Mergers: Exception to the duty to refer in markets of insufficient importance
Preface

This guidance forms part of the advice and information published by the Competition and Markets Authority (CMA) under section 106 of the Enterprise Act 2002 (the Act). This guidance is designed to provide general information and advice to companies and their advisers on how the CMA applies the exception to the duty to refer in markets of insufficient importance when operating the merger control regime set out in the Act. It should be read alongside the CMA general merger guidance Mergers: Guidance on the CMA’s jurisdiction and procedure (CMA2) and the Office of Fair Trading (OFT)/Competition Commission (CC) publication Merger Assessment Guidelines (CC2/OFT1254).

This guidance updates and replaces Chapter 2 of the Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance (OFT1122). The remaining chapters in that guidance remain unchanged and in effect.

This guidance sets out the CMA’s current practice (and intended future practice) as from the date of publication. This guidance reflects the views of the CMA at the time of publication and may be revised from time to time to reflect changes in best practice, legislation and the results of experience, legal judgments and research. This guidance may in due course be supplemented, revised or replaced. The CMA’s website will always display the latest version of the guidance. 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.

Although it covers most of the points likely to be of immediate concern to businesses and their advisers, this guidance is not intended to be comprehensive. It cannot, therefore, be seen as a substitute for the Act and the regulations and orders made under the Act, nor can it be cited as a definitive interpretation of the law. Anyone in any doubt about whether they may be affected by the legislation should consider seeking legal advice. Furthermore, although the CMA will have regard to this guidance in handling mergers under the Act, the CMA will apply this guidance flexibly and may depart from the approach described in the guidance where it is appropriate to do so.
Markets of insufficient importance (‘de minimis’)

Executive summary

1. 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.

2. The CMA considers that the market(s) concerned will generally be of sufficient importance to justify a reference (such that the exception will not be applied) where its/their annual value in the UK, in aggregate, is more than £15 million. By contrast, where the annual value in the UK of the market(s) concerned is, in aggregate, less than £5 million, the CMA will generally not consider a reference justified unless a clear-cut undertaking in lieu of reference is in principle available.

3. Where the annual value in the UK, in aggregate, of the market(s) concerned is between £5 million and £15 million, the CMA will consider whether the expected customer harm resulting from the merger is materially greater than the average public cost of a phase 2 reference (currently around £400,000). The CMA will base its assessment of expected customer harm on: the size of the market concerned; its view of the likelihood that a substantial lessening of competition will occur; its assessment of the magnitude of any competition that would be lost; and its expectation of the duration of that substantial lessening of competition.

4. The CMA will also take account of the wider implications of its decisions in this area, and will be less likely to exercise its discretion, and therefore more likely to refer, where the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question.

Introduction

5. Under sections 22(2)(a) and 33(2)(a) of the Act, the CMA may exercise its discretion not to refer a merger to phase 2 if it believes that the market(s) to which the duty to refer applies is/are not of sufficient importance to justify a reference. By not making a reference, use of this provision has the same effect as a decision that clears the merger unconditionally. 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.

6. In deciding whether or not to apply the ‘de minimis’ exception, the CMA will exercise its discretion, taking account of the facts of each individual case and
its circumstances. In so doing, the CMA will have regard to the principles set out in this guidance and its decisional practice in this area. The CMA has sought, notwithstanding the discretionary nature of the exception, to set out the principles it applies in order to enhance predictability and self-assessment for companies considering acquisitions in relatively small markets.

7. Although the CMA considers that the primary purpose of the de minimis exception is to avoid the public cost of a phase 2 reference where these would not be proportionate, the CMA also sets out at the end of this chapter a number of ways in which it may also use the de minimis exception to reduce the burden of merger control at earlier stages of review (see paragraphs 45 to 54 below).

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

8. The primary purpose of the de minimis exception is to avoid references being made where the costs involved would be disproportionate to the size of the market(s) concerned. However, the Act does not specify what criteria the CMA should consider in exercising this discretion, but leaves the matter to the judgment and expertise of the CMA.

9. The CMA applies the discretion with regard to a broad cost/benefit analysis. That is, the CMA takes the view that it is proportionate – and therefore justifiable – to refer a merger where the CMA considers that the benefits of that reference, in terms of preventing or remedying the customer harm that would otherwise result from the merger if at phase 2 the CMA found a substantial lessening of competition, materially exceed the public costs of the reference.

10. When considering the cost of a reference, the CMA considers it appropriate to take account only of the public costs (ie the costs to the CMA) of a phase 2 reference, and not those costs that might be incurred by the parties.

11. The average public cost of a phase 2 reference is, at present around £400,000. The CMA therefore considers whether, in broad terms, the benefit of a reference in terms of the potential customer harm saved (taking account of the fact that not all references result in an anti-competitive finding) is materially greater than £400,000.

12. The expected customer harm that directly results from the individual merger under consideration will be a function of a number of factors: the size of the market, the likelihood that the substantial lessening of competition will actually occur, the magnitude of competition that would be lost by the merger, and the duration of the substantial lessening of competition. Prevention or remedy of
an anti-competitive merger by the CMA at phase 2 would therefore avoid this harm. The CMA will also have regard to the wider implications for future cases of any decision that it takes to exercise its de minimis discretion.

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

13. The CMA takes into account a range of factors (discussed in this guidance) in using its judgment as to whether or not to exercise its discretion in a particular case. However, recognising the value of predictability, the CMA has sought to provide guidance on when the exception will generally not apply, and when it would be more likely to apply.

14. By way of upper threshold, the CMA considers that the market(s) concerned will generally be of sufficient importance to justify a reference (such that the exception will not be applied) where its/their annual value in the UK, in aggregate, is more than £15 million. This is because the benefits of a phase 2 reference would be expected to outweigh the public costs where the market(s) concerned have an aggregated turnover above £15 million.

15. Conversely, the CMA considers that where the annual value in the UK of the market(s) concerned is, in aggregate, less than £5 million (and where the CMA considers there are no clear-cut undertakings in lieu in principle available – see paragraph 21) a reference to phase 2 will generally not be justified. The CMA would expect to refer a merger where the value of the market(s) concerned was less than £5 million only exceptionally, and where the direct impact of the merger in terms of customer harm was particularly significant and/or where the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question (see paragraphs 41 to 43 below).

**Application of the cost/benefit analysis**

16. In all cases where the value of the market(s) concerned is below £15 million, the CMA will consider whether a reference, overall, would be proportionate on the basis of a broad cost/benefit analysis. In making this assessment, the CMA will typically consider three issues:

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1 It is not possible, given the cost/benefit approach the CMA adopts, to identify a ‘safe harbour’ in terms of market size below which the de minimis exception will always be applied. Furthermore, providing a firm ‘safe harbour’ threshold risks being inconsistent with the CMA’s proper exercise of its discretion in the light of the facts and circumstances of each case.
• First, whether undertakings in lieu could in principle be offered by the merging parties to remedy in a clear-cut way any substantial lessening of competition concerns created by the merger.

• Second, whether the customer harm potentially resulting from the actual merger under investigation is likely materially to exceed the costs of a reference, taking account: the size of the market, the likelihood that the substantial lessening of competition will actually occur, the magnitude of competition that would be lost by the merger, and the duration of the substantial lessening of competition.

• Third, whether a reference would be proportionate when account is taken of the wider implications of the decision in question.

These three considerations are each discussed below.

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

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

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

Legislative framework

19. Sections 22 and 33 of the Act require the CMA to consider as a first question whether it is under a duty to make a reference to phase 2. If it is, the CMA must then decide whether to apply certain exceptions to the duty to refer, including the de minimis discretion. Only where it decides not to apply any available exception (such that it would otherwise actually make a reference),
the CMA may alternatively accept undertakings in lieu of reference offered by the parties under section 73(2) of the Act.

20. Although the Act is clear on the sequence of questions that the CMA must ask itself, the Act leaves open to the CMA the considerations it may take into account in exercising its de minimis discretion. Consequently, it is open to the CMA, when exercising its de minimis discretion, to have regard to all relevant considerations, including whether the potential customer harm in the case in question could be avoided, without the need for a reference, by the provision of clear-cut undertakings in lieu.

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

21. The CMA’s general policy is not to apply the de minimis exception where clear-cut undertakings in lieu of reference could be offered by the parties to resolve the competition concerns identified, for the following reasons:

- The aim of the de minimis exception is to avoid the cost of a reference where this is not proportionate to the harm identified. Undertakings in lieu of reference avoid the risk of customer harm identified by the CMA – yet at the same time avoid in full the costs of a reference.

- Even where the market(s) concerned is/are small in size, parties should remain incentivised to offer clear-cut undertakings in lieu to remedy concerns or to design their transactions so as to avoid anti-competitive effects (sometimes known as a ‘fix it first’ approach).

- The costs of a reference in an individual case\(^3\) are outweighed by the long-run, aggregated benefit of remedial action in similar cases at the phase 2 stage.

- In any given case where the prospect of a reference arises, it is ultimately for the parties to decide whether to offer undertakings in lieu or to pursue their case in phase 2. The CMA cannot impose a first-phase remedy via order (as it can in appropriate phase 2 cases) and the CMA’s approach as to whether or not to apply the de minimis exception does not remove the parties’ choice as to whether to offer undertakings in lieu.

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\(^3\) That is, in any given case where the CMA considers that undertakings in lieu of reference are ‘in principle’ available (such that the de minimis exception is not applied) but are not in fact offered by the parties (such that a reference actually follows and the public costs of a reference are incurred).
CMA’s assessment of when undertakings in lieu are in principle available

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

23. In practical terms, therefore, the CMA will consider whether the de minimis exception should be applied before any consideration is given to whether or not the parties have in fact offered undertakings in lieu of reference to phase 2.⁴

24. Cases that the CMA considers are in principle suitable for resolution by undertakings in lieu are typically those where the part of the transaction that raises concerns can be divested to an independent third party purchaser. The de minimis exception is therefore unlikely to be applied to this type of case.

25. By contrast, the CMA will not consider that undertakings in lieu are in principle available where the CMA’s competition concerns relate to such an integral part of a transaction that to remedy them via a structural divestment would be tantamount to prohibiting the merger altogether.⁵

26. Nor will the CMA consider for these purposes that undertakings in lieu are in principle available where the minimum structural divestment that would be required to ensure the remedy was effective would be wholly disproportionate in relation to the concerns identified. It is not the role of the undertakings in lieu process effectively to invite parties to abandon their own transactions. On the contrary, the logic of first-phase remedies is to resolve competition concerns clearly whilst allowing the transaction, albeit in modified form, to proceed.⁶

27. The CMA will take a conservative approach to assessing whether undertakings in lieu are in principle available. To the extent that there is any doubt as to whether undertakings in lieu would meet the ‘clear-cut’ standard, it

⁴ See CMA2, paragraphs 7.46 & 8.2.
⁵ See Anticipated acquisition by BOC Limited of the packaged chlorine business and assets carried on by Ineos Chlor Limited (29 May 2008), paragraph 111 and Completed acquisition by Idox plc of Grantfinder Limited (2 September 2010), paragraph 100.
⁶ See Completed acquisition by General Healthcare Group of control of four Abbey hospitals and de facto control over Transform Holdings Limited, previously part of the Covenant Healthcare Group (14 September 2010), footnote 37.
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.

Assessment of the expected customer harm from the merger

28. Where the annual value in the UK of the market(s) concerned is in aggregate less than £15 million, and the CMA concludes that clear-cut undertakings in lieu of reference are not in principle available, it will consider whether the merger impact is expected materially to outweigh the public costs of a reference. In assessing the customer harm of an individual merger, the CMA will generally pay close attention to the interaction of four key variables:

- the size of the market;
- the likelihood that the substantial lessening of competition will actually occur;
- the magnitude of competition lost by the merger; and
- the duration of the substantial lessening of competition.

29. The fact that one of these factors may point towards or against exercise of the discretion should not be regarded as decisive in any individual case. The CMA considers these factors in the round as part of its overall assessment of whether the expected impact of the merger in terms of customer harm is likely to materially exceed the public costs of a reference.

Size of the market

30. In line with the wording of the Act, the starting point for the CMA’s considerations is the size of the market(s) concerned. For the purposes of

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

8 As a result of this conservative approach, the CMA has on occasion considered seriously undertakings in lieu that have actually been offered by the merging parties having previously considered that, in its view, the case was not an obvious candidate for resolution by way of undertakings in lieu (such that it should not exclude application of de minimis on this ground). Clearly this situation can occur only where the CMA does not apply the de minimis exception, such that there would be a phase 2 reference absent acceptable undertakings in lieu. See Anticipated acquisition by BOC Limited of the packaged chlorine business and assets carried on by Ineos Chlor (29 May 2008), paragraph 128 and footnote 54 and Anticipated acquisition by Reckitt Benckiser of the K-Y brand from Johnson & Johnson (19 December 2014), paragraphs 260–266 and reference decision in the same case discussing undertakings in lieu offered by the Parties (7 January 2015).
applying the de minimis exception, the market concerned is the affected market. The smaller the size of the market(s) concerned, the more likely it is that the CMA will apply the ‘de minimis’ exception (in any event the market(s) will be expected to fall within the £15 million threshold). The CMA applies the following principles in determining the size of the market:

- Only markets in relation to which the CMA concludes there is a realistic prospect of a substantial lessening of competition qualify as ‘markets concerned’.

- The size of the market concerned is the sum of all suppliers’ annual turnover in the UK in that market (and not solely the annual turnover of the parties).

- Where the test for reference is met in multiple markets, the relevant figure will be the aggregate size of all such markets.

- If the geographic scope of any market concerned is wider than the UK, turnover generated outside the UK will not be taken into account.

- The CMA considers that, when considering market size for these purposes, it should not view the market statically, but should take into account any factors which indicate that the market size may be significantly expanding or contracting in the foreseeable future.

- As a general statement, in lumpy markets, the CMA considers it artificial to consider the value of contracts for one particular year only as the market size, as this may inflate or underestimate the true annual value of the overall market. In such circumstances, the CMA is likely to err on the

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

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

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

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

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

14 That is, where short-term fluctuations in market shares can be dramatic as large contracts are won and lost.
side of caution in determining the annual size of the market and obtain a more representative figure by considering the annual value over a number of years.\textsuperscript{15}

\textbf{CMA’s belief regarding the likelihood of a substantial lessening of competition}

31. The CMA will take into account the strength of its belief regarding the likelihood that the merger will have an anti-competitive effect when deciding whether to exercise the de minimis exception. As the Court of Appeal ruled in IBA Health,\textsuperscript{16} the CMA’s duty to refer can in principle be triggered by a belief as the likelihood of a substantial lessening of competition that may be no higher than ‘more than fanciful’ at one end of the spectrum but may alternatively extend to, at the other extreme, a very high degree of confidence.

32. The CMA considers it appropriate to attach weight to the belief it holds regarding the likelihood of a substantial lessening of competition. This is because customers in the relevant market will receive no direct benefit if a benign merger is subject to in-depth scrutiny and is then cleared, a scenario which becomes increasingly likely the lower the likelihood that a substantial lessening of competition will occur.

33. In a number of cases in which the CMA has applied the de minimis exception to date, the CMA therefore attached weight to the fact that its belief as to the likelihood was merely on the ‘may be the case’ standard, rather than on the ‘is the case’ (more likely than not) standard.\textsuperscript{17}

\textbf{Magnitude of competition lost by the merger}

34. In all cases in which the CMA has concluded that its duty to refer is met, it follows that it must believe that any lessening of competition is potentially ‘substantial’ in scale. However, above this threshold, the magnitude of the CMA’s substantive competition concerns will vary between different cases.

35. The CMA’s assessment of the magnitude of competition that could be lost by the merger essentially acts as a proxy for the extent of the price effect (for example, whether the merger could lead to a 5, 15 or 30% price increase) or

\textsuperscript{15} See Completed acquisition by Capita Group plc of 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 de minimis. Although the OFT accepted that the relevant market could be characterised at the time of the merger by a relatively limited number of contracts expected to come up for renewal in the short term, it noted that this situation could change going forward.

\textsuperscript{16} IBA Health v OFT [2004] EWCA Civ 142.

\textsuperscript{17} See, for example, Anticipated acquisition by Prince Minerals Limited of Castle Colours Limited (6 May 2009), paragraph 67.
equivalent non-price effect. Where there are factors that would directly constrain any price increase in the market (even if insufficient to prevent a realistic prospect of a substantial lessening of competition from arising at all) these will be relevant in this context.

36. By way of general illustration, where the CMA considers each merging party to be the only significant competitor to the other (a ‘two to one’ merger) or one of only two (a ‘three to two’ merger), the merger would typically be expected to lead (absent countervailing competitive constraints) to large price increases and/or quality or innovation cutbacks.

37. In considering the magnitude of competition concerns that could result from a merger, the CMA will take account of evidence of coordination between competitors (including hard-core breaches of Chapter I of the Competition Act 1998) in one or more of the markets in question and whether the merger may increase the impact of any such coordination. In addition, when considering the magnitude of competition lost by the merger, the CMA will have regard to whether a substantial proportion of the likely detriment would be suffered by vulnerable customers.

**Durability of the merger’s impact**

38. The CMA will consider the likely durability of the merger effect as part of its assessment of the overall impact of the merger on the market in question.

39. The CMA may consider whether any barriers to entry into the market are substantial and durable. For example, the CMA may not be sufficiently confident that entry would be timely, likely and sufficient such as to prevent competition concerns from arising in the first place, but may believe that barriers to entry are such that effective new entry is likely ultimately to occur. Equally, the CMA may consider that the durability of a merger’s impact will be

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

19 See Completed acquisition by Stagecoach Bus Holdings Limited of Cavalier Contracts Limited (18 September 2008), paragraph 100, where the OFT considered that any price increases resulting from the merger may not be that significant given the limited ability of Stagecoach to cause a price increase on multi-operator tickets, the constraint on Stagecoach’s own tickets posed by multi-operator tickets, and the role played by the Council in limiting and vetoing price increases.

20 See Merger Assessment Guidelines, paragraph 5.8.3.

21 See in this respect Anticipated acquisition by FMC corporation of the alginates business of ISP Holdings (U.K.) Limited (30 July 2008), paragraph 74, in which the OFT stated that it was possible that entry could take place in the medium to long term, and as such it did not consider that the negative impact of the merger would definitely persist for the foreseeable future.
limited because technological or market transformation will render merger effects relatively short-lived.

*Consideration of the wider implications of a ‘de minimis’ decision*

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

*Replicability of merger and ‘de minimis’ decisions*

41. The CMA will be less likely to apply the 'de minimis' discretion where it believes that the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question.

42. Research for the OFT by Deloitte in 2007\(^{22}\) clearly confirms the view that individual merger decisions (as well as the existence of the mergers regime as a whole) can have a significant impact in the relevant sector by determining whether future anti-competitive transactions are pursued.

43. Consistency of treatment requires that the application of the de minimis discretion by the CMA in one case should mean that the discretion is also applied to an analogous future case in the same sector where competitive conditions are comparable. Where the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question, the CMA’s de minimis decision could be ‘replicable’ also. This could mean that the exercise of the CMA’s discretion in one case could cumulatively lead to aggregate customer harm far in excess of the costs of referring the individual problematic merger at hand.

*Economic rationale*

44. In considering the wider implications of a particular decision whether to exercise the de minimis discretion, the CMA may also have regard to the economic rationale behind an individual transaction.\(^{23}\) In particular, the CMA will be less likely to apply the de minimis discretion where there is evidence that the merger in question is solely or primarily motivated by the acquisition

\(^{22}\) *The deterrent effect of competition enforcement by the OFT: a report prepared for the OFT by Deloitte (OFT962, November 2007).*

\(^{23}\) See Anticipated acquisition by Orbital Marketing Services Group Ltd of Ocean Park Ltd (14 November 2008), paragraph 85, where the OFT took into account the fact that customers did not raise concerns about the merger and were, in some cases, supportive of it for reasons of ensuring security of supply.
of market power. For example, a firm decides to acquire its only competitor active in one or more small local markets for the principal purpose of eliminating competition and reaping monopoly profits post-merger.

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

45. The CMA considers that the primary aim of the de minimis discretion is to avoid the public cost of a phase 2 investigation where the market(s) concerned is/are not of sufficient importance to justify the making of a reference. However, the CMA is also mindful of the value of reducing the overall costs of first-phase review where this is possible without compromising the performance of the CMA’s duties under the Act and/or the rights of private parties (merging parties and third parties).

46. The CMA considers that the availability of the de minimis discretion can, in some circumstances, also serve to eliminate, or reduce, the costs of a first-phase review in three ways:

- First, by the CMA taking into account the existence and operation of the discretion when deciding whether to send an enquiry letter.
- Second, through the provision of informal advice on the application of the discretion.
- Third, through consideration of whether the discretion is applicable in suitable cases at an early stage of the CMA’s review.

These three measures are discussed below.

Consideration of ‘de minimis’ when sending enquiry letters

47. The CMA will have regard to the potential applicability of its de minimis discretion in deciding whether or not to send an enquiry letter to trigger an own-initiative investigation.

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

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

26 For further information and guidance on the CMA’s process for launching own-initiative investigations and the mergers intelligence functions relating to this see CMA2, paragraphs 6.5–6.8 and 6.15–6.19 and Guidance on the CMA’s mergers intelligence function (17 June 2016, CMA56).
48. Where the CMA is confident on the basis of available information that any market(s) potentially concerned by a merger would be of insufficient importance to justify a reference, regardless of the magnitude, likelihood or duration of any substantial lessening of competition caused by the merger, and taking into account any wider effects of a decision whether or not to apply the de minimis exception to such a merger, then the CMA is likely to conclude that there is no sensible justification for it to call the case in for a first-phase review. In practical terms, for the CMA to be confident this is the case, it would generally need to be very clear that the annual value of any market(s) potentially concerned would be below £5 million and that there would not be any clear-cut undertakings in lieu of reference available if the duty to refer were to be met.

49. This consideration does not eliminate the possibility of the CMA investigating a case of its own initiative and ultimately deciding to apply the de minimis discretion to it. As is clear from the discussion in paragraphs 28 to 43 above, whether to apply the de minimis discretion will – in markets worth less than £15 million – often turn on factors that become clear only after an investigation by the CMA.

Availability of informal advice on ‘de minimis’

50. The CMA (via the Mergers Group) will offer informal advice on the potential application of the de minimis exception, subject to the caveats generally applicable to such advice.27

51. Of particular relevance in the context of de minimis is the fact that the CMA relaxes its normal requirement that the request for informal advice relates to a transaction that raises a genuine issue as to referral where the party seeking informal advice is a private enterprise that is unable to afford external competition law advice.28

Consideration of de minimis at an early stage by the CMA

52. When a merger is notified to the CMA, either voluntarily by the parties or following receipt of an enquiry letter from the CMA, the CMA will consider at an early stage of its investigation whether the case is a candidate for application of the de minimis discretion. Indeed, where appropriate, the CMA will engage with parties during any pre-notification phase on what information

27 See CMA2, paragraphs 6.25–6.38.
28 See CMA2, paragraph 6.30.
might be helpful in following the CMA to assess whether a merger is appropriate for application of the de minimis exception.

53. In cases where it becomes clear to the CMA during its investigation that the market(s) concerned is/are of insufficient importance to justify a reference to phase 2, and that there would not be any clear-cut undertakings in lieu of reference available if the duty to refer were met, then the CMA is likely to move towards a decision not to refer on the basis of the de minimis exception.

54. This will include scenarios where it would obviously be quicker and more efficient to determine that the discretion would be applied than it would be for the CMA to reach the requisite level of belief that the transaction in question does not in fact trigger the duty to refer (that is, that it should be unconditionally cleared). In such circumstances, the CMA would discuss with the parties whether they would be willing to waive their procedural rights to a full investigation\textsuperscript{29} (including an issues letter and issues meeting) to the extent that the CMA is minded to apply the de minimis discretion.\textsuperscript{30} In such cases, the CMA would generally leave open the question of whether its duty to refer is met on the basis that its conclusion is that the merger should not be referred to 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.\textsuperscript{31}

\textsuperscript{29} Such consent would be without prejudice to the parties’ views on whether the duty to refer was actually met.

\textsuperscript{30} For example, see paragraph 8 of the Completed acquisition by Govia Limited of South Central Rail Franchise (6 August 2009).

\textsuperscript{31} Such a conclusion might be particularly suitable in circumstances such as those arising in Anticipated acquisition by Chiral Technologies Europe SAS of Chromtech Limited (24 September 2008), in which the target’s UK turnover amounted to only £80,000 and the overall UK value of the market concerned amounted to substantially less than £10 million.