

Completed acquisition by Rentokil Initial plc of the pest control, fire and water businesses of Connaught plc (Santia branded businesses)

ME/4911/11

The OFT's decision on reference under section 22(2)(a) given on 13 June 2011. Full text of decision published 14 July 2011.

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

PARTIES

1. **Rentokil Initial Plc** (Rentokil) is a global business services provider with activities including pest control, building, facilities management, courier services, catering services and the rental and laundering of textiles. In the UK, **Rentokil Initial UK Limited** (Rentokil IUL) provides services which include pest prevention and control, timber care and damp proofing, water treatment and hygiene.
2. The Target comprises the assets and employees of the pest control, fire and water businesses formerly owned by **Connaught Plc** (in administration) (Connaught) and/or its subsidiaries:
 - i. Santia Pest Prevention Limited (Santia PPL)
 - ii. Santia Water Services Limited (Santia WSL)
 - iii. Santia Fire Services Limited (Santia FSL).

The UK turnover of the Target in 2010 was £30.5 million.

TRANSACTION

3. Connaught went into administration on 8 September 2010 and Rentokil acquired the Target from the administrator on 14 February 2011.

4. The OFT launched its own-initiative merger investigation on 22 February 2011. The administrative deadline for OFT to make a decision on this case is 7 June 2011 and the statutory deadline is 13 June 2011.

JURISDICTION

5. As a result of this transaction Rentokil and the Target businesses have ceased to be distinct. The parties overlapped and had a combined share of supply of 90-100 per cent in the wholesale supply of metal phosphide products for the fumigation of bulk commodities. Therefore the share of supply test in section 23(3) of the Enterprise Act 2002 (the Act) is met. As a result, the OFT believes that it is or may be the case that a relevant merger situation has been created.

MARKET DEFINITION

Product scope

Pest control services (excluding fumigation)

6. The market for pest control has previously been defined as:

'...the undertaking and performance for gain or reward of engagements to prevent or remedy infestation by pests, but does not include the undertaking and performance of engagements to prevent or remedy the infestation by pests or animals, or of trees or crops growing in the open air, or damage by woodworm or other wood-boring insects'¹
7. The MMC Report defined 'pests' as 'insects, rodents and birds'. In this case Rentokil argues that since there is little specialization by pest control service providers, with all generally being able to provide the full range of services, there are no grounds for subdividing the relevant product market further than this.
8. Set against this, the MMC Report found that although almost all providers supplied pest control services relating to insects and rodents, a lower percentage provided them relating to birds. Further, the OFT considers that markets are defined primarily on the basis of demand-side

¹ Monopolies and Mergers Commission: Pest Control Services: A report on the supply of pest control services in the United Kingdom, 1988, Cm 302 (**MMC Report**).

substitution and not on the basis of supply-side substitution, as suggested by Rentokil.

9. In this regard, although some customers responding to the OFT enquiries purchased pest control services that dealt with a subset of these pests, other customers procured pest control services against a wider variety of pests, including feral cats, rabbits and moles. It may be appropriate to define a range of product markets commensurate with the range of different customer requirements. However since no competition concerns arise in this market under any product market definition, the OFT leaves open the question of whether the relevant market would include pest control services relating to a narrower or wider set of pests than insects, rodents and birds.
10. Although the OFT Review² did not reach a firm conclusion on market definition, it did consider that it may be appropriate to distinguish between domestic, business and public sector customers on a local basis and national-account customers.³ In addition, the OFT considered that customer groups may vary depending on their preferences and requirements. A distinction would differentiate those procuring pest control services as a largely preventative measure (by contract) and those to treat an existing infestation (job work).⁴ For instance, the MMC Report found that the supplier set for hospital customers was relatively limited, with only about a third of pest control suppliers supplying them. However, as no competition concerns arise in this market under any market definition it has not been necessary to consider these possible delineations further.
11. On the basis of the evidence above, the OFT has examined the impact of the transaction on the supply of pest control services as defined by the MMC in paragraph 6 above, albeit without concluding on whether the appropriate subset of pests treated is narrower or wider than insects, rodents and birds. This decision has also differentiated the impact of this merger on different customer groups (that is, national-account and

² Review of undertakings given by Rentokil Initial Plc, OFT Report (Consultation 2002 and Final Report 2003), paragraph 18, page 4 (Final Report 2003) See both at: www.offt.gov.uk/shared_offt/register_of_orders_and_undertaki/rentokil.pdf

³ The OFT Report defined 'national-account customers' as customers who require multi-site contracts, ie supermarkets, brewers, etc. across several regions, that is, most, or the whole, of the UK. See footnote 3, page 4 (Final Report 2003).

⁴ See OFT Report, paragraph 2.3, page 3 (Consultation 2002)

regional multi-site customers on the one hand and local domestic and single-site customers on the other). The OFT has not considered fumigation as part of the wider pest control market because of the specific demand- and supply-side features associated with this type of pest control that are discussed in the section below.

Fumigation services

12. Fumigation services relate to pest control for the prevention of insect infestation, particularly in food storage and for container distribution. Fumigation services were not considered separately in the MMC report or OFT Review, however, Rentokil submits that this service requires specific licensing and regulations, and the customer base tends to be different from that for mainstream pest control services. Fumigation tends to be provided by specialist firms and does not form part of the general service offering of most pest control firms. This was corroborated by third parties and, on this basis, it appears appropriate to define a market for fumigation services that is separate to general pest control services.
13. Within this fumigation market, Rentokil suggests that there are three main segments, each with slightly different characteristics.
 - i. Fumigation of bulk commodities
14. Fumigation of bulk commodities, such as grain, is typically carried out by a fumigation provider using a phosphine generating metal such as aluminium phosphide or magnesium phosphide.⁵ Other treatment methods such as heat treatment or carbon dioxide can be used but Rentokil did not consider this to be common practice. Consistent with this, third parties told the OFT that no other products are as effective or non-residual as metal phosphides for treating commodities. On the basis of the above evidence the OFT has considered the impact of the transaction on the supply of fumigation services using metal phosphide for bulk commodities.

⁵ Pellets of aluminium phosphide, calcium phosphide, or zinc phosphide release phosphine upon contact with atmospheric water or rodents' stomach acid.

15. Some third parties indicated that the fumigation of commodities aboard ships was more specialized than fumigation more generally and that fewer firms may provide this service. The parties also submit that fumigation using aluminium phosphide can be done at lower temperatures and in less time (although at greater expense) than with magnesium phosphide. However, the OFT received no evidence to suggest that these segments should properly be defined as separate relevant markets.

ii. Fumigation of buildings

16. Rentokil submits that many businesses will manage their risks through cleaning and ad hoc pest control methods, and because of this the fumigation of buildings should be considered part of general pest control fumigation.

17. That said, Rentokil states that building fumigation is typically carried out using either Profume (the trade name of a product manufactured by Dow AgroSciences containing the active ingredient sulfuryl fluoride) or heat treatment. A Profume treatment takes two to three months to carry out and costs around [] per site. By contrast, heat treatment involves heating a space to around 55 degrees Celsius for around 2.5 hours.

18. Rentokil submits that heat treatment is normally used for spot treatment rather than the entire building and that it may not be a substitute for fumigation in some circumstances such as when electronics could be damaged by exposure to the high temperature.

19. On a cautious basis the OFT considers it appropriate to consider building fumigation separately from the general pest control fumigation. The parties only overlap in the provision of building fumigation services to the extent that Santia PPL supplied Profume treatments and Rentokil offers heat treatments. Given the innate differences between these treatment types, and that no third party concerns regarding a lessening of competition were raised with relation to either, the OFT does not consider that the merger raises a realistic prospect of a substantial lessening of competition (SLC) and this market is not considered further in this decision.

iii. Fumigation of small valuable objects

20. Rentokil submits that fumigation of high value objects such as furniture and textiles is a service used by museums and the heritage market as a way of dealing with pests such as wood boring insects or textile moths. This type of fumigation is typically carried out using Controlled Atmosphere Technology ('CAT') which treats the item in a sealed off bubble with a gas such as carbon dioxide, nitrogen, or with the creation of a low oxygen controlled atmosphere. In 2010, the parties overlapped only in CAT fumigation using carbon dioxide.
21. One customer described other substitutable methods of pest control that might be used for small valuable objects, such as freezing or smoke generation. However, this customer said that, at least for some applications where other methods would be harmful to the affected items or ineffective, only CAT fumigation would be appropriate.
22. The OFT considered whether CAT fumigation is a relevant market or whether it would be appropriate to delineate the market into CAT fumigation using (i) carbon dioxide; (ii) nitrogen; or (iii) low oxygen controlled atmosphere. One customer of CAT fumigation using carbon dioxide submitted that they could have used nitrogen but it would have been a more expensive and labour intensive treatment, while a low oxygen alternative treatment may be an option in the future.
23. On a cautious basis, the OFT has considered the impact of the merger on the market in CAT fumigation using carbon dioxide (as the narrowest plausible market in which the parties overlap) as well as a wider CAT fumigation market.

Wholesale supply of metal phosphide products for fumigation of bulk commodities

24. The only phosphine generating products approved for use with foodstuffs in the UK are aluminium phosphide and magnesium phosphide, which are manufactured in Germany by Detia Degesch GmbH (Detia Degesch). Detia Degesch produces these products under the Detia and Degesch brands, with similar products produced in both product ranges.

25. On the basis of the evidence described in paragraph 14, the market is considered to be no wider than the wholesale supply of metal phosphide products for the fumigation of bulk commodities.

Water hygiene and treatment services

26. Water treatment and hygiene services aim to manage legionella risks. The OFT understands that this covers a wide spectrum of treatment methods and customer requirements.
27. Rentokil claims that at one end of this spectrum are water hygiene services; these relate to the low-tech management of legionella risks through temperature monitoring. These services are typically purchased by SMEs for use in offices and properties considered to be low risk.
28. At the other end of the spectrum are water treatment services, which include chemical analysis and treatment of systems to both reduce the risk of legionella and to reduce corrosion. Rentokil submits that the customer base for treatment services is very different from that for hygiene services. Chemical treatments tend to be purchased by high risk entities such as care homes, hospitals and other specialist businesses (including those with large complex buildings with open water systems).
29. Rentokil suggests that these ends of the spectrum can be differentiated on the basis of the skills required for those that identify the risks and those that undertake the work.
30. On a cautious basis, the OFT has considered that the relevant market may be the provision of all water treatment and hygiene services, or any plausible set of services within this broad category (including possibly a market for water treatment services and a separate market for water hygiene services). As each customer's requirements may be unique based on the characteristics of its property and its use, possibly with a commensurately distinct supplier set, it may even be appropriate to consider that each customer constitutes its own market.
31. However, on the basis that no concerns arise under any plausible market definition, the OFT has not had to conclude on the precise product market definition in this case.

Other goods and services in which the parties' activities overlapped

32. The parties also overlap in the following activities:
- i. property care services
 - ii. supply of pest control products (other than the wholesale supply of phosphide products for the fumigation of bulk commodities).
33. Rentokil submitted that the parties' combined share of supply with respect to the manufacture or supply of any plausible, narrowly-defined pest control product, or any plausible, narrowly-defined property care service, would not exceed 15 per cent (within any plausible geographic market). Such market shares are not high enough to give the OFT cause for concern over unilateral effects. This, together with the fact that the OFT received no concerns from third parties, has led the OFT to consider that the merger does not give rise to a realistic prospect of an SLC on the basis of unilateral effects in either of these product overlaps and hence they will not be considered further in this decision.

Geographic scope

Pest control services (excluding fumigation)

34. The OFT Review considered that national account customers generally prefer to use the services of a single, well-known pest control company able to provide national coverage and that—for those particular contracts—local competition may have little effect on constraining the pricing behaviour of larger firms. On this basis the OFT Review considered that it may be appropriate to distinguish between the supply of pest control services to (i) domestic, business and public sector customers on a local basis, and (ii) national-account customers, where competition takes place on a national scale. However, while making the distinction between national-account customers and other customers, the OFT did not conclude on whether local and national-accounts are in separate markets. In this case large national customers expressed a preference to source services from a single supplier who can service all of their sites rather than to subcontract to several local suppliers.

35. In this case Rentokil submits that the relevant market is the market for the provision of pest control services in the UK and division of the UK into national and local markets remains unnecessary. Rentokil offers pest control services via 26 branch offices, operating a 'virtual branch system' where operational and administrative support is provided to technicians through a limited number of support offices. Technicians operate from their home addresses and meetings are held remotely. Rentokil submits that the Santia business is more branch-based, but that its technicians still operate in a similar way to Rentokil's, working from home and using PDA's to communicate with their managers. One competitor responded to OFT enquires and confirmed that, from a small number of office locations it provides services all over the UK and Ireland.
36. However, the OFT considers that even if suppliers notionally offer pest control services nationally, evidence presented to the OFT suggests that local competitive conditions may vary in different areas of the country. For instance, Rentokil states that one rationale for the acquisition was for it to obtain a greater density of coverage in local areas where it is underrepresented, such as East Anglia, in order to improve its offering to customers in those locations. The OFT considers that greater branch or staff density may be commensurate with a more competitive offering for customer accounts within a local area, and so that the constraint represented by different suppliers may vary by area.
37. It is also plausible that a supplier may be able to better serve a customer account where its network of branches/staff is commensurate with the location of customer sites. This is for a variety of reasons: response times, customer relations, marketing etc may all be easier and more effective if the customer is in the vicinity of a supplier's branch or staff. This may be particularly the case where the service required includes regular checking of client sites, which may not be feasible or efficient if the customer and supplier premises are located far apart.
38. Varying market penetration of suppliers in different areas would be consistent with a proposition that competitive conditions may vary in different local or regional areas. A Rentokil internal document regarding the pest control activities of Connaught states:

'The business has a national presence, although there is a strong weighting towards northern Home Counties and Suffolk and Essex which accounts for c.[40-50]per cent of portfolio. London accounts for c.[0-10] per cent of portfolio as does the Midlands and the North East. There is a limited presence in Scotland and the South West'

39. In summary, the evidence presented to the OFT suggests that there may be local, regional and national elements to competition in the supply of pest control services. The merger has been assessed at each of these levels, though it has not been necessary for the OFT to conclude on the precise geographic definition as no concerns arise under any definition.

Fumigation services

40. Rentokil submits that both it and Santia offer national coverage, with the distribution of their service provision largely driven by the location of customers that require these types of services. For instance, Rentokil says that clusters of customers would be present at key coastline port locations.
41. The Santia PPL fumigation business offers national coverage from its Croydon office. Two competitors also told the OFT that it is possible to offer fumigation services throughout the UK from a single office location. Responses from several other competitors corroborate this, although they also indicate that fumigation activities tend to be within fairly wide regions around business premises.
42. For these reasons, the OFT has considered the provision of fumigation services on a UK basis.

Wholesale supply of metal phosphide products for fumigation of bulk commodities

43. Metal phosphide products for the fumigation of bulk commodities are manufactured by Detia Degesch in Germany and imported and distributed in the UK by Rentokil and Connaught. One third party told the OFT that there are other suppliers of metal phosphide products globally but that none are currently licensed for use in Europe with foodstuffs. The same

third party asserted that the costs of obtaining a license for one of these alternative suppliers would be very high.

44. The OFT has therefore assessed the impact of the merger on a UK basis.

Water treatment and hygiene services

45. Rentokil states that the water treatment services offered by Santia WSL are provided on a national basis by teams based in Newton Abbott and Birmingham. There is some concentration in customer distribution around these offices but Rentokil argues that this does not affect the characterization of the activities of Santia WSL as being national. Rentokil states that its water hygiene business is evenly spread across the UK, operating from ten water quality management offices.
46. Evidence from the parties' internal documents was mixed. A Rentokil's [plan] suggests that [] (70-80 miles away). [] this suggests that the supply areas of their branches are fairly wide. Conversely, another Rentokil internal document indicates that Rentokil's small portfolio of water treatment activities are currently not sold nationally but indicate that this would be the intention post merger.
47. For similar reasons to those discussed in paragraph 39 above, while suppliers of water treatment and hygiene services may notionally offer a 'national' service, suppliers may provide a more competitive offering for some or all customer accounts within the vicinity of their business premises or staff. The concentration in customer distribution around the Santia WSL premises, as well as the current implied sub-national provision of some Rentokil water treatment services, further suggest that it would potentially be appropriate to define markets in the provision of water treatment and hygiene services that are narrower than national.
48. Customers told the OFT that they considered it desirable to have one firm operating across all of their sites, on this basis it appears likely that— similar to pest control services—there may be local markets for local accounts and regional or national markets in the supply of regional or national accounts. Consequently, the OFT has assessed the competitive impact of the merger on both bases.

CONCLUSION ON MARKET DEFINITION

49. On the basis of the above, the OFT has assessed the competitive impact of the merger on the basis of:
- the national and sub-national supply of pest control services excluding fumigation
 - the national supply of general pest control fumigation
 - the national supply of metal phosphide for fumigation of bulk commodities
 - the national supply of fumigation services for small valuable objects (both general CAT fumigation and carbon dioxide CAT fumigation) and
 - the national and sub-national supply of all water treatment and hygiene services, and of water treatment services and water hygiene services separately.

HORIZONTAL ISSUES

PEST CONTROL SERVICES (EXCLUDING FUMIGATION)

Shares of supply

50. Rentokil provided the following estimates of national market shares in the supply of pest control services (excluding fumigation services).

Table 1: Market shares in the supply of pest control services (excluding fumigation) in the UK, by value (2009)

Company	Per cent
Rentokil	[20-30]
Connaught	[0-10]
Parties combined	[20-30]
Ecolab	[10-20]
Cannon Hygiene	[0-10]
MITIE	[0-10]
Others	[50-60]
Total (£[250-300] million)	100

Source: Rentokil based on its own internal survey, 2009

51. Overall, including national and sub-national customer groups, internal documents provided by Rentokil also suggest that Ecolab is its largest competitor by value and that Connaught (Santia PPL), MITIE and Cannon Hygiene have lower shares of supply. The parties' combined market shares were estimated to be slightly higher in a Rentokil 2010 board strategy paper, at [20-30] per cent (increment [0-10] per cent), though it is not clear whether these estimates included revenues from fumigation services. These market shares would not ordinarily give the OFT cause for competition concerns over unilateral effects, given that the market is drawn narrowly.
52. Differentiating by customer groups, at local/sub-national level, the OFT received no evidence that the parties' combined market share in any local market was likely to be high enough to give it cause for concern over unilateral effects, given the presence of these many small, local pest-control companies.
53. On the impact of the merger for national-accounts and multi-site regional customers (which may constitute a separate market), the OFT considers that the parties' share of the supply of pest control services would likely be much higher than the shares of supply shown in Table 1. This is because the estimated shares of supply in Table 1 may include smaller local pest control companies who will not compete with the larger pest control firms for regional or national accounts. As a result, the OFT has

proceeded to consider the closeness of competition between the merging parties and the competitive constraints remaining post merger.

Closeness of competition

54. Third party views and internal documents provided mixed evidence on the closeness of competition between Rentokil and Santia PPL for regional or national accounts. Some third parties considered them to be close competitors and Rentokil's internal documents indicate that Santia PPL is considered a significant competitor to Rentokil. However, two customers, one regional and one national, told the OFT that Ecolab and MITIE are closer competitors to Rentokil than is Santia PPL. Furthermore, as described in paragraph 36, Rentokil submits that the parties' activities are complementary in that Santia PPL is strong in regions that Rentokil was not before the merger.
55. Customer views on the degree of choice remaining post merger varied. However, comments from several large customers (with multiple sites) indicated that at least four significant alternative suppliers would remain for regional or national contracts (Ecolab, MITIE, Pestokil and Green Compliance and Peter Cox).
56. The OFT also received very few concerns from national or regional customers regarding the acquisition in respect of pest control services. Accordingly, the OFT takes the view that—consistent with the small market share and increment at a national level discussed above—the presence of several remaining competitors and the lack of customer concerns indicate that the proposed transaction does not give rise to a realistic prospect of a substantial lessening of competition for regional or national contracts on the basis of unilateral effects in the pest control market.

GENERAL PEST CONTROL FUMIGATION SERVICES

Shares of supply

57. Rentokil estimates that the total size of the national fumigation market is around £[10-15] million per annum. The parties' estimates of market shares are reproduced in Table 2 below.

Table 2: Rentokil's estimates of fumigation market shares in the UK, by value

Company	Per cent⁶
Connaught	[10-20]
Rentokil	[0-10]
Parties combined	[20-30]
Command Pest Control	[10-20]
Ellibert Bros	[0-10]
Others ⁷	[50-60]
Total (£[10-15] million)	100

Source: Rentokil

58. The parties' combined share is [20-30] per cent with an increment of [0-10] per cent. Command Pest Control is the parties' largest competitor and there is a long tail of small competitors accounting for over half the market. The parties' combined market share is not high enough to give the OFT cause for competition concerns over unilateral effects, given that the market is drawn narrowly. Notwithstanding this, evidence on the closeness of competition between the parties is considered below.

Closeness of competition

59. In respect of fumigation services in general, Rentokil submits that it has only been active in this market to a limited extent since methyl bromide was banned in Europe. This is supported by an internal Rentokil document stating that '[Santia] is very strong in the fumigation market which Rentokil currently doesn't have a presence in.'⁸
60. Consistent with this, no third parties raised concerns about fumigation services in general. On this basis—and mirroring the small market share and increment at a national level discussed above—the OFT does not consider that the merger creates a realistic prospect of an SLC on the basis of unilateral effects in the overall market for fumigation pest control services.

⁶ Based on a total market value of £[10-15] million.

⁷ Based on a total market value of £[10-15] million.

⁸ Rentokil's Board note titled: 'Acquisition of the Services division of Connaught Compliance Ltd' as submitted by Rentokil in Annex 3 to its submission to the OFT of 11 March 2011.

FUMIGATION SERVICES FOR BULK COMMODITIES

Shares of supply

61. In the supply of fumigation services for bulk commodities, the parties estimate that the national market was worth between £[1-2] and [1-2] million in 2010. On the basis of the lower market value estimate, the parties' combined market share in this market was [50-60] per cent (increment [0-10] per cent). Using data from third parties the OFT has estimated that the market might be around £[1-2] million in size, on which basis the parties would have a market share of up to [70-80] per cent (increment [0-10] per cent).
62. On either basis, these shares are high enough to give the OFT cause for competition concerns over unilateral effects. For this reason, evidence on the closeness of competition between the parties and possible unilateral effects resulting from this merger are examined below.

Closeness of competition

63. Customers for these services named six alternative suppliers to the parties (Fuminex, Command, Termapest, Dealey Pest Control, Pest Force, John Fiddes). No end customer (users of fumigation services for bulk commodities) raised any substantiated complaints about the merger.
64. When assessing the level of closeness of competition, customers noted that Santia is the leading fumigation company for bulk commodities on vessels in the UK. Conversely, the OFT notes that Rentokil has a relatively small presence in this market.
65. However, some competitors in the provision of fumigation services for bulk commodities noted that the parties may be the strongest constraints on one another by virtue of their vertical integration. They both are the only wholesale suppliers of metal phosphide, a critical input into the provision of this type of fumigation services. This was said by third parties to give them an advantage (in terms of cost and availability) in acquiring it from its German manufacturer.
66. Notwithstanding that, on balance, this evidence corroborates the OFT's concerns on the basis of the parties' markets shares (discussed above),

the OFT has not needed to conclude on whether the merger gives rise to a realistic prospect of an SLC on the basis of unilateral effects in the supply of fumigation services for commodities. This is because OFT's concerns are subsumed in the vertical concerns that arise by virtue of the parties' position as the only two suppliers of metal phosphide to suppliers of fumigation services in this market, discussed in paragraphs 89 to 106 below.

FUMIGATION FOR SMALL VALUABLE OBJECTS (USING CARBON DIOXIDE AND WIDER CAT FUMIGATION)

Shares of supply

67. Rentokil told the OFT that the parties are two of only three firms (EC02 BV being the other) licensed in the UK for the use of carbon dioxide as a fumigant (outside of some exemptions for bulk commodity use). Rentokil believes that the fumigation services offered by EC02 BV are likely to be for the treatment of crops rather than of small valuable objects. On this basis, the market to supply fumigation services for small valuable objects using carbon monoxide was worth around £[100,000-150,000] in 2010, of which the parties would have had a [90-100] per cent (increment [20-30 per cent] share). This combined share is high enough to give the OFT cause for concern over unilateral effects.
68. Rentokil did not supply market value or share of supply estimates that included the use of CAT fumigation using nitrogen or use of a low oxygen controlled atmosphere. That said, Rentokil submits that the number of firms able to supply CAT fumigation using nitrogen is not limited as firms are not currently required to be licensed to use nitrogen as a fumigant.
69. However, the parties' revenues in these activities were negligible (only £ [] in 2010) and the OFT considers, to the extent that the parties' service mix may roughly reflect the wider market, that neither the market value or the parties' market shares are likely to be materially different if the relevant market is the supply of fumigation for small valuable objects using CAT fumigation with CO₂ or CAT fumigation in general: that is, high enough to give it cause for concern over unilateral effects. For this reason, evidence on the closeness of competition between the parties and possible unilateral effects resulting from the merger are examined below.

Closeness of competition

70. Consistent with the OFT's concerns given the parties' combined market shares (discussed above), the OFT received one complaint from a customer who feared that a monopoly provider may raise prices and that CAT treatments may be unaffordable in future.
71. Rentokil argues that the use of carbon dioxide and nitrogen as fumigants will, from November 2012, be governed by the Biocide Product Directive. Rentokil told the OFT that it believes only it has registered to use carbon dioxide and nitrogen as fumigants under this new licensing regime and, as such, the merger will not impact the number of firms active in this sector going forward.
72. However, the new regime does not come into force until November 2012 and the OFT considers that the Target might reasonably be expected to have applied for registration to continue to provide such fumigation services in future in the absence of the merger. In light of this—and consistent with the parties' combined market share—the OFT is of the view that the merger may result in a realistic prospect of an SLC in this market.

WHOLESALE SUPPLY OF METAL PHOSPHIDE PRODUCTS

Shares of supply

73. Prior to the merger, the parties were the only suppliers of metal phosphide products for fumigation of bulk commodities in the UK and now the merger has created a monopoly at the wholesale level of supply.⁹ Their turnover from selling these products to third parties in the UK was £[] in 2010. The cost price of the phosphide products the parties used internally in 2010 was £[].
74. In assessing whether self-supply should be included in the same market as merchant supply, the OFT follows the principle that the two will be included in the same relevant market if it would be profitable for the supplier to forgo its own use of the input and sell into the merchant market in response to a SSNIP. Given that the parties use this internal supply to provide fumigation services in competition with downstream

⁹ The OFT is aware that another firm distributes metal phosphide products in the UK for use in the fumigation of moles and rats.

competitors just such a pricing constraint runs from merchant use to self-supply. Thus, it is appropriate that the parties' internal supply should be included in the merchant market and valued at the market rate at which they supply metal phosphide products to third parties.

75. On the basis of information received from third parties regarding the approximate cost per kg of phosphide products purchased from the parties, the OFT estimates that the parties' internal supply could be valued at up to £ [].
76. Adding the market value of the parties' internal supply of metal phosphide to the parties' sales to third parties in 2010, the OFT estimates that the market to supply metal phosphide products used for fumigation of commodities may be worth up to approximately £[250,000-750,000] in 2010.
77. On this basis, the merger is to monopoly and gives the OFT cause for concern over unilateral effects. Evidence on the closeness of competition between the parties is therefore examined below.

Closeness of competition

78. Rentokil and the German supplier of these products, Detia Degesch agreed with the statement that the merged parties, prior to the merger were the only wholesale suppliers of metal phosphide and that the merger has led to the creation of a monopoly at that (wholesale) supply level.
79. Despite this, Rentokil submits that the parties' sales of metal phosphide products (for bulk commodity applications) to third parties in the UK were likely to have been sales of excess stock. Set against this, the OFT notes that in 2010, Rentokil sold over £[] worth of Detia Degesch metal phosphide products in the merchant market but used only £[] worth of them internally, which does not seem consistent with Rentokil's sales being simply excess stock. [End note 1]
80. Several third parties told the OFT that the parties were the only suppliers of metal phosphide products for use with commodities to the UK, and that they had concerns that prices charged by the merged entity might rise going forward or they would be vulnerable in obtaining supplies. It was also presented to the OFT by an expert third party that the level of competition between the parties at the wholesale level had not been very significant. It was noted that the parties' wholesale list prices had been

fairly similar. Although it was also stressed that prior to the merger, the possibility of bilateral negotiations or threat to switch at least existed.

81. Consequently, the OFT considers that the merger may give rise to a realistic prospect of an SLC on the basis of unilateral effects in the wholesale supply of metal phosphide products in the UK. The OFT considers that the lessening of competition in this market raises additional vertical concerns discussed at paragraphs 89 to 106.

WATER TREATMENT AND HYGIENE SERVICES

Shares of supply

82. Rentokil estimates that the overall water hygiene and treatment market was worth £[200-250] million in 2010. Although Rentokil did not provide detailed market share estimates, it estimates that the parties had a combined market share of [0-10] per cent (increment [0-10] per cent).
83. A Rentokil internal document prepared in relation to the acquisition indicates that the water market has a core of very large competitors (Nalco and GE) then mid sized firms (Clearwater and IWS) and a tail of independents. Santia WSL is described as being 'positioned 4th' in the market with a [0-10] per cent national market share.
84. The national market shares are not of a level that would typically give the OFT cause for concern over unilateral effects. However, as discussed previously, the OFT considers that the relevant market definition may be narrower than the overall supply across all hygiene and treatment services in the UK.
85. On a narrower market definition, and particularly in respect of regional and/or national accounts, the OFT considers that the parties' combined share of supply may be materially higher than these overall market shares. Given this the OFT has proceeded to consider the closeness of competition between the merging parties below.

Closeness of competition

86. Consistent with Rentokil's submission that it focuses on water hygiene services and Santia WSL on water treatment services, the majority of customers either did not consider the parties to be competitors at all, or

not to be particularly close competitors in this market or any segment of it (for example, national accounts or regional accounts).

87. No customers in any segment raised any significant concerns in this market and—consistent with the parties' low combined overall market share— all were able to identify a number of alternative suppliers to the merging parties for both water hygiene and water treatment, and for national and sub-national business. On this basis, the OFT does not consider that the merger gives rise to a realistic prospect of an SLC in the supply of water hygiene or treatment services.

Conclusion on unilateral effects

88. On the basis of the above, the OFT considers that the merger may give rise to a realistic prospect of an SLC on the basis of unilateral effects in the fumigation of small valuable objects (both overall CAT and carbon dioxide only CAT fumigation) and in the supply of metal phosphide products for fumigation of commodities. In the light of its discussion of non-horizontal issues (below), the OFT has left open the question of whether the merger also gives rise to a realistic prospect of an SLC on the basis of unilateral effects in the fumigation of commodities.

VERTICAL ISSUES

Supply of metal phosphides and related fumigation services

89. Pre-merger, the parties were the only two vertically integrated firms who were present in both the supply of metal phosphide products (for use with bulk commodity fumigation) and the associated downstream commodity fumigation service market. On this basis, several competing fumigation firms raised concerns over the impact of the merger on the availability and price of metal phosphides.
90. In light of these concerns, the OFT has examined whether the merger may give Rentokil the ability to engage in a partial input foreclosure strategy post merger (by increasing the price of metal phosphide products to rival fumigators), whether it would give Rentokil an incentive to do so and the effects (if any) resulting from any foreclosure. In addition, the OFT received representation from a third party concerned that Rentokil would now have greater knowledge on the amount of work being carried out by competitors than it had pre-merger. The OFT has therefore also

considered the likely impact from such access to commercially sensitive information of its non-integrated rivals in the fumigation market.

Ability to foreclose

91. All third parties who have responded to the OFT information request on this issue have stated that there is no viable alternative input to metal phosphide to which they could switch to in the event that the merged entity raised prices or limited wholesale supply. Consistent with this, third parties told the OFT that Detia Degesch has not to date considered granting an additional licence to a new entrant. Where downstream rivals are unable to turn to any good substitutes for the input, the merged firm will be more able to impose a price increase.¹⁰
92. That said, Rentokil informed the OFT that the cost of metal phosphides accounts for only a relatively small proportion—between [] and [] per cent—of the revenue that they subsequently generate in fumigation services. All else being equal, where the input accounts for only a small part of the total costs incurred, the merged firm will be less able to harm its downstream rivals' ability to compete.¹¹ Set against this, third parties provided information to the OFT which indicated that the cost of purchasing metal phosphides from the parties can account for up to [40-50] per cent of the subsequent fumigation revenue generated.
93. Based on the above, the OFT considers that the merger gives Rentokil the ability to foreclose its downstream rivals.

Incentive to foreclose

94. In assessing whether the merged firm may have the incentive to foreclose rival fumigators, the OFT considers:
- the loss of profits on sales of metal phosphides to rivals fumigators lost as a result of the price increase/restriction of supply
 - the gain in profits on sales of fumigation as final customers switch away from foreclosed downstream rivals to the merged firm's fumigation services

¹⁰ See Merger Assessment Guidelines, paragraph 5.6.10(b).

¹¹ See Merger Assessment Guidelines, paragraph 5.6.10(a).

- the level of incremental profit margins on metal phosphides and fumigation.
95. The loss of profits on lost sales of metal phosphides will be lower when competition in the supply of metal phosphides is muted, as it is in this case.¹²
96. The gain in profits on sales of fumigation diverted from downstream rivals will be less where end customers do not react strongly to changes in the price of fumigation. In this regard, a customer (a supplier of fumigation services) told the OFT that any cost increases in fumigation services would simply be passed onto its customers. The OFT considers this is consistent with the cost of fumigation being a relatively small cost for customers transporting and storing bulk commodities. This implies that the price responsiveness of end customers is muted, reducing the extra sales of fumigation enjoyed by the merged firm (and the gain in profits on them), reducing the incentive to foreclose.¹³
97. Set against this, the gain in profits on extra sales of fumigation will be greater where the merged firm's fumigation is a good substitute for the fumigation of its foreclosed rivals, such that it may expect to enjoy substantial diversion to its downstream fumigation services. In this regard, the parties' combined market share in commodity fumigation of between [50-60] and [70-80] per cent (see paragraph 61) suggests that the merged firm may expect to enjoy substantial diversion to it, increasing the extra sales of fumigation (and the gain in profits on them), increasing the incentive to foreclose.¹⁴
98. The OFT also understands that the incremental profit margin on sales of metal phosphides is less (as a commodity product) than the incremental profit margin on fumigation sales (as a value added service). If so, then this would mean that the positive impact on profitability of fumigation sales gained may outweigh the negative impact on profitability of metal phosphide sales lost, increasing the incentive to foreclose.¹⁵
99. On this basis, the OFT considers that the merger gives Rentokil the incentive to foreclose its downstream rivals.

¹² See Merger Assessment Guidelines, paragraph 5.6.11(a).

¹³ See Merger Assessment Guidelines, paragraph 5.6.11(b), first bullet.

¹⁴ See Merger Assessment Guidelines, paragraph 5.6.11(b), second bullet.

¹⁵ See Merger Assessment Guidelines, paragraph 5.6.11(c).

Effect of foreclosure

100. On the basis that the Rentokil appears to have both the ability and incentive to foreclose downstream fumigation rivals post-merger, the OFT has considered the impact of any such foreclosure on competition in the downstream fumigation market. In doing so, the OFT also takes account of any stimulus to rivalry in the fumigation market as a result of any efficiencies arising from the merger, given that the OFT recognises that vertical mergers may allow the merged firm to remove an pre-existing double mark-ups on metal phosphides and fumigation.¹⁶ In this case, however, pre-existing double mark-ups do not appear large given that both Rentokil and Santia were vertically integrated pre-merger (so the merger is best viewed as a horizontal merger of two vertically-integrated firms with horizontal effects in both the metal phosphides market and the fumigation market).
101. In terms of effect, a significant proportion of downstream competitors responded to OFT enquiries and all were concerned that their ability to compete could be compromised if Rentokil raised prices or restricted supply.¹⁷ Coupled with the OFT's discussion of potential unilateral effects in commodity fumigation in paragraphs 61 to 66, the OFT therefore considers that input foreclosure by Rentokil may give rise to anticompetitive effects.

Conclusion on partial input foreclosure of metal phosphides in fumigation services

102. On the basis of the above, the OFT considers that the merger gives Rentokil the ability and incentive to foreclose downstream fumigation rivals and that the impact of this foreclosure means that the merger may give rise to a realistic prospect of an SLC on the basis of anticompetitive vertical effects in the market for the supply of goods and/or services of fumigation of bulk commodities.

¹⁶ See Merger Assessment Guidelines, paragraph 5.7.10.

¹⁷ See Merger Assessment Guidelines, paragraph 5.6.12.

Commercially sensitive information

103. One third party told the OFT that by being the only supplier of metal phosphides in the UK, Rentokil will now have greater information about their amount of work undertaken by individual downstream fumigation rivals. The OFT considers that as a consequence Rentokil will also have greater information on the amount of fumigation work being undertaken in aggregate.
104. The OFT considers that access to such commercially sensitive information may have two adverse impacts on the downstream fumigation market.¹⁸
105. Firstly, Rentokil would potentially have greater capability to put, for instance, a new entrant or a rapidly expanding downstream rival at a commercial disadvantage. Secondly, with greater knowledge about the aggregate level of demand for fumigation services, Rentokil may unilaterally compete less aggressively in the downstream market for fumigation services than it may have done when it had only imperfect information on the level of demand for fumigation services.

Conclusion on commercially sensitive information

106. It has not been necessary for the OFT to conclude whether greater access to commercially sensitive information would, by itself, give rise to a realistic prospect of an SLC in the market for the fumigation of bulk commodities. However, on the basis of the evidence above the OFT does consider that such concerns may at least exacerbate concerns of any lessening of competition as a result of input foreclosure.

BARRIERS TO ENTRY AND EXPANSION

107. Given that the transaction does not give rise to the prospect of an SLC in the supply of pest control services (excluding fumigation) and water treatment and hygiene services, the OFT has not needed to consider barriers to entry in these markets.

¹⁸ See Merger Assessment Guidelines, paragraph 5.6.13, fifth bullet.

108. In the supply of fumigation of small valuable objects the OFT had insufficient evidence on which to conclude whether barriers to entry in the supply of CAT Fumigation are currently high or not. However, the OFT was told by both Rentokil and third parties that the cost to a firm wishing to use a fumigant as an active ingredient will be more onerous going forward.
109. Rentokil told the OFT that the use of fumigants is regulated under European Directives 91/414 on Plant Protection Products (PPD) and 98/8 on Biocidal Products (BPD). Fumigants are covered by either of these depending on their intended use. These directives replace the Food and Environment Protection Act 1985 ('**FEPA**') and the Control of Pesticides Regulations 1986 ('**CoPR**'). Rentokil told the OFT, and third parties confirmed, that the data requirements under BPD are much more onerous than under the current regime, with the cost of preparing the appropriate dossier to obtain such licensing possibly reaching hundreds of thousands of pounds versus the relatively small revenues achievable in these specialist fields. Consequently, the OFT considers that new entry may not be likely, timely or sufficient to mitigate any lessening of competition in this market.

THIRD PARTY VIEWS

110. In total, the OFT received over 25 representations from third parties of all customer groups. In brief, most end users of the different services were not concerned. In their view, the parties were not each other's closest competitors and there remain sufficient alternative providers. The most notable exception related to the supply of fumigation goods and services for bulk commodities and small valuable items. Several intermediary customers who also compete with the merging parties in the supply of these services downstream responded to the OFT information request noting that this merger has led to the creation of a monopoly at the wholesale supply level of metal phosphide. An end user also told the OFT that the merged parties were two of the only three firms supplying CAT fumigation services for small valuable items. Third party comments have been discussed above where relevant.

ASSESSMENT

111. Prior to this merger, Rentokil and the Target's activities significantly overlapped in the supply of pest control services (excluding fumigation), fumigation services, the wholesale supply of metal phosphide used for the fumigation of bulk commodities and water treatment and hygiene services.
112. The OFT has considered the impact of this merger on the supply of pest control services (excluding fumigation) and water treatment and hygiene services at the national (national-contract and regional multi-site customers) and sub-national (local domestic and single-site businesses). In both cases the OFT received very few concerns from customers who generally considered there to be sufficient choice of alternative providers remaining in each market.
113. With respect to general pest control fumigation services, the OFT considered that the parties' combined share of supply ([20-30] per cent) was not high enough to give the OFT cause for competition concerns. However, in the supply of fumigation services for bulk commodities and fumigation of small valuable objects, the transaction did raise serious competition concerns.
114. In the supply of fumigation for bulk commodities, the parties have a combined share of supply of between [50-60] and [70-80] per cent. While the increment is small ([0-10] per cent) and several competitors remain, the OFT considers that the parties may have been each other's closest competitors by virtue of their position as the only wholesale suppliers of the essential input for this type of fumigation, metal phosphide. Consequently, the OFT did not need to conclude on unilateral effects as its concerns are subsumed in vertical concerns related to the supply of metal phosphide.
115. The parties were the only wholesale suppliers of metal phosphide products for use in fumigation of bulk commodities in the UK. The OFT received several complaints from providers of fumigation services for bulk commodities who had concerns that the price of metal phosphide might rise going forward or they would be vulnerable in obtaining supplies. The OFT therefore considers that the merger may give rise to a realistic prospect of an SLC on the basis of unilateral effects, but the OFT has not

needed to conclude on this issue for the reasons set out in paragraphs 119 and 131 below.

116. On the supply of fumigation services for small valuable items, the parties were two of the only three suppliers of specialised CAT fumigation. With high barriers to entry, this merger also raised competition concerns with regard to these specialized segments of fumigation services for small valuable items.
117. This merger has also raised significant vertical concerns. Based on the evidence before the OFT, it considers that the merger gives Rentokil the ability and incentive to foreclose downstream competitors in the supply of fumigation services for bulk commodities, and that the impact of this foreclosure means that the merger may give rise to a realistic prospect of an SLC in the supply of fumigation of bulk commodities in the UK, , but the OFT has not needed to conclude on this issue for the reasons set out in paragraphs 119 and 131 below.
118. Although it has not been necessary for it to conclude, the OFT considers that these vertical concerns may be exacerbated by the commercially sensitive information that Rentokil will have (in its position as sole supplier of metal phosphide) regarding the total amount of work carried out by competitors and the size of the fumigation market for bulk commodities.

EXCEPTIONS TO THE DUTY TO REFER

119. The OFT's duty to refer under section 22(1) of the Act is subject to certain discretionary exceptions, including the markets of insufficient importance or 'de minimis' exception under section 22(2)(a), and the undertakings in lieu exception under section 73(2).
120. The OFT has found that its duty to refer this case may be met in the wholesale supply of fumigation products and/or services for bulk commodities and in the supply of fumigation services for small valuable objects using CAT fumigation.¹⁹ The OFT believes that the annual cumulative size of the markets concerned in the UK are less than £10 million. The OFT has therefore considered whether it should apply the 'de minimis' exception to the duty to refer.

¹⁹ See paragraphs 115 and 118 above.

121. During the course of the OFT's investigation, Rentokil submitted that it would be willing to forego the receipt of an issues paper, in the event that the OFT found that its duty to refer might be triggered but that it would exercise its discretion not to refer given that the markets concerned were of insufficient importance. Since on the basis of the discussion below the OFT did decide that it would exercise its discretion, it did not send an issues paper to Rentokil.²⁰ [End note 2]

Availability of undertakings in lieu

122. As set out in the OFT's Exceptions Guidance,²¹ the OFT's general policy is not to apply the 'de minimis' exception where it is 'in principle' open to the parties to offer a clear-cut undertaking in lieu of reference. This is because the recurring benefits of avoiding consumer harm by means of undertakings in lieu in a given case, and all future like cases, outweigh the one-off costs of a reference.

123. Cases that the OFT 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.²² The OFT's Exceptions Guidance also stress that '[t]he OFT 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. 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.'²³

124. In the present case, the OFT does not consider, based on its objective evaluation of the transaction, that undertakings in lieu are 'in principle' available to solve the competition concerns that this case has raised. The

²⁰ OFT1122, Mergers- Exceptions to the duty to refer and undertakings in lieu of reference guidance, December 2010 (the OFT's Exceptions Guidance). See paragraph 2.53.

²¹ See the OFT's Exceptions Guidance, paragraph 2.21. See also OFT decision on the *Completed acquisition by Dunfermline Press Limited of the Berkshire regional newspapers business from Trinity Mirror plc* of 4 February 2008 (the OFT Dunfermline decision) and the OFT decision on the *Completed acquisition by Govia Limited of South Central Passenger Rail Franchise* of 6 August 2009 (the OFT Govia/SCP decision).

²² See the OFT's Exceptions Guidance, paragraph 2.24.

²³ See the OFT's Exceptions Guidance, paragraph 2.27.

OFT has a strong preference for structural undertakings over behavioural commitments. In its Capita/IBS decision,²⁴ the OFT acknowledged that while it could ultimately be possible to design effective, timely and proportional remedies for the case, it was reasonable to take a cautious view on the workability of a structural remedy for the purposes of assessing its 'in principle' suitability and reject that undertakings in lieu were 'in principle' available in that case. This was because it was not certain that it could design effective, timely and proportional remedies within the constraints of first-phase merger control.

125. In this case a clearly effective structural remedy does not appear possible because the SLC concerns relate in part to the licensing of the wholesale supply of metal phosphide by a third party manufacturer. Any remedy would also involve the entry of a new competitor into the wholesale supply of fumigation products and services for bulk commodities. The OFT has not been able to conclude that this is likely. Furthermore, the OFT has not been able to conclude that the divestment of a small part of the overall fumigation market would replicate the on-going service supplied by the merged parties. This is, for example, different to the divestiture of a stand-alone business that removes the overlap in a local market.
126. Based on the above, the OFT considers that there is no clear-cut and proportionate divestiture package in principle available. The OFT has therefore proceeded to examine whether to exercise its 'de minimis' exception in this case.

Application of the markets of insufficient importance exception to this case

127. As set out in the OFT's guidance, where the annual value in the UK of the market(s) concerned is, in aggregate, less than £3 million (and where the OFT considers there are no clear-cut undertakings in lieu in principle available), a reference to the Competition Commission (CC) will generally not be justified. In only exceptional circumstances will the OFT refer the merger where the markets concerned are less than £3 million. This may be where the direct impact of the merger in terms of customer harm is particularly significant and/or where the merger is highly replicable in the relevant sector.

²⁴ OFT decision on the *Completed acquisition by Capita Group plc of IBS OPENSsystems plc* of 19 November 2008 (the OFT Capita /IBS decision), paragraph 112.

128. In the present case, the markets concerned are the upstream supply of metal phosphide products for bulk commodities, which is estimated to be worth up to £[250,000-750,000], and the downstream supply of fumigation services for bulk commodities, which is estimated to be worth between £[1-2] million and £[1-2] million. The size of the market for the fumigation for small valuable objects is estimated to be worth in the vicinity of £[100,000-150,000]. As a result, it is clear that the total value of the markets concerned in this case is likely to be below £3 million.²⁵
129. Rentokil stated that these market sizes are not expected to rise materially in the foreseeable future and the OFT received no evidence to contradict this.
130. In this case, the OFT does not consider that the customer harm is so significant to justify a reference to the CC. Neither does it consider that the merger is likely to be highly replicable across any of the sectors considered more generally.
131. Given the small size of the affected markets, the OFT considers that the total impact of the merger in terms of customer harm is not likely to be significant in this case, and the costs associated with a CC inquiry would be disproportionate in comparison. For the reasons given above, the OFT therefore considers it appropriate to exercise its 'de minimis' discretion in this case.

DECISION

132. This merger will therefore **not be referred** to the Competition Commission under section 22(2)(a) of the Act.

²⁵ It is arguably that the OFT should not include the value of the upstream metal phosphide market in its calculation of the market sizes given that an increase in the price of metal phosphide is a pre-condition for input foreclosure in the downstream market for fumigation of bulk commodities. However, given the size of the markets involved, the OFT has not been required to determine this.

END NOTES

1. With regard to paragraph 79, the OFT clarifies that Rentokil's representations on 'sales of excess stock' referred to general pest control products and not to 'metal phosphide products' as could mistakenly be inferred from that paragraph. This does not alter the outcome of this decision.
2. With regard to paragraph 121, the OFT recognizes that Rentokil's offer to waive the receipt of an issues paper and the opportunity to submit comments to the OFT does not, in any way, constitute acceptance on Rentokil's part of the OFT's findings with regard to the definition of the market(s) and/or the risk of an SLC in any relevant market(s).

This procedural approach is in line with the OFT's Exceptions to the duty to refer and undertakings in lieu of reference guidance (OFT1122), December 2010. Paragraph 2.53 states that '[i]n such circumstances, the OFT would discuss with the parties whether they would be willing to waive their procedural rights to a full investigation (including an issues letter and issues meeting) to the extent that the OFT is minded to apply the 'de minimis' discretion. In such cases the OFT 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 the CC, 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.'