

# Mergers: Exceptions to the duty to refer

Consultation response

CMA64

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# 1. Introduction

## Background

- 1.1 On 20 November 2023 the Competition and Markets Authority (**CMA**) launched a consultation on draft revised guidance on the exceptions to its duty to refer mergers raising competition concerns for an in-depth phase 2 investigation (Mergers: Exception to the duty to refer (CMA64)).
- 1.2 This will replace the version of the guidance that was published in 2018 (**2018 Guidance**). The revised guidance updates 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.<sup>1</sup>
- 1.3 The overarching objective of the amendments is to ensure that the CMA continues to focus its resources on mergers that will have the biggest impact on UK consumers and businesses. The amendments are also designed to simplify certain elements of the assessment and make it easier to apply the 'de minimis' exception at an earlier stage of the CMA's review in appropriate cases.
- 1.4 The key changes from the 2018 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' exception 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 2018 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.
- 1.5 The CMA received three submissions in response from legal advisors. Non-confidential versions of all submissions are available on the [consultation page](#) and a list of respondents is included at the end of this document.

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<sup>1</sup> Outdated paragraph references to CMA guidance or references to CMA forms were corrected throughout.

1.6 This document summarises the key comments made in these submissions and our response to them. It sets out the changes made to the guidance following the consultation. It also gives reasons where changes have not been made following respondents' comments.

### **Consultation questions for consideration**

1.7 The consultation document set out the following questions for consideration:

- (a) 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.
- (b) Do you agree with the approach to applying the 'de minimis' exception set out in the Draft Revised Guidance?
- (c) Do you have any other comments on the Draft Revised Guidance?

## **2. Issues raised by the consultation and CMA response**

- 2.1 The CMA has carefully considered the views raised during the consultation and wishes to thank those stakeholders who made a submission.
- 2.2 Consultation responses were overall supportive of the proposed changes and the substance of these is therefore unchanged. The consultation responses were valuable in identifying specific areas where further consideration or clarification was required to ensure the successful implementation of the changes. These points are discussed below.

### **Increasing the market size threshold and replacing the ‘two-tier’ approach**

- 2.3 The CMA consulted on two amendments to the market size threshold used to determine whether to apply the ‘de minimis’ exception.
- (a) The first was to increase the market size threshold under which the CMA will consider whether to apply the ‘de minimis’ exception from £15 million to £30 million, to take into account inflation since 2017 and the increased public cost of a Phase 2 investigation.
  - (b) The second was to move to a single threshold under which the CMA will consider whether to apply the ‘de minimis’ exception rather than having two thresholds – one of £5 million or less where the market is generally considered to be insufficiently important to justify a reference, and another of between £5 million and £15 million where a cost/benefit analysis is carried out to determine whether the potential harm from the merger would be likely to materially exceed the public cost of a Phase 2 investigation.

### ***Consultation responses***

- 2.4 Responses to the public consultation on these amendments were positive. Respondents welcomed both the increased threshold and the simplification of moving to a single threshold.
- 2.5 One respondent suggested increasing the market size threshold further to £60 million to ensure the ‘de minimis’ exception was available in more cases.
- 2.6 One respondent suggested the CMA makes it clear that the smaller the market size, the more likely it is to apply the ‘de minimis’ exception.

## **CMA response**

- 2.7 As explained when the CMA consulted on the draft revised guidance, the CMA considered it appropriate to increase the threshold to take into account of inflation and the increased public cost of a phase 2 investigation. The CMA also explained that it considered a threshold of £30 million (having regard to the other factors that will be taken into account where the relevant markets fall under that threshold) struck a balance between avoiding references where the public costs would not be justified, while ensuring that mergers are referred where the costs are justified given potential consumer harm. The threshold was informed by the market sizes in mergers reviewed by the CMA over the past few years. The CMA therefore does not consider that increasing the threshold to £60 million so that the 'de minimis' exception is available in more cases would be appropriate. The CMA will, however, keep the threshold under review.
- 2.8 Paragraph 2.16 of both the draft and final guidance state that the smaller the size of the market(s) concerned, the more likely it is that the CMA will apply the 'de minimis' exception.

## **Removing the requirement for no clear-cut undertakings in lieu of a reference**

- 2.9 The CMA consulted on removing the requirement for no clear-cut undertakings in lieu of a reference being in principle.
- 2.10 All responses supported removing the requirement for clear-cut undertakings in lieu of a reference not to be available in principle in order to apply the 'de minimis' exception.

## **Replacing cost/benefit analysis with a list of three factors focused on importance of the market**

- 2.11 The CMA consulted on replacing the current cost/benefit analysis with three factors focused on the importance of the market(s) in question. These factors are:
- (a) the size of the market(s) concerned, including the extent to which revenues are an appropriate metric to assess the size of the market(s) and whether the market(s) is/are expanding or contracting;
  - (b) whether the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question; and

- (c) the 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.

### ***Consultation responses***

2.12 Respondents welcomed the removal of the cost-benefit analysis.

2.13 One respondent requested the CMA maintains drafting in the 2018 Guidance stating that the affected market for the purposes of considering 'de minimis' might be a subset of the relevant market considered by the CMA in its competitive assessment, for example where it is clear the detriment will only be felt by certain customers. This respondent also submitted that the CMA should clarify its approach to declining markets.

2.14 Another respondent made the following comments:

- (a) the CMA should remove market size as a factor the CMA considers, or clarify how this factor interacts with the £30 million threshold and confirm that the size of the market, provided it is below £30 million, would not of itself preclude the use of the 'de minimis' exception.
- (b) The CMA should clarify when replicability would be relevant and of concern (which should be more than hypothetical and might arise when there is actual significant market concentration or a party seeking to build a market-leading presence through acquisitions) and what evidence the CMA would use to determine whether a merger may be replicable.
- (c) the CMA should specify what it means by nature of detriment and provide examples of the types and gravity of detriments that would cause the CMA to not apply the 'de minimis' exception.

2.15 One respondent commented on the importance of consistency and requested that the CMA produce examples of mergers that might be captured by the new guidelines that would not have done so previously.

### ***CMA response***

#### *Size of the market(s) concerned*

2.16 The CMA considers retaining market size as a factor is important because it is the most direct measure of the economic importance of a market (as reflected in the explanatory notes to the Enterprise Act 2002). The CMA has clarified how this factor will be considered in paragraph 2.16. This makes clear that the CMA will consider market size alongside the other two factors when deciding



whether the market(s) concerned is/are of sufficient importance to justify a reference. It also makes it clear that where the aggregate value of the market(s) concerned is/are £30 million or less, and there are no other factors that suggest that the market(s) is/are of sufficient importance to justify a reference, the CMA is likely to apply the 'de minimis' exception.

2.17 The CMA does not consider it appropriate to include a reference to the possibility for the market(s) concerned to be a subset of the relevant market in the competitive assessment as per the 2018 Guidance. The amendments to the guidance are intended to shift the focus of the CMA's assessment towards the importance of the markets in question, rather than the extent of the CMA's competition concerns in those markets. Including a provision that considers the proportion of customers that might be affected by the detriment would cut across that approach. This distinction has also not been applied in any merger cases in recent years.

2.18 The CMA has added text to paragraph 2.18 of the guidance to clarify its approach to declining markets.

### *Replicability*

2.19 The mere fact a merger could, in theory, be replicated would not automatically exclude the application of the 'de minimis' exception. On the other hand, the CMA does not consider it necessary for significant market consolidation to have taken place for it to decide not to exercise its discretion to apply the 'de minimis' exception on the grounds of replicability. The CMA will consider whether there is evidence of M&A activity in a sector in deciding whether replicability is a relevant factor. Such evidence may include (but is not limited to) the CMA's own knowledge of the market(s) in question gathered through its various functions (including the mergers intelligence function), the parties' internal documents, third party submissions and public announcements and sectoral press. Paragraph 2.23 of the guidance has been updated to clarify this.

### *Nature of the potential detriment*

2.20 The CMA recognises that the objectives and priorities set out in its Annual Plan are broad. In order for the nature of the potential detriment to exclude the use of the 'de minimis' exception, the CMA would generally expect there to be a clear link between the market(s) concerned and the CMA's Annual Plan. The guidance gives examples of the CMA focusing on areas of core consumer spending and digital markets and this being relevant a merger that involves an area of non-discretionary consumer spending or important digital products or services. The CMA does not intend to consider the 'gravity' of the detriment as suggested by the respondent, as this would revert to the approach under the

2018 Guidance of focusing the assessment on the magnitude of the harm that the merger may lead to rather than the importance of the market(s) concerned.

2.21 The CMA recognises the benefits of practical examples and will look to update the guidance in due course, including with examples of how the revised guidance has been applied in practice. The CMA does not consider that it would be practical (and could be confusing) to provide examples of cases where the 'de minimis' exception would not have applied under the 2018 Guidance, but would apply under the new guidance.

### **'De minimis' and the mergers intelligence function**

2.22 As explained above, one aim of the amendments to the CMA's approach on the 'de minimis' exception is to enable the CMA to apply it earlier in cases where appropriate.

#### ***Consultation responses***

2.23 One respondent requested increased clarity on the circumstances in which the CMA's mergers intelligence function would take the 'de minimis' exception into account. Another respondent requested that the mergers intelligence function disclose when it has decided not to ask further questions regarding a merger on the basis of the 'de minimis' exception.

#### ***CMA response***

2.24 As stated at paragraph 2.7 of the guidance, where merger parties submit a briefing note to the mergers intelligence function, if they believe the 'de minimis' exception should be applied then they should include an explanation of this in their briefing note. Where such submissions are made, the CMA will consider them. Even if such submissions are not made (eg when the parties respond to an information request from the CMA), the mergers intelligence function will consider whether the 'de minimis' exception could apply when deciding whether or not to initiate a phase 1 investigation, when the facts of the case support such consideration.

2.25 The more limited basis of information the CMA mergers intelligence function relies on to determine whether to call in a merger for investigation (compared to the information that would be relied on during a phase 1 investigation), means that calculating the size of the market(s) concerned may be more difficult at this stage. As stated in the guidance, to 'de minimise' a merger at this stage, the CMA would need to be sufficiently confident that the size of the market(s) concerned is £30 million or less and that the three factors as described in the guidance support the application of the 'de minimis' exception.

2.26 The CMA does not consider it appropriate to disclose that the 'de minimis' exception is the reason why the mergers intelligence function has decided not to initiate an investigation consistent with its approach of not disclosing the basis for not initiating an investigation more generally. The CMA will consider whether it can add further details and/or examples to the guidance to explain how the 'de minimis' exception is applied by the mergers intelligence function in the future once it has some experience of applying the revised guidance.

### **3. List of respondents**

1. Herbert Smith Freehills LLP
2. Eversheds Sutherland
3. Allen & Overy LLP