Mergers: Exceptions to the duty to refer

CMA64

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1. Introduction – Exceptions to the duty to refer

1.1 If the Competition and Markets Authority (CMA) believes that it may be the case that a relevant merger situation may lead to a substantial lessening of competition (SLC) in a market or markets in the United Kingdom (UK), then it is under a duty to refer the merger for an in-depth (phase 2) investigation.[1]

1.2 However, in certain circumstances the CMA has a discretion not to make a reference despite the fact that there is a realistic prospect that the merger will lead to an SLC.[2] These are:

- When the markets concerned are not of sufficient importance to justify a reference;
- In the case of anticipated mergers, when the arrangements concerned are insufficiently far advanced, or insufficiently likely to proceed, to justify a reference; or
- When any relevant customer benefits arising from the merger outweigh the SLC concerned and any adverse effects of the SLC concerned.

1.3 Each of these exceptions to the duty to refer is considered in further detail below.

~~1.3~~1.4 The CMA's discretion not to make a reference is different from the 'safe harbour' threshold for small mergers,[3] which excludes the CMA's jurisdiction over mergers where none of the enterprises concerned has a UK turnover exceeding £10 million. For guidance on the safe harbour threshold see Mergers: CMA's Guidance on Jurisdiction and Procedure (CMA2).

~~1.4~~1.5 This guidance forms part of the advice and information published by the CMA under section 106 of the Act. It should be read alongside Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2) and Merger Assessment Guidelines (CMA129).

~~1.5~~1.6 This guidance updates and replaces Mergers: Exceptions to the duty to refer (CMA64) published in 2018. This update makes changes to Chapter 2 (Markets of insufficient importance). No changes have been made to the other chapters.

[1] Sections 22(1) and 33(1) of the Enterprise Act 2002 (the Act).
[2] Sections 22(2) and 33(2) of the Act.
[3] Section 23(2)(c) of the Act introduced by the DMCC Act.

~~1.6~~1.7 This guidance sets out the CMA's current practice (and intended future practice) but may be revised from time to time. Where there is any difference in emphasis or detail between this guidance and other guidance produced by the CMA, the most recently published guidance takes precedence.

2. Markets of insufficient importance ('de minimis' exception)

Introduction

2.1 Under sections 22(2)(a) and 33(2)(a) of the Act the CMA may decide not to refer a merger for an in-depth 'phase 2' investigation if it believes that the market(s) to which the duty to refer applies is/are not of sufficient importance to justify a reference. This exception is designed primarily to avoid references being made where the costs involved would be disproportionate to the size of the market(s) concerned.[4]

2.2 The CMA's starting point when considering whether to apply the 'de minimis' exception is therefore the size of the market(s) concerned. The CMA considers that the market(s) concerned will generally be of sufficient importance to justify a reference (such that the exception will not be applied) where the annual value in the UK, in aggregate, of those market(s) is more than £30 million. Further information on how this figure is calculated is provided at paragraph 2.17.

2.3 The CMA considers that the size of a market (by revenues) may not always fully reflect its importance. Where the annual value in the UK, in aggregate, of the market(s) concerned is £30 million or less, the CMA will consider a number of factors, in addition to market size, in order to determine whether to exercise its discretion to apply the 'de minimis' exception. These are (a) the extent to which revenues are an appropriate metric to assess the size of the market at issue and whether the market is 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 (given that the cumulative effect of these mergers across a sector may be substantially higher than the effect of a single merger), 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.

[4] Paragraph 95 of the Explanatory Notes to Section 22 of the Enterprise Act 2002.

2.4 These factors are discussed in turn from paragraph 2.16 below. Where one or more of these factors suggests that the market is of sufficient importance to justify a reference, the CMA will not exercise its discretion not to refer.

Application of the 'de minimis' exception at different stages of the CMA's review

2.5 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. In appropriate cases, the CMA will therefore consider whether to apply the exception where it has found, following a phase 1 investigation, that a merger gives rise to a realistic prospect of an SLC.

2.6 The CMA may also use the 'de minimis' exception to reduce the burden of merger control (both for the CMA and the merging parties) at earlier stages of the CMA's review. This includes at the mergers intelligence stage, as well as during the phase 1 review.

Consideration of the 'de minimis' exception by the mergers intelligence function

2.7 The CMA will take into account the existence and operation of the discretion when deciding whether to send an enquiry letter to trigger an own-initiative investigation.[5] If merging parties submit a briefing note to the mergers intelligence function regarding a merger[6] and believe the 'de minimis' exception should be applied, they should include a clear explanation of this position in their briefing note, having regard to the criteria set out in this guidance.

2.8 Where the CMA considers, on the basis of the information available to it, that any market(s) potentially concerned by a merger would be of insufficient importance to justify a reference, then the CMA is unlikely to call the case in for a phase 1 review. In practical terms, for the CMA to be confident this is the case, it would need to be sufficiently confident that the annual value of any markets(s) potentially concerned would be £30 million or less and that, having regard to the factors set out in paragraph 2.3, the market(s) concerned would not be sufficiently important to justify a reference.

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[5] For further information and guidance on the CMA's process for launching own-initiative investigations and the mergers intelligence function relating to this see CMA2, paragraphs 6.1-6.11, and Guidance on the CMA's mergers intelligence function (CMA56).
[6] See Guidance on the CMA's mergers intelligence function (CMA56), paragraphs 3.1-3.3.

2.9 The potential for the mergers intelligence function to rely on the 'de minimis' exception as a basis not to call in a merger for a phase 1 review does not eliminate the possibility of the CMA investigating a case of its own initiative and ultimately deciding to apply this discretion. This is because the CMA may only be in a position to determine whether it would be appropriate to exercise its discretion after a formal investigation.

Consideration of the 'de minimis' exception at an early stage of the CMA's review

2.10 The CMA will consider whether a merger may be a candidate for the application of the 'de minimis' exception at an early stage of its review. This may include, where appropriate, the CMA engaging with the merging parties during pre-notification and the phase 1 investigation on what information might be helpful to enable the CMA to assess whether the merger may be suitable for the application of the 'de minimis' exception.

2.11 In cases where it becomes clear to the CMA during its investigation that the market(s) concerned is/are of insufficient importance to justify a reference to phase 2, then the CMA is likely to move towards a decision not to refer on the basis of the 'de minimis' exception. There may be investigations where it would be quicker and more efficient to determine that the discretion would be applied than it would be for the CMA to reach the requisite level of belief that the merger in question does not trigger the duty to refer. In such cases, the CMA can 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 for a phase 2 investigation, either because the duty to refer is not met or because, even if the duty to refer is met, then the CMA would apply its discretion not to refer.[7]

Application of 'de minimis' exception

2.12 The Act does not specify what criteria the CMA should consider in exercising this discretion. Recognising the value of predictability, the CMA has sought to provide guidance on when the exception will generally not apply, and when it will be more likely to apply.

2.13 By way of upper threshold, the CMA considers that the market(s) concerned will generally be of sufficient importance to justify a reference (such that the 'de minimis' exception will not generally be applied) where the annual value in

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[7] For example, see Graco BV/Hi-Tech Spray Equipment, S.A (18 February 2021) at paragraph 48, Turnitin LLC/Ouriginal Group AB (26 July 2021) at paragraphs 71-72, Kaplan International Holdings Limited/Osborne Books Limited (9 February 2016) at paragraph 87 and First TransPennine Express Limited/ TransPennine Express franchise (14 March 2016) at paragraph 159.

the UK of the market(s) concerned is more than £30 million in aggregate. This is because the benefits of a phase 2 reference, in terms of potential customer harm saved, would be expected to outweigh the public costs of a reference.[8]

2.14 Where the annual value in the UK of the market(s) concerned is in aggregate £30 million or less, the CMA will consider the following three factors, which are described further below:

- Market size, including the extent to which revenues are an appropriate metric to assess market size and whether the market is expanding or contracting;
- Whether the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question; and
- 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.

2.15 Where one or more of these factors suggests that the market(s) is/are of sufficient importance to justify a reference, the CMA will not exercise its discretion not to refer.

Size of the market

2.16 In line with the wording of the Explanatory Notes to the Act, the starting point for the CMA's consideration is the size of the market(s) concerned. Generally, the smaller the size of the market(s) concerned, the more likely it is that the CMA will apply the 'de minimis' exception (in any event the aggregate value of the market(s) concerned will be expected to be £30 million or less).[9] The CMA will consider the size of the market alongside the other two factors below when deciding whether the market(s) concerned is/are of sufficient importance to justify a reference. Where the aggregate value of the market(s)

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[8] The average public cost (ie the costs to the CMA) of a phase 2 investigation is in excess of £530,000.
[9] Where the aggregate value of the market(s) concerned only marginally exceeds the £30 million threshold, the CMA may consider whether the 'de minimis' exception should be applied, where other factors suggest the exercise of this discretion would be appropriate. The CMA applied the 'de minimis' exception to seven cases in the past five years (under the previous guidance where the upper threshold was £15 million). In five of these seven, the markets concerned had a market size of less than £10 million (Energystore Limited/Warmfill Ltd (5 April 2022) - £[5-15]m, Graco BV/Hi-Tech Spray Equipment, S.A (18 February 2021) - £1.9m, Turnitin LLC/Ouriginal Group AB (26 July 2021) - £6-7m, Aragorn Parent Corporation (KKR & Co Inc.)/OverDrive Holdings Inc (16 June 2020) - £[5-10]m, Elis UK Limited/Central Laundry Limited (23 October 2020) - £[10-15]m, Cartamundi NV/Naipes Heracliio Fournier S.A. and the United States Playing Card Company (6 December 2019) - £[3-4m], Universal Sealants (U.K.) Limited/ Ekspan Holdings Limited (23 March 2018) - £4m).
Examples of cases in the past five years in which the CMA considered the exception but decided not to apply it include Imprivata, Inc./Isosec Limited (2 June 2021) - £[5-15]m, Nielsen Holdings PLC/ the AdIntel division of Ebiquity PLC (13 June 2018) - >£11.3m; and Vanilla Group Limited (JLA)/ Washstation Limited (27 April 2018) close to £15m and growing.

concerned is £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 applies the following principles in determining the size of the market(s) concerned:

- Only markets in relation to which the CMA concludes there is a realistic prospect of an SLC qualify as market(s) concerned.[10]
- The size of the market concerned is the sum of all suppliers' annual revenues in the UK in that market (and not solely the annual revenues of the merging parties).
- Where the test for reference is met in multiple markets, the relevant figure will be the aggregate size of all such markets.[11]
- If the geographic scope of any market concerned is wider than the UK, revenues generated outside the UK will not be taken into account.[12]
- In 'lumpy' markets,[13] the CMA considers it artificial to count the value of contracts for one particular year only to determine the market size, as this may inflate or underestimate the true annual value of the overall market. In such circumstances, for the purposes of applying the de minimis exception, the CMA is likely to take a cautious approach to determining the annual size of the market and obtain a more representative figure by considering the annual value over a number of years.[14]

2.18 When assessing market size for these purposes, the CMA will not view the market statically, but will take into account any factors which indicate that the market may significantly expand or contract in the foreseeable future.[15] For

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[10] Or could potentially conclude, in cases where the CMA decides to leave open whether or not the merger gives rise to a realistic prospect of an SLC (see paragraph 2.11 above).
[11] For example, Future Plc/TI Media Limited (22 April 2020), paragraph 366-367 and Bellis/Asda (20 April 2021), paragraphs 191-193.
[12] This reflects the fact that the Act is concerned with a SLC within any market or markets in the UK for goods and services (sections 22 and 33 of the Act).
[13] That is, where short-term fluctuations in market size can be dramatic as large contracts are won and lost.
[14] See Capita Group plc/ IBS OPENSystems plc (19 November 2008), paragraph 119, where the OFT stated that it was not persuaded that the number of contracts coming up for renewal in one particular year alone was the correct way to ascertain the annual market size for the purposes of the de minimis exception. Although the OFT accepted that the relevant market could be characterised at the time of the merger by a relatively limited number of contracts expected to come up for renewal in the short term, it noted that this situation could change going forward.
[15] See, for example, Imprivata, Inc./Isosec Limited (2 June 2021) paragraphs 209-213, where the CMA considered that the market was likely to grow considerably in the near future and did not apply the 'de minimis' exception.

example, the CMA will take into account whether a market that is substantially below £30 million is nascent and likely to grow. Where this is the case, the CMA may decide that it would be inappropriate to exercise its discretion.[16] Conversely, if a market is expected to decline substantially in size in the foreseeable future to below £30 million, the CMA will be more likely to exercise its discretion.

2.19 The CMA may also consider the relevance of revenues as a measure of market size. In particular, revenues may be a less appropriate indicator of the size of the market where customers do not pay a monetary price for certain products or services.[17] These types of considerations may be particularly relevant in certain sectors. For example, the UK market size measured by past revenues may be less relevant where a digital product is provided free to consumers.

2.20 When considering a market with aggregate annual revenues of £30 million or less, and where the CMA does not consider that revenue is a suitable metric for determining the size of the market, the CMA may consider one or more of a wide range of other factors(eg taking into account evidence relating to the value of and rationale for the transaction, the size of investments made by market participants, and/or number of customers/users in the markets at issue), to reach a view on the economic importance of the market(s) concerned.[18]

Replicability

2.21 The CMA will be unlikely to apply the 'de minimis' exception where it believes the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question.[19] This factor may be relevant to

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[16] The CMA will not seek to estimate with precision the size of the market in future years. The CMA will take a cautious approach and may refuse to exercise its discretion to 'de minimise' a merger where there are indications that the market may grow significantly.
[17] See, for example, Imprivata, Inc./Isosec Limited (2 June 2021) paragraphs 209-213, where the CMA considered the estimated size of the market based on revenues undervalued the total market size because some services provided for free were not captured by the estimate.
[18] This list is illustrative and not intended to be exhaustive.
[19] For example, the CMA has conducted multiple merger investigations involving local markets in a number of sectors including veterinary practices (CVS Group Plc/Quality Pet Care Ltd (trading as The Vet) (7 April 2022), VetPartners Limited/Goddard Holdco Limited (28 April 2022), Independent Vetcare Limited (IVC)/Multiple independent veterinary businesses (17 February 2023) and Medivet Group Limited/Multiple independent veterinary businesses (18 May 2023)), dental practices (Riviera Bidco Limited/Dental Partners Group Limited (23 August 2022) and Portman Healthcare (Group) Limited/Dentex Healthcare Group Limited (3 February 2023)), petrol stations (Asda Stores Limited/Arthur Foodstores Limited from Co-operative Group Limited (14 March 2023), CD&R Holdings, LLC/Wm Morrison Supermarkets Limited (24 March 2022) and Bellis Acquisition Company 3 Limited/Asda Group Limited (20 April 2021)), and convenience groceries (Asda Stores Limited/Arthur Foodstores Limited from Co-operative Group Limited (14 March 2023), Morrisons/McColl's (8 September 2022), CD&R Holdings, LLC/Wm Morrison Supermarkets Limited (24 March 2022) and Bellis Acquisition Company 3 Limited/Asda Group Limited (20 April 2021)).

mergers involving local markets, in particular in sectors where firms are acquiring multiple small local businesses over time.

2.22 While the acquisition of a small local business may involve a small local market, successive acquisitions (by the same or other firms) can have a wider impact across a sector. A literature review by the CMA in 2017[20] showed that individual merger decisions (as well as the existence of the mergers regime as a whole) can have a significant impact on M&A activity in a relevant sector, affecting whether future anti-competitive transactions are pursued.[21]

2.23 In sectors where a merger may be replicated, a decision by the CMA to apply the 'de minimis' exception to a small merger could therefore lead to customer harm across markets that in aggregate are significantly in excess of £30 million.

2.24 When considering the potential for replicability, the CMA may examine a range of evidence including (but not limited to) internal documents, third party submissions, public announcements and trade press. The CMA may also rely on its own knowledge of the market(s) concerned as gathered through its various functions (including the merger intelligence function).[22]

Nature of the potential detriment

2.25 The third factor the CMA will take into account when considering whether to exercise its discretion to apply the 'de minimis' exception is the nature of the potential detriment that may result from the merger.

2.26 When considering the nature of the potential detriment, the CMA takes account of the CMA's purpose, which is to help people, businesses and the UK economy by promoting competitive markets and tackling unfair behaviour. The CMA is required by statute to produce an annual plan that sets out its main objectives for the year and the relative priorities of those objectives, and to consult on that plan before it is finalised. When applying the de minimis exception, the CMA will have particular regard to the CMA's objectives and priorities as set out in the CMA's Annual Plan. In particular, where the markets(s) concerned by a merger relate to an area of priority in the CMA's Annual Plan, the CMA is less likely to apply the 'de minimis' exception.

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[20] Deterrent effect of competition authorities' work (7 September 2017).
[21] As an example of this effect, the recent annual report of CVS Group Limited refers to the CMA's investigation of its acquisition of Quality Pet Care Ltd (trading as The Vet), and notes that for future acquisitions it 'continues to follow the guidance issued by the Competition and Markets Authority' and will liaise with the CMA (2023 Annual Report, pages 48 and 65).
[22] The fact that a merger could hypothetically be replicated would not generally of itself preclude the application of the 'de minimis' exception.

2.27 The application of this factor will necessarily evolve over time in line with changes to the CMA's Annual Plan,[23] reflecting that the importance of markets can change over time in line with changing macro factors. For this reason, this guidance does not set out exhaustively the markets where the CMA would be less likely to exercise its discretion. However, by way of example, if the CMA's Annual Plan included priorities such as focusing action on areas of core consumer spending or on digital markets, then the CMA would be less likely to exercise its discretion to not refer a merger where it involves an area of non-discretionary consumer spending or important digital products or services.[24]

2.28 In some circumstances, the CMA may consider that it would not be appropriate to apply the 'de minimis' exception even in markets that have no direct connection to the priorities set out in the Annual Plan (which, as noted, may change over time) because of the nature of the potential detriment. This may be the case, for example, where the products/services at issue involve non-discretionary consumer expenditure, are used by people who need help the most,[25] relate to key areas of public expenditure (eg healthcare), are of systemic importance within the UK, or are otherwise important within the context of the specific geographic area in question.

3. Arrangements which are insufficiently advanced or likely to proceed

3.1 This provision ensures that the CMA is not obliged to make a reference if a merger is insufficiently likely to proceed. This may arise where the CMA has issued a decision finding that a merger gives rise to an SLC (which ordinarily would give rise to a duty to make a reference absent an offer of satisfactory undertakings in lieu of reference) but the parties choose to abandon the merger during the 10-working day window for the consideration of undertakings in lieu of a reference.[26]

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[23] Where a merger is being investigated during a period of time when the CMA's Annual Plan changes, the CMA will consider the nature of the potential detriment against the CMA's priorities as set out in the most recent Annual Plan as at the commencement of the 40-working-day period of the merger investigation. At the mergers intelligence stage, the CMA will take into account the version of the most recent Annual Plan whenever the merger is being considered by the Mergers Intelligence Committee.
[24] The CMA's 2024/25 Annual Plan includes both of these as areas of focus (page 29).
[25] For examples of products/services that would fall within this description see Tobii/Smartbox (2019) and Cochlear/Oticon (2023).
[26] Section 73A of the Act. Examples of abandonment after the decision on SLC but before reference are Safetykleen/Puresolve (2016) and Capita/Vodafone (2017). The CMA is not obliged under section 107(1)(a) of the Act to publish a decision if it decides not to refer on the basis of this exception. Under article 4(2) of The Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 no fee is payable in respect of a merger which is the subject of a decision under section 33(2)(b). In contrast, a fee is payable if the merger is referred and then abandoned.

3.2 Another function of section 33(2)(b) of the Act is to avoid the unnecessary expense of a reference where it is still uncertain whether the parties will proceed with the merger (the "insufficiently far advanced" limb).

3.3 The CMA would usually expect a transaction to be sufficiently advanced to justify a reference where:

- The parties to a transaction have publicly announced an agreed merger or their intention to merge (in whole or in part), or
- One of the parties to a proposed transaction has announced a possible offer or a firm intention to make an offer for the other notwithstanding that this may be subject to conditions or be a hostile bid.

3.4 This exception may be appropriate for use in situations where commercial discussions between the parties are still ongoing at the time of the CMA's investigation, for example in anticipated joint venture situations where there remains material ambiguity about how the joint venture will be structured.

3.5 In practice, and where this is justified, the CMA would take a view soon after notification as to whether an investigation is appropriate in light of the early stage of proceedings and will not proceed with the investigation if the transaction is insufficiently far advanced.[27] This limb of the provision is therefore only likely to be used if the proposed merger suffers unexpected disruption after the CMA has started the 40-working day clock of the initial period and issued an invitation to comment.

4. Relevant customer benefits

Introduction

4.1 While mergers can harm competition, they can also give rise to efficiencies which enhance rivalry and/or produce relevant customer benefits.

4.2 If efficiencies arising from the merger enhance rivalry within a market where an SLC finding might potentially arise, the CMA can take this into account in its assessment of the merger's impact on competition. For example, a merger of two of the smaller firms in a market resulting in efficiency gains might allow the merged entity to compete more effectively with larger firms. Rivalry-enhancing efficiencies may lead the CMA to conclude (at Phase 1) that the

[27] See footnote 2 to the Case Team Allocation Form, available on the CMA's website, and paragraph 13.3 of CMA2.

merger does not give rise to a realistic prospect of an SLC in a particular market, or may mitigate the severity of any SLC caused by the merger.[28]

4.3 In addition, the CMA may conclude that the merger gives rise to a realistic prospect of an SLC in one market, but also gives rise to efficiencies in a different market. Moreover, the merger may give rise to an adverse effect on one set of customers but not on another set of customers. The CMA has the discretion not to refer a merger for a Phase 2 investigation, or not to accept remedies following a Phase 2 investigation, if the efficiencies arising from the merger result in relevant customer benefits which outweigh the SLC caused by the merger.

4.4 The CMA considers the likeliness, timeliness and merger specificity of relevant customer benefits, in establishing whether they exist, and considers both quantitative and qualitative evidence of their likelihood and probability in deciding whether they outweigh the adverse effects of the SLC.

4.5 Relevant customer benefits as a potential exception to the duty to refer a merger to Phase 2 are discussed further below. Relevant customer benefits can also be taken into account in selection of remedies under section 73, 82 or 84 of the Act.[29]

4.6 In practice, the CMA has rarely exercised its discretion to apply relevant customer benefits as an exception to the duty to refer.[30] Where merging parties expect relevant customer benefits to play a decisive role in the CMA's assessment of a merger, they should collect and present the relevant evidence to the CMA at the earliest possible opportunity during the pre-notification period. It may be difficult to consider claimed benefits in detail in a phase 2 investigation unless they are raised at an early stage. This applies in particular to cases, such as hospital mergers, which require the input of other regulators in assessing RCBs.

Statutory definition of relevant customer benefits

4.7 Relevant customer benefits are defined by section 30(1) of the Act to be benefits to relevant customers in the form of:

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[28] Merger Assessment Guidelines, section 8.2-8.27.
[29] Merger remedies.
[30] As of April 2018, the CMA has only exercised this discretion in relation to the University Hospitals Birmingham NHS Foundation Trust/Heart of England NHS Foundation Trust (UHB/HEFT) and the Derby Teaching Hospitals NHS Foundation Trust/Burton Hospitals NHS Foundation Trust (DTHFT/BHFT). The CMA has also published CMA guidance on the review of NHS Mergers (CMA29). Pursuant to section 83 of the Health and Care Act 2022, the CMA no longer has a role reviewing mergers between NHS trusts.

- Lower prices, higher quality or greater choice of goods or services in any market in the UK, or
- Greater innovation in relation to such goods or services.

4.8 Sections 30(2) and (3) of the Act provide that a benefit is only a relevant customer benefit if it has accrued or is expected to accrue to relevant customers within the UK within a reasonable period from the merger and would be unlikely to accrue without the merger or a similar lessening of competition. Relevant customers are customers at any point in the chain of production and distribution and are therefore not limited to final customers (section 30(4) of the Act).

Illustrations of relevant customer benefits

4.9 Illustrations of situations where relevant customer benefits (as defined by the Act) might be weighed against the identified loss of competition include the following:[31]

- Lower prices. A merger may, despite leading to an SLC, give clear scope for large cost savings through a reduction in marginal costs of production. In these circumstances, the merged firm – even if it is a monopolist – may therefore pass on some of this reduction in the form of lower prices to its customers such that it might outweigh the SLC.
- Greater innovation. A merger might, in rare cases, facilitate innovation through research and development that could only be achieved through a certain critical mass, especially where larger fixed (and) sunk costs are involved. Exceptionally, the benefits likely to be passed through to customers from such innovation might outweigh the SLC.
- Greater choice or higher quality. In unusual circumstances, a merger might bring together two companies' specialist resources in a way which would not be possible, absent the merger, and which would allow them to produce a higher quality product.

Assessing the existence of relevant customer benefits

4.10 Where potential relevant customer benefits have been identified, the CMA considers the likelihood, timeliness and merger specificity of the claimed

[31] Different types of efficiencies, which may be considered in some cases as relevant customer benefits, are discussed in the Merger Assessment Guidelines paragraphs 8.2 to 8.27.

benefits, to assess whether relevant customer benefits exist under section 30 of the Act.

4.11 In assessing a claimed benefit's likelihood, the CMA considers the merging parties' incentives, and their ability to implement the claimed benefit, post-merger. The claimed relevant customer benefits must be clear, and the parties should be able to produce detailed and verifiable evidence that anticipated price reductions or other benefits will in fact emerge. Where relevant, the CMA may consider the views of a sector regulator.[32]

4.12 In considering the timeliness of a claimed benefit, what is a reasonable period will vary on a case-by-case basis and will depend on the complexity of the changes required to bring about the benefit. It may depend, for example, on the nature of the proposed benefit and the circumstances of its implementation.

4.13 To determine whether a claimed benefit is merger specific, the CMA will consider whether the merging parties had plans to take similar actions absent the merger (eg to undertake a given research project), and whether the merger parties would have the ability and incentive to achieve the benefits independently or through other arrangements, such as another merger or through an agreement which does not amount to a merger, that do not themselves give rise to competition issues of a similar magnitude.

4.14 In assessing the likelihood, timeliness and merger specificity of relevant customer benefits, the CMA may consider a wide range of evidence, including:

- The merging parties' plans to implement the relevant customer benefits (the more detailed, the better);
- The views of third party stakeholders (especially those which could delay or prevent the realisation of the relevant customer benefits); and
- The merging parties' track record in implementing similar initiatives in similar circumstances.

4.15 The provision of evidence by merging parties that relevant customer benefits will result from the merger in no way implies that they accept the existence of an SLC.

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

Weighing relevant customer benefits against the SLC

4.16 When it finds that relevant customer benefits exist, the CMA considers whether they outweigh the adverse effect from the merger's impact on competition.

4.17 To clear a case on the basis of relevant customer benefits, the CMA would need to believe that, on the specific facts of the case, customers overall would be better off with the merger, despite the fact that the CMA believes that the merger raises a realistic prospect of a SLC which will harm some customers. These will be rare cases since, ordinarily, the CMA would expect that a substantial loss of competition which leads to higher prices, lower quality, reduced service and/or reduced innovation in one or more markets would be unlikely to also present benefits to customers, whether in those or other markets.

4.18 To be counted, the claimed relevant customer benefits must accrue to customers of the merging parties (or to customers in a chain beginning with those customers), but need not necessarily arise in the market(s) where the SLC concerns have arisen. Sufficient relevant customer benefits may accrue in some market(s) as a result of the merger that outweigh a finding of realistic prospect of a SLC in other market(s).

4.19 In assessing the weight of the claimed relevant customer benefits, the CMA has regard to both the magnitude of the benefits and the probability of them occurring. This is set against the magnitude and probability of the identified anti-competitive effects. The more powerful and more likely the anti-competitive effects of the merger, the greater and more likely the relevant customer benefits must be to meet and overcome such concerns.[33]

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

[33] For example, in UHB/HEFT and DTHFT/BHFT, the merging parties were public service providers operating in a heavily regulated environment. The CMA therefore concluded that the role of competition was reduced (although no eliminated), and took this into account in weighing the benefits against the competition concerns.

Relevant customer benefits and remedies

4.21 It is not possible for the CMA both (i) to apply relevant customer benefits as an exception to the duty to refer, eg in relation to certain affected markets, and (ii) to accept an undertaking in lieu in respect of other affected markets.[34]

4.22 The CMA is exercising its discretion in deciding whether to apply an exception to the duty to refer the merger in question for a Phase 2 investigation. In exercising this discretion, the CMA has regard to the benefits of a Phase 2 investigation, including the possibility of remedies being obtained at Phase 2 that could prevent an SLC while also capturing any relevant customer benefits.

[34] See Merger remedies.