases, the CMA would generally leave open the question of whether its duty to refer is met on the basis that its conclusion is that the merger should not be referred to to phase 2, either because the duty to refer is not met or because, even if the duty to refer is met, then the discretion would be applied.³³

³¹ Such consent would be without prejudice to the parties' views on whether the duty to refer was actually met.

³² For example, see paragraph 8 of the Completed acquisition by Govia Limited of South Central Rail Franchise (6 August 2009).

³³ Such a conclusion might be particularly suitable in circumstances such as those arising in Anticipated acquisition by Chiral Technologies Europe SAS of Chromtech Limited (24 September 2008), in which the target's UK turnover amounted to only £80,000 and the overall UK value of the market concerned amounted to substantially less than £10 million.

Arrangements which are insufficiently advanced or likely to proceed

61. This provision ensures that the CMA is not obliged to make a reference if a merger is insufficiently likely to proceed. This may arise where the CMA has issued a decision finding that a merger gives rise to a SLC (which ordinarily would give rise to a duty to make a reference absent an offer of satisfactory undertakings in lieu of reference) but the parties choose to abandon the merger during the 10-working day window for the consideration of undertakings in lieu of a reference.³⁴
62. Another function of section 33(2)(b) of the Act is to avoid the unnecessary expense of a reference where it is still uncertain whether the parties will proceed with the merger (the “insufficiently far advanced” limb).
63. The CMA would usually expect a transaction to be sufficiently advanced to justify a reference where:
- the parties to a transaction have publicly announced an agreed merger or their intention to merge (in whole or in part), or
 - one of the parties to a proposed transaction has announced a possible offer or a firm intention to make an offer for the other notwithstanding that this may be subject to conditions or be a hostile bid.
64. This exception may be appropriate for use in situations where commercial discussions between the parties are still ongoing at the time of the CMA's investigation, for example in anticipated joint venture situations where there remains material ambiguity about how the joint venture will be structured.
65. In practice, and where this is justified, the CMA would take a view soon after notification as to whether a full competition analysis is not required because of the early stage of proceedings and will not proceed with the investigation if the transaction is insufficiently far advanced. This limb of the provision is therefore only likely to be used if the proposed merger suffers unexpected disruption

³⁴ Section 73A of the Act. Examples of abandonment after the decision on SLC but before reference are [Safetykleen/Puresolve](#) (2016) and [Capita/Vodafone](#) (2017). The CMA is not obliged under section 107(1)(a) of the Act to publish a decision if it decides not to refer on the basis of this exception. Under article 4(2) of The Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 no fee is payable in respect of a merger which is the subject of a decision under section 33(2)(b). In contrast, a fee is payable if the merger is referred and then abandoned.

after the CMA has started the 40-working day clock of the initial period and issued an invitation to comment.

Relevant customer benefits

Introduction

66. While mergers can harm competition, they can also give rise to efficiencies which enhance rivalry and/or produce relevant customer benefits.
67. If the efficiencies arising from the merger enhance rivalry within a market where a SLC finding might potentially arise, the CMA can take this into account in its assessment of the merger's impact on competition. For example, a merger of two of the smaller firms in a market resulting in efficiency gains might allow the merged entity to compete more effectively with the larger firms. Rivalry-enhancing efficiencies may lead the CMA to conclude that the merger does not give rise to a SLC in a particular market, or may mitigate the severity of any SLC caused by the merger.³⁵
68. In addition, the CMA may conclude that the merger gives rise to a realistic prospect of a SLC in one market, but also gives rise to efficiencies in a different market. Moreover, the merger may give rise to an adverse effect on one set of customers but not on another set of customers. The CMA has the discretion not to refer a merger for a Phase 2 investigation, or not to accept remedies following a Phase 2 investigation, if the efficiencies arising from the merger result in relevant customer benefits which outweigh the SLC caused by the merger.
69. The CMA considers the likeliness, timeliness and merger specificity of relevant customer benefits, in establishing whether they exist, and considers both quantitative and qualitative evidence of their likelihood and probability in deciding whether they outweigh the adverse effects of the SLC.
70. Relevant customer benefits as a potential exception to the duty to refer a merger to Phase 2 are discussed further below. Relevant customer benefits can also be taken into account in the selection of remedies under section 73, 82 or 84 of the Act.³⁶
71. In practice, the CMA has rarely exercised its discretion to apply relevant customer benefits as an exception to the duty to refer.³⁷ Where merging

³⁵ [Merger Assessment Guidelines \(CC2\)](#), section 5.7.

³⁶ [Merger remedies \[CMA\]](#).

³⁷ As of April 2018, the CMA has only exercised this discretion in relation to the [University Hospitals Birmingham NHS Foundation Trust/Heart of England NHS Foundation Trust \(UHB/HEFT\)](#) and the [Derby Teaching Hospitals NHS Foundation Trust/Burton Hospitals NHS Foundation Trust \(DTHFT/BHFT\)](#). The CMA has also published [CMA guidance on the review of NHS Mergers \(CMA29\)](#).

parties expect relevant customer benefits to play a decisive role in the CMA's assessment of a merger, they should collect and present the relevant evidence to the CMA at the earliest possible opportunity. It may be difficult to consider claimed benefits in detail in a phase 1 investigation unless they are raised at an early stage.

Statutory definition of relevant customer benefits

72. Relevant customer benefits are defined by section 30(1) of the Enterprise Act 2002 (the Act) to be benefits to relevant customers in the form of:
- lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom, or
 - greater innovation in relation to such goods or services.
73. Sections 30(2) and (3) of the Act provide that a benefit is only a relevant customer benefit if it has accrued or is expected to accrue to relevant customers within the UK within a reasonable period from the merger and would be unlikely to accrue without the merger or a similar lessening of competition. Relevant customers are customers at any point in the chain of production and distribution and are therefore not limited to final customers (section 30(4) of the Act).

Illustrations of relevant customer benefits

74. Illustrations of situations where relevant customer benefits (as defined by the Act) might be weighed against the identified loss of competition include the following.³⁸
- Lower prices. A merger may, despite leading to a SLC, give clear scope for large cost savings through a reduction in marginal costs of production. In these circumstances, the merged firm – even if it is a monopolist – may therefore pass on some of this reduction in the form of lower prices to its customers such that it might outweigh the SLC.
 - Greater innovation. A merger might, in rare cases, facilitate innovation through research and development that could only be achieved through a certain critical mass, especially where larger

³⁸ Different types of efficiencies, which may be considered in some cases as relevant customer benefits, are discussed in the Merger Assessment Guidelines paragraphs 5.7.6 to 5.7.18.

fixed (and) sunk costs are involved. Exceptionally, the benefits likely to be passed through to customers from such innovation might outweigh the SLC.

- Greater choice or higher quality. In unusual circumstances, a merger might bring together two companies' specialist resources in a way which would not be possible, absent the merger, and which would allow them to produce a higher quality product.

Assessing the existence of relevant customer benefits

75. Where potential relevant customer benefits have been identified, the CMA considers the likelihood, timeliness and merger specificity of the claimed benefits, to assess whether relevant customer benefits exist under section 30 of the Act.
76. In assessing a claimed benefit's likelihood, the CMA considers the merging parties' incentives, and their ability to implement the claimed benefit, post-merger. The claimed relevant customer benefits must be clear, and the parties should be able to produce detailed and verifiable evidence that anticipated price reductions or other benefits will in fact emerge.³⁹
77. In considering the timeliness of a claimed benefit, what is a reasonable period will vary on a case-by-case basis. It may depend, for example, on the nature of the proposed benefit and the circumstances of its implementation.
78. To determine whether a claimed benefit is merger specific, the CMA will consider whether the merging parties had plans to take similar actions absent the merger (eg to undertake a given research project), and whether the merger parties would have the ability and incentive to achieve the benefits independently or through other arrangements, such as another merger or through an agreement which does not amount to a merger, that do not themselves give rise to competition issues of a similar magnitude.
79. In assessing the likelihood, timeliness and merger specificity of relevant customer benefits, the CMA may consider a wide range of evidence, including:
 - The merging parties' plans to implement the relevant customer benefits (the more detailed, the better);

³⁹ For example, in UHB/HEFT and DTHFT/BHFT, NHS Improvement (an expert regulator) advised the CMA, assisting in verifying the Parties' submissions on benefits.

- The views of third party stakeholders (especially those which could delay or prevent of the realisation of relevant customer benefits); and
 - The merging parties' track record in implementing similar initiatives in similar circumstances.
80. The provision of evidence by merging parties that relevant customer benefits will result from the merger in no way implies that they accept the existence of a SLC.

Weighing relevant customer benefits against the SLC

81. When it finds that relevant customer benefits exist, the CMA considers whether they outweigh the adverse effect from the merger's impact on competition.
82. To clear a case on the basis of relevant customer benefits, the CMA would need to believe that customers overall would be better off with the merger, despite the fact that the CMA believes that the merger raises a realistic prospect of a SLC which will harm some customers. These will be rare cases since, ordinarily, the CMA would expect that a substantial loss of competition which leads to higher prices, lower quality, reduced service and/or reduced innovation in one or more markets would be unlikely to also present benefits to customers, whether in those or other markets.
83. To be counted, the claimed relevant customer benefits must accrue to customers of the merging parties (or to customers in a chain beginning with those customers), but need not necessarily arise in the market(s) where the SLC concerns have arisen. Sufficient relevant customer benefits may accrue in some market(s) as a result of the merger that outweigh a finding of realistic prospect of a SLC in other market(s).
84. In assessing the weight of the claimed relevant customer benefits, the CMA has regard to both the magnitude of the benefits and the probability of them occurring. This is set against the magnitude and probability of the identified anti-competitive effects. The more powerful and more likely the anti-competitive effects of the merger, the greater and more likely the relevant customer benefits must be to meet and overcome such concerns.⁴⁰

⁴⁰ For example, in UHB/HEFT and DTHFT/BHFT, the merging parties were public service providers operating in a heavily regulated environment. The CMA therefore concluded that the role of competition was reduced (although not eliminated), and took this into account in weighing the benefits against the competition concerns.

85. The CMA may consider both qualitative and quantitative evidence in assessing the magnitude of relevant customer benefits. Merging parties should give careful thought to what quantitative evidence they can provide to substantiate claimed benefits. Quantitative evidence is particularly important in circumstances in which it is difficult to judge whether the scale of the relevant customer benefits is such that they outweigh the competition concerns.

Relevant customer benefits and remedies

86. It is not possible for the CMA both (i) to apply relevant customer benefits as an exception to the duty to refer, eg in relation to certain affected markets, and (ii) to accept an undertaking in lieu in respect of other affected markets.⁴¹
87. The CMA is exercising a discretion in deciding whether to refer the merger in question for a Phase 2 investigation. In exercising this discretion, the CMA has regard to the benefits of a Phase 2 investigation, including the possibility of remedies being obtained at Phase 2 that could prevent a SLC while also capturing any relevant customer benefits.

⁴¹ See [Merger Remedies \[CMA\]](#)