Mergers: Exceptions to the duty to refer

Consultation document

20 November 2023

CMA64

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1. About the consultation

Introduction

1.1 The CMA has published new draft guidance on the exceptions to its duty to refer mergers raising competition concerns for an in-depth phase 2 investigation. This guidance is intended for merging parties and their legal advisers.

1.2 This guidance should be read alongside Mergers: Guidance on the CMA's jurisdiction and procedure (**CMA2**) and Merger Assessment Guidelines (**CMA129**).

1.3 The previous guidance (Mergers: Exception to the duty to refer (CMA64)) was last updated in 2018 (**Current Guidance**). The CMA is now consulting on a revised draft of the Current Guidance which makes updates to Chapter 2 (Markets of insufficient importance) setting out the CMA's approach to the 'de minimis' exception. No changes have been made to other chapters.[1]

Background

1.4 The primary purpose of the 'de minimis' exception 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 costs of a reference. However, the CMA considers that the exception can also be relied on to reduce the public cost of earlier stages of its merger review process (including at the mergers intelligence stage and during phase 1 reviews). In particular, where it is clear that any market(s) concerned by a merger would not be sufficiently important to justify a reference, the CMA considers that it should not spend further resources investigating it.

1.5 The CMA has looked at how the exception has been applied in cases over the last few years. The exception has been applied in a small number of cases and, having regard to the size and other features of the markets involved, there is no basis to suggest that the application of the exception was not appropriate in these cases. In addition, the CMA considers that the mergers referred to phase 2 over the same period involved markets that were sufficiently important to justify a reference, having regard to their size and other features.

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[1] Outdated paragraph references to CMA guidance or references to CMA forms have been corrected throughout the Draft Revised Guidance.

1.6 Nevertheless, the CMA considers that the way it determines whether to apply the exception could be improved to ensure that the CMA continues to focus its resources on mergers that will have the biggest impact on UK consumers and businesses.

1.7 Under the current guidance, the CMA will consider exercising its discretion not to refer a merger where the markets in question have a value of £15 million or less in the UK. This threshold has not changed since 2017. The CMA therefore considers that this threshold should be increased to take account of inflation and the increased public cost of a phase 2 investigation.

1.8 The CMA also considers that the factors that it takes into account when deciding whether to 'de minimise' a merger falling below this threshold should be adapted to simplify certain elements of the assessment and make it easier to apply the 'de minimis' exception at an earlier stage of its review in appropriate cases, whilst also ensuring that mergers in small but strategically important markets are referred to phase 2 where they raise competition concerns.

1.9 To help ensure transparent and predictable decision-making, and to support the efficiency of the UK merger control regime, the CMA has reviewed the Current Guidance and proposes to make the changes set out in this consultation. The draft revised text of the Current Guidance issued alongside this consultation paper is referred to as the Draft Revised Guidance.

1.10 The CMA's review has been limited to the chapter of the Current Guidance relating to the application of the 'de minimis' exception to the duty to refer. The CMA has not reviewed the chapters of the Current Guidance relating to the application of the other two exceptions to the CMA's duty to refer.[2]

Scope of the consultation

1.11 This consultation seeks the views of interested parties, particularly businesses and legal or other advisers who have been involved in merger reviews by the CMA, on the CMA's proposed revisions to the Current Guidance.

1.12 The specific questions on which we are seeking respondents' views are set out in Section 3 of this consultation document.

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[2] These are (i) in the case of anticipated mergers, when the arrangements concerned are insufficiently far advanced, or insufficiently likely to proceed, to justify a reference and (ii) when any relevant customer benefits arising from the merger outweigh the SLC concerned and any adverse effects of the SLC concerned.

Amendments proposed in the Draft Revised Guidance

1.13 The CMA has reviewed the Current Guidance with a view to identifying the further changes that are necessary to help the CMA achieve the aims set out in paragraphs 1.4 to 1.9 above. These changes do not require new legislation.

1.14 The key changes to the Current Guidance are:

(a) Replacing the current two-tier threshold for applying the 'de minimis' exception;

(b) Increasing the market size threshold for the 'de minimis' exemption to apply;

(c) Removing the requirement for no clear-cut undertakings in lieu of a reference to be available in principle in order to apply the 'de minimis' exception; and

(d) Replacing the cost/benefit analysis in the Current Guidance with a list of three factors which are intended to focus the CMA's assessment on the importance of the markets in question, rather than the extent of the CMA's competition concerns in those markets.

1.15 These changes are described in more detail below.

Replacing the current two-tier threshold

1.16 Under the Current Guidance, there are two thresholds which apply to the 'de minimis' exception:

1) If the size of the market in the UK is less than £5 million, the CMA considers that the market is generally not sufficiently important to justify a reference, unless clear cut undertakings in lieu are available; and

2) If the size of the market in the UK is between £5 million and £15 million, the CMA carries out a cost/benefit analysis to determine whether the potential harm from the merger is likely to materially exceed the public cost of a phase 2 investigation.

1.17 The CMA considers that having a single threshold instead of the current two-tier threshold would simplify the application of the 'de minimis' exception, in particular given that for mergers under the £5 million threshold the Current Guidance states that a reference may still be justified, for example, where the direct impact of the merger in terms of customer harm is particularly significant. The CMA considers that the size of the market can be taken into

account without seeking to draw a distinction between cases above and below £5 million.

1.18 The Draft Revised Guidance replaces the two-tier threshold with a single threshold. The CMA will consider the same factors when deciding whether to apply the 'de minimis' exception to all mergers falling under that threshold (recognising, as set out in the Draft Revised Guidance, that the smaller the size of the market(s) concerned, the more likely it is that the CMA will apply the 'de minimis' exception).

Increasing the market size threshold

1.19 Under the Current Guidance, the CMA will generally consider the market(s) concerned to be of sufficient importance to justify a reference where the aggregate annual value in the UK of the market(s) concerned is more than £15 million.

1.20 The market size threshold which applies to the 'de minimis' exception has not been revised since 2017. The CMA believes that this should be increased to take into account inflation since 2017 as well as the increased public cost of a phase 2 investigation. An increase would also be consistent with the proposed increase to the turnover test threshold for jurisdictional purposes in the Digital Markets, Competition and Consumer Bill.[3]

1.21 Under the Draft Revised Guidance, the CMA will generally consider the market(s) concerned to be of sufficient importance to justify a reference (such that the exception will not be applied) where the annual value in the UK, in aggregate, of those markets(s) is more than £30 million. This increase to the threshold is sufficient to reflect inflation and the increased public cost of a phase 2 investigation. We consider that an upper threshold of £30 million (having regard to the other factors that we will take into account where the relevant markets fall under that threshold) achieves a balance between avoiding references where the public costs would not be justified, but ensuring that mergers where the costs are justified given potential consumer harm are referred. In reaching this threshold we have had regard to the size of the relevant markets in the mergers referred to phase 2, or for which undertakings in lieu of a reference were accepted, over the past few years.

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[3] Section 2(2) of Schedule 4 of the Digital Markets, Competition and Consumer Bill proposes increasing the turnover test used in the Enterprise Act 2002 (the Act) from £70 million to £100 million.

Removing the requirement for no clear-cut undertakings in lieu of a reference to be available

1.22 Under the Current Guidance, the application of the 'de minimis' exception is contingent on no clear-cut undertakings in lieu of a reference being in principle available.[4]

1.23 We recognise that there are certain public policy advantages to this requirement. In particular, it encourages parties to offer undertakings in lieu of a reference, thereby avoiding the harm caused by a merger without incurring the public costs of a phase 2 investigation. However, whether clear-cut undertakings in lieu of a reference are available is unrelated to the importance of a market. It is also the merging parties' choice whether to offer undertakings in lieu (the CMA cannot impose remedies on merging parties at phase 1), meaning that mergers where undertakings in lieu are in principle available can still end up being referred to phase 2. Moreover, in cases where undertakings in lieu are accepted, significant public resources can be spent to reach that point and implement remedies (even if the public costs of a phase 2 investigation are avoided), irrespective of the importance of the markets concerned.

1.24 The CMA believes the removal of this requirement will make it easier for the CMA to rely on the 'de minimis' exception and to do so at an earlier stage of its review (including by the mergers intelligence function). This will enable the CMA to spend fewer resources assessing mergers in market(s) that are not of sufficient importance to justify a reference, and expedite the merger control process for merging parties and the CMA.

1.25 The CMA also believes that continuing to consider whether the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question when deciding whether to exercise its discretion (see paragraph 1.32 below) will achieve some of the policy benefits currently achieved by the requirement for no clear-cut undertakings in lieu to be in principle available. In particular, for the reasons explained in paragraphs 1.32 to 1.34 below, merging parties will likely continue to be incentivised to address competition concerns in local markets, as these mergers tend to be replicable and will therefore be less likely to be de minimised.

[4] The CMA may, instead of making a reference to phase 2 and for the purposes of remedying, mitigating or preventing the SLC, accept from the merging parties undertakings to take such action as it considers appropriate, section 73 of the Act.

1.26 The Draft Revised Guidance removes the requirement for no clear-cut undertakings in lieu of a reference to be in principle available in order for the CMA to apply the 'de minimis' exception.

Replacing the cost/benefit analysis

1.27 Under the Current Guidance, the CMA carries out a broad cost/benefit analysis which assesses the extent of the potential harm the merger could cause. This cost/benefit analysis requires the CMA to consider the following factors:

1) the size of the market(s) concerned;
2) the likelihood that a substantial lessening of competition (SLC) would occur;
3) the magnitude of competition that will be lost; and
4) the expected duration of any SLC.

1.28 The CMA considers that there is some tension between the CMA's assessment of whether the merger gives rise to a realistic prospect of an SLC (such that the duty to refer is engaged) and the cost/benefit analysis used to determine whether the merger should nevertheless be 'de minimised', in particular because evidence supporting a SLC finding will generally point against the application of the 'de minimis' exception. In this regard, the CMA considers that certain elements of the cost/benefit analysis are more relevant to assessing the extent/likelihood of harm within a market, rather than the importance of that market. The cost/benefit analysis can also be difficult to apply at an early stage of the CMA's merger review process.

1.29 The Draft Revised Guidance replaces the cost/benefit analysis with three factors that are broadly intended to assess the importance of the market(s) in question:

1) Size of the market(s) concerned, including the extent to which revenues are an appropriate metric to assess the size of the market at issue and whether the market(s) is/are expanding or contracting;
2) Whether the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question; and
3) Nature of the potential detriment that may result from the merger, having particular regard to the CMA's objectives and priorities set out in its current annual plan.

Size of the market(s) concerned

1.30 The CMA's starting point will continue to be the size of the market. The smaller the market(s) concerned, the more likely the CMA will be to exercise its discretion.

1.31 The CMA's experience in recent years, in particular in digital markets, is that current revenues may not always accurately capture the size of the market (as services may be provided free of charge to some users) and may also not reflect the potential future importance of the market in question (as the market may be growing rapidly).

1.32 The Draft Revised Guidance therefore provides that the CMA may also consider the relevance of revenues as a measure of market size. Where the CMA does not consider that revenue is a suitable metric for determining the size of the market, the CMA may consider other factors, to reach a view on the economic importance of the market(s) concerned. The CMA will continue to take a forward-looking approach to its assessment and will consider whether a market is expanding or contracting significantly when deciding whether to exercise its discretion.

Whether the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question

1.33 The CMA will continue to consider whether the merger is one of a large number of similar mergers that could be replicated across the sector in question when deciding whether to apply the 'de minimis' exception (given that the cumulative effect of these mergers across a sector may be substantially higher than the effect of a single merger).

1.34 In sectors where a merger may be replicated, a decision by the CMA to apply the 'de minimis' exception could lead to customer harm across markets that in aggregate have a value significantly in excess of £30 million (such that the public cost of referring the individual merger would be outweighed by the benefits in terms of potential harm avoided).

1.35 The CMA anticipates that this factor will play a more prominent role in future cases given the removal of the requirement for no undertakings in lieu to be in principle available for the exception to be applied. In particular, replicability will often be relevant to mergers involving local markets where undertakings in lieu are often in principle available to resolve competition concerns. Firms acquiring targets in local markets prone to M&A activity will therefore continue

to be incentivised to address these concerns by offering undertakings in lieu of a reference.[5]

Nature of the potential detriment

1.36 The CMA believes it is appropriate to take into account the nature of the potential detriment that may result from a merger, having particular regard to the CMA's objectives and priorities set out in its current Annual Plan.

1.37 The CMA is required by statute to consult on and publish an Annual Plan which sets out its main objectives, and the relative priorities of those objectives, for the next 12 months. As this plan reflects the CMA's overall priorities and objectives, taking account of it when considering the 'de minimis' exception will ensure that the CMA exercises its discretion in a way that is consistent with the way the CMA prioritises other areas where it has a degree of discretion over the work it undertakes, such as competition and consumer law enforcement, market studies and investigations and our advocacy work.

1.38 The CMA recognises that the priorities in the Annual Plan will be subject to change over time, although the use of medium-term priorities means that any evolution will be gradual. Whilst this creates an element of uncertainty, these evolving priorities and objectives reflect that the importance of a market is also liable to change over time as macro factors change. The CMA also notes that it will only have regard to the Annual Plan in the subset of cases where it is considering applying the 'de minimis' exception ie when the value of the market(s) concerned is £30 million or less.

[5] For example, the CMA has investigated multiple mergers involving petrol stations, convenience groceries, veterinary practices and dentistry practices in the last few years. The mergers raising competition concerns at phase 1 have all been resolved through undertakings in lieu rather than being referred to phase 2.

2. Consultation process

2.1 We are publishing this consultation on the CMA webpage and drawing it to the attention of a range of stakeholders to invite comments.

How to respond

2.2 We encourage you to respond to the consultation in writing (by email) using the contact details provided in paragraph 2.6 below.

2.3 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.

2.4 In pursuance of our policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide a non-confidential version for publication on our webpages which omits that material and explain why you regard it as sensitive at the same time.

Duration and contact details

2.5 The consultation will run from 20 November 2023 to 8 January 2023.

2.6 Responses should be submitted by email by no later than 5pm on 8 January 2023 and should be sent to deminimis.guidance@cma.gov.uk.

Compliance with government consultation principles

2.7 In consulting, the CMA has taken into account the published government consultation principles, which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.

Statement about how we use information and personal data that is supplied in consultation responses

2.8 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the UK General Data Protection Regulation 2016 (GDPR)

and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.

2.9 We are processing this personal data for the purposes of our work. This work relates to the issuance of guidance on exceptions to CMA's the duty to refer mergers for an in-depth phase 2 investigation, for which we are consulting, and which forms part of the advice and information published by the CMA under section 106 of the Enterprise Act 2002. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take consultation responses into account.

2.10 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our Privacy Notice.

2.11 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.

2.12 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration any representations made by you here in support of confidentiality. We will also be mindful of our responsibilities under the data protection legislation referred to above and under the Enterprise Act 2002.

2.13 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

After the consultation

2.14 After the consultation, we will decide whether to make the changes proposed in the Draft Revised Guidance and whether any further changes are necessary.

2.15 We will publish a final version of the revised Mergers: Exception to the duty to refer (CMA64) and a summary of the responses received that fall within the scope of the consultation on our webpages. As noted above, we propose to publish non-confidential versions of responses received. These documents will be available on our webpage and respondents will be notified when they are available.

3. Questions for consideration

3.1 Is the content, format and presentation of the Draft Revised Guidance sufficiently clear? If there are particular parts of the Draft Revised Guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.

3.2 Do you agree with the approach to applying the ‘de minimis’ exception set out in the Draft Revised Guidance?

3.3 Do you have any other comments on the Draft Revised Guidance?