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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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**Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note
by the United Kingdom**

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More documents related to this discussion can be found at www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm

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United Kingdom (CMA)

1. Executive Summary

1. The UK Competition and Markets Authority (CMA) has a statutory duty to refer mergers which it believes may raise a realistic prospect of a substantial lessening of competition for further in-depth investigation. A discretion not to refer a merger is available where the CMA believes the market or markets in question are of insufficient importance to justify a reference (the '*de minimis*' exception).

2. The CMA has published guidance explaining how it interprets and will apply this discretion. The CMA's application of the exception is based on a 'cost-benefit' approach. In considering whether to apply the exception, the CMA assesses whether the benefits of referring the case for in-depth investigation (in terms of the consumer harm that might ultimately be avoided by referring the merger) materially outweigh the public costs of a reference.

3. In keeping with this approach, the CMA has, in order to provide additional clarity, identified certain market size thresholds at which a reference generally will not be – or will be – justified. At present (following recent changes to the CMA's guidance), the CMA considers that a reference will not generally be justified for mergers where the market(s) concerned have an annual value, in aggregate, of less than £5 million. By contrast, the CMA considers that a reference will be generally justified where the market(s) concerned have an annual value, in aggregate, of over £15 million.

4. Where the annual value of the market(s) concerned lies between these two thresholds, the CMA will conduct a case-by-case analysis of the extent of the potential consumer harm. 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.

5. 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.

6. The CMA's general policy is not to apply the '*de minimis*' exception (even where the markets concerned are below the market size thresholds at which a reference will generally not be justified) where clear-cut undertakings in lieu of reference could be offered by the parties to resolve the competition concerns identified.¹

7. The CMA believes that its current approach to applying the '*de minimis*' exception is the right one in the context of its statutory duties and its previous detailed considerations of its guidance, which aim to balance the risk of underenforcement with the desire to reduce burden overall. Although the cost-benefit nature of the guidance reflects a generally cautious approach to limit the risk of underenforcement, application in practice has reflected a careful consideration of the facts at hand and does not appear to

¹ [Mergers: Exception to the duty to refer in markets of insufficient importance](#) (CMA64) 17 June 2017.

have been overly narrowly interpreted such as to limit the *'de minimis'* exception's general use. In this context, the CMA notes that the *'de minimis'* exception has been applied regularly and has had a significant impact on the overall number of Phase 2 cases. Further to its most recent review, the CMA believes that the *'de minimis'* exception will deliver increased benefits, particularly due to earlier application of the exception. The CMA remains committed to reviewing the guidance on the *'de minimis'* exception, particularly in light of any changes to its functions.

2. Background to the CMA's *'de minimis'* exception

2.1. The basis for and purpose of the *'de minimis'* exception

8. The CMA has responsibility for review of mergers under the Enterprise Act 2002 (the Act). Under the Act, the CMA has a duty to refer a merger for a second in-depth (phase 2) investigation where it believes there to be a realistic prospect that the Merger will result in a substantial lessening of competition (SLC).

9. 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. The effect, in practice, is the same as a decision to clear the merger unconditionally.²

10. The exception was introduced in order to avoid references where the costs involved would be disproportionate to the size of the markets concerned.³ However, the criteria that the CMA should consider in exercising this discretion are not defined in primary legislation, with the Government indicating that interpretation of the *'de minimis'* exception should be left to the judgment and expertise of the competition regulator on a case-by-case basis.⁴

2.2. The initial adoption of a market size-based approach

11. The CMA's predecessor, the Office of Fair Trading (OFT), initially issued guidance in 2003 on how it would exercise this discretion.⁵ The 2003 guidance adopted a

² Other exceptions to the duty to refer include: arrangements that are insufficiently far advanced and relevant customer benefits. These are not discussed further in this paper.

³ See, for example, the [Explanatory Notes](#) to the parts of the Enterprise Bill which eventually became sections 22(2) and 33(2) of the Enterprise Act, which state: *'The discretion for the [CMA] to decide not to refer a merger because the market is of insufficient importance is designed primarily to avoid references being made where the costs involved would be disproportionate to the size of the markets concerned.'*

⁴ See in particular the comments made by, Melanie Johnson, the then Parliamentary Under-Secretary for Trade and Industry, to the House of Commons Standing Committee in relation to a proposed amendment that would have required a legislative definition of the term *'sufficient importance'* for the purposes of the exception, who noted: *'The Government believe that judgments of that type are best made on a case-by-case basis by the experts in the competition authorities.'*

⁵ The guidance on the *de minimis* exception has been revised a number of times since its introduction in 2003 via the Act, in 2003, 2007, 2010 and, most recently, 2017.

market size-based approach in applying the ‘*de minimis*’ exception, stating that: “By way of guidance, at the time of writing the OFT would expect a CC inquiry to cost around £400,000.”⁶ The guidance also stressed the rarity with which the exception would be applied, noting that “in the majority of cases where a substantial lessening of competition is identified, it will be appropriate for the CC to investigate.”

12. In practice, the OFT used a straight comparison between the size of the market at issue and the incremental taxpayer cost of a CC reference as that the appropriate test to apply the ‘*de minimis*’ exception. In other words, the exception was restricted to the (relatively rare) cases in which the affected market size in the UK was around £400,000 or less.⁷ The test set out in the 2003 Guidance was not applied to any cases during the time it was in place.

2.3. The move to a cost-benefit-based approach

13. In 2007, the OFT conducted its first review of the guidance on the ‘*de minimis*’ exception. That review found that the approach adopted in the 2003 guidance had not been successful in attaining the objectives of the exception (ie to avoid disproportionate references to Phase 2). The OFT noted that unduly narrow interpretation of the exception could lead to cases where the customer harm was relatively limited receiving further unnecessary scrutiny, and, particularly in marginal cases, to potentially efficiency enhancing merger activity being potentially discouraged. In this regard, the OFT noted that a significant number of small anticipated transactions had been abandoned when referred since the Act was introduced.⁸

14. Following this review, the OFT concluded that a case-by-case application of the exception, taking into account all relevant facts and circumstances including, but not limited to, the size and *significance* of the markets concerned, would be more faithful to the original intention of the exception. Within this context, the OFT believed that the fundamental question should be whether, on the facts of the case before it, the OFT would consider a reference is proportionate.

15. The OFT considered that this proportionality test was best understood as requiring a comparison of the incremental costs and benefits of each reference, with the benefits being best measured by the harm, particularly the consumer harm, potentially avoided – ie a ‘cost-benefit’ analysis. On this basis, the OFT did not consider that a simple safe harbour based on a figure for market size would be appropriate.

2.3.1. The OFT’s initial approach to cost-benefit analysis

16. As a first step, the OFT’s revised approach indicated a threshold market size – £10 million – above which the exception would generally not apply.

17. The £10 million figure was chosen following analysis of the market size that might impute sufficient customer harm to justify a reference. This was assessed by reference to a number of variables, including: (i) the price rise that might be avoided; (ii) the duration for which a price rise might be avoided; (iii) the cost of a reference; (iv) the

⁶ The OFT and CC were the CMA’s predecessors.

⁷ See summary in [Consultation Document for November 2007 Guidance, OFT 933con](#).

⁸ [OFT933con](#), para 3.7.

likelihood of a reference; and (v) the expected cost-to-benefit ratio.⁹ The OFT stressed that this analysis was intended to be illustrative example and noted that other variables (not included in the analysis) could also be relevant.¹⁰ Nonetheless, the OFT believed that the simple figure of £10 million was both intuitively reasonable and not inconsistent with a quantitative analysis for the purposes of setting an upper bound threshold.

18. For markets below the £10 million market size threshold, the OFT indicated that it would generally apply the exemption, unless the impact was likely to be “*particularly significant*” because:

- The merger related to very highly concentrated markets where the prospect of entry is low; and/or
- There was evidence of coordination between competitors.

19. The OFT further indicated that use of the exception would also be less appropriate where:

- A reference would have important precedent value, for example, because the case raises novel issues, so that an in-depth CC inquiry would provide guidance for the industry concerned; and/or
- A substantial proportion of the likely detriment is suffered by vulnerable consumers.

20. Finally, following concerns raised in consultation that the specific criteria set out above could lead to the underapplication of the exception, the OFT indicated it could apply the exception if its overall assessment indicated that the total merger impact was likely to be limited, for example because the market was very small, or the magnitude or duration of the loss of competition would be unusually limited, or because the relevant variables otherwise suggested that the merger would have a limited impact.¹¹

21. Therefore, the OFT sought to identify market features that would in most cases be capable of reasonably straightforward assessment by the merging parties and expert advisors and would therefore allow them to determine whether the exception might be available in markets below £10 million. However, in doing so, the OFT noted that the market features identified in the 2007 Guidance did inevitably overlap with those relevant to a substantive assessment, given the focus on avoided harm.

⁹ The OFT assumed that the following assumptions were valid: (i) The consumer saving from preventing an anti-competitive merger is around 10 per cent of market turnover (for example, intervention prevents a 5 per cent market-wide price rise lasting two years); (ii) A CC reference will typically cost the taxpayer around £500,000; (iii) Around 50 per cent of CC merger references lead to a finding that the merger is anti-competitive (that is, that the merger may be expected to result in a substantial lessening of competition); (iv) 1:1 cost to benefit ratio. Based on this the benefits of a CC merger reference would outweigh the costs for any market with a turnover above £10 million (that is, £500,000 ÷ (50 per cent x 10 per cent)).

¹⁰ In particular, the OFT explained that: (i) reference costs could vary; (ii) third party costs might double the implied size; (iii) deterrence factors (ie the impact of finding and preventing problematic mergers has on stopping further potentially problematic mergers from happening) could significantly reduce it. [OFT933con](#), Para 4.9-4.16,

¹¹ 2007 Guidance, OFT516b, para 7.7-7.8.

2.3.2. A revised approach to cost-benefit analysis

22. The OFT reviewed and updated its guidance on the 'de minimis' exception again in December 2010.¹² The 2010 Guidance retained and reiterated certain key features and principles of the 2007 Guidance, including, by retaining the broad cost/benefit approach advocated by the 2007 Guidance and the upper bound £10 million threshold.¹³

23. The 2010 Guidance did, however, refine the CMA's approach to the application of the exception in markets below the upper bound of £10 million in several ways, as described below.

24. The introduction of a lower bound threshold

25. First, based on previous case practice, the OFT introduced a new discretionary 'lower bound' market size threshold of £3 million under which it indicated the exception would generally be more likely to apply.

Revised approach to assessment in markets under £10 million

26. Second, the 2010 guidance revised the approach to assessing the application of the exemption in markets under £10 million.

27. As noted above, the 2007 Guidance had sought to identify certain circumstances in which a merger might have a particularly significant impact on consumers (in which case the exception should not apply).

28. The 2010 Guidance moved away from this approach by:

- Placing more emphasis on the fact that a variety of factors could be relevant to establishing consumer harm rather than focusing on one or two key features such as high concentration or evidence of co-ordination;
- Identifying certain factors that the OFT believed would be relevant to the assessment and excluding factors which would not; and
- Providing clearer guidance on how the OFT would assess these in considering whether the exception should apply by explaining what each of the relevant factors meant and was intended to assess, explaining the circumstances the OFT would take into account in assessing those factors and including references to previous case practice as appropriate.

29. The factors identified by the OFT (in addition to market size) included: (i) the likelihood of the SLC; (ii) the magnitude of the SLC; (iii) the duration of the SLC; and (iv) replicability (ie the extent to which the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question).

¹² This guidance was adopted by the CMA in March 2014 and remained in force until 15 June 2017.

¹³ The OFT did not consider there to be a case for increasing the £10 million market size threshold. The OFT noted that the OFT's experience of applying the 'de minimis' exception since the £10 million threshold was introduced in November 2007 had not provided evidence to it to indicate that it would be appropriate to increase this threshold. In addition, the OFT did not consider that evidence that the costs of a reference had reduced should play a role as to do so would suggest an artificial degree of precision in the way the OFT approached the use of this discretion. OFT1122res, para 2.11.

Clarification of the treatment of private costs

30. Third, the OFT confirmed that private costs (ie principally the costs incurred by the merging parties) would not be directly relevant to the OFT's assessment.

31. This approach was motivated by the belief that a consumer welfare standard (which would not include private costs) should be considered when assessing the costs/benefits of a reference. In addition, the OFT considered that merging parties have a clear choice as to whether to pursue a potentially anti-competitive transaction and are also able to structure transactions so as to reduce merger control risk. Finally, the OFT noted that it would not expect that the fixed costs to the parties of a reference would generally be passed through to customers.¹⁴

Relevance of deterrence

32. Fourth, the initial draft of the guidance included some serious consideration of the role of deterrence in gauging the benefits and therefore the potential consumer harm that could be avoided as a result of merger control. After a period of consultation, the OFT moved away from indicating that it would explicitly take into account a deterrence factor and apply a deterrence multiplier in its case-by-case assessment of markets below £10 million. In doing so, the OFT noted respondents' concern that mergers (as a generality) should not be deterred by the merger control regime and reiterated the view (which is also held by the CMA) that many mergers are either pro-competitive or benign in their effect on rivalry.

33. However, the OFT remained conscious of the need for consistency and predictability in the way it would exercise its discretion. It therefore believed that it should have regard to the wider implications of any decision it took to exercise its discretion for the treatment of other potentially anti-competitive future transactions. The OFT believed that the application of the exception in one case should mean that the exception is also applied to an analogous future case in the same sector where competitive conditions are comparable. For this reason, the OFT considered that it should have regard to the cumulative implications for a particular sector in applying the '*de minimis*' exception to markets of a particular size.

The availability of the exception where clear-cut remedies are available

34. Fourth, based on case practice, the OFT indicated that the exception would not be available where 'in principle' undertakings in lieu of a reference were available to the merging parties.

35. The OFT noted that merging parties should be incentivised to offer remedies to address identified competition concerns where they could do so whilst allowing the remainder of the transaction to proceed (or that companies should be encouraged to structure their transactions so that they avoid competition concerns in the first place).

36. The OFT set out detailed guidance on when an undertaking in lieu might be considered to be 'in principle' available, noting that it would take a 'conservative' approach to this question. In this regard, where there was doubt whether possible undertakings were sufficiently 'clear-cut' in nature (as is required for Phase 1 undertakings), these would not be available for the purposes of applying the '*de minimis*'

¹⁴ OFT122res, para 2.14-2.16.

exception. In practice, this approach has significantly increased the availability of the ‘*de minimis*’ exception (which could otherwise be made unavailable by the existence by remedies that are technically available but unfeasible in practice).

Use of the exception to reduce costs at phase 1

37. Fifth, the 2010 Guidance built on the desire to use the exception as a tool to streamline and reduce burden at phase 1 as well as phase 2 and more clearly set out how the exception could be applied at earlier stages of the process. In doing so, the 2010 Guidance highlighted that given the cost/benefit nature of the assessment, at very early stages of the assessment (where less evidence would typically be available) the OFT would have to be very confident that any harm would not materially outweigh the costs of a reference. In practice, therefore, when considering whether to launch an investigation on its own initiative, the OFT would only be likely to apply the ‘*de minimis*’ exception, where it was confident that the market size was below £3 million.

3. The CMA’s current guidance on the ‘*de minimis*’ exception

3.1. Recent review

38. In 2017, following a period of review, the CMA issued updated guidance on the ‘*de minimis*’ exception. The CMA retained the approach set out in the 2010 Guidance but increased the thresholds at which the CMA might consider the ‘*de minimis*’ exception more and less likely to apply from £3 million and £10 million to £5 million and £15 million.

39. The CMA concluded that increasing the market size thresholds to £5 million and £15 million would be appropriate by evaluating the cost and benefits associated with higher thresholds in relation to phase 1 and phase 2 mergers in the last three years. The costs considered were those that could result of the exception being applied to potentially problematic cases which are no longer investigated and remedied. The benefits were judged by reference to any cost savings as a result of fewer phase 2 cases or, in relation to the lower threshold, fewer phase 1 cases being notified or called in by the CMA.

40. In judging these cost and benefits, the CMA also considered, on a qualitative basis:

- The need to exercise a necessary degree of caution when setting these thresholds given the difficulty in accurately judging customer harm that could arise as a result of a merger. In particular, it is important to note that the ‘*de minimis*’ exception is only applicable when the CMA believes that there is at least a realistic prospect of an SLC and the risk of Type 1 errors is lower. As such, the CMA faces a potentially greater risk of underenforcement (Type 2 errors), the impact of which could be amplified because of potential replicability of the decision to apply the exception.¹⁵
- A recognition that the savings from avoiding a reference may not only avoid the administrative costs of that more in-depth merger investigation. Avoiding a reference may also allow an opportunity to avoid competitive harm in other

¹⁵ See [the CMA’s recent literature review of methodologies to measure the deterrent effect of competition authorities’ work](#), September 2017.

contexts by using the relevant resource in the delivery of the CMA's discretionary functions such as market investigations, competition investigations or consumer enforcement actions.

41. The CMA's assessment indicated that the proposed revised thresholds were appropriate as a means of maximising benefits and minimising costs. The CMA believes that the risk of underenforcement is mitigated by the fact that based on decisional practice, the thresholds are consistent with where, at the lower level, the customer harm will not generally justify a reference; and, at the higher level, the customer harm will generally justify a reference. In addition, the CMA's review indicated that potentially significant benefits in terms of Phase 1 cost reduction could rise as result of an increase in the lower bound threshold due to earlier consideration of the exception by both the CMA and merging parties.

3.2. Current guidance

42. The CMA's current guidance can therefore be summarised as follows:

- 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 provided that there is in principle not a clear-cut undertaking in lieu of reference available.
- Where the annual value in the UK, in aggregate, of the market(s) concerned is between £5 million and £15 million, if in principle no clear-cut undertakings in lieu are available 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.
- While 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 (as described above) may be useful directionally, the CMA considers that this cost/benefit assessment is ultimately a judgment for the CMA to make in a particular case depending on the relevant facts and circumstances.
- 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 potentially replicable across a number of similar markets in a particular sector.¹⁶

¹⁶ CMA64, paras 1-4.

4. The use in practice of the ‘*de minimis*’ exception

4.1. Application of cost-benefit approach

43. Since 2010, when the OFT first issued guidance based on a broad cost/benefit approach with two discretionary market size thresholds, the discretion has been applied in 28 of the 35 cases where it has been considered.¹⁷ Despite only reflecting 5% of all Phase 1 cases during this period, this represented a significant potential reduction in the number of phase 2 (reference) cases of approximately 40%.¹⁸

44. In most cases (20 of 28 where it has applied) the ‘*de minimis*’ exception has been applicable as the size of the market(s) in question has fallen below the lower threshold (which, as explained above was £3 million prior to June 2017 and has been £5 million since then). The exception has been applied in 8 cases where the market size was between £3/5 million and £10/15 million.

45. Although ultimately discretionary, the exception has never been applied to a market above £10 million, or as of July 2017, £15 million.

46. Consistent with the case-by-case nature of the assessment and the variability of the factors relevant to determining customer harm, there are examples of the ‘*de minimis*’ exception being applied where the market size is near to the upper bound threshold and not being applied in markets near to the lower bound threshold.

47. An illustrative example of the use of the ‘*de minimis*’ exception in a market close to the upper bound threshold is provided by *WGSN/Stylesight*,¹⁹ in which the exception was applied where the market size – at £9 million (a £10 million upper bound threshold was in force at that time).

48. The CMA found a realistic prospect of SLC in the supply of online subscription trend forecasting services to fashion and non-fashion customers (operating in design-led industries) in the UK. The CMA believed that application of the exception was justified as: (i) the likelihood of an SLC, although over the required legal threshold, was quite low and merely more than fanciful; (ii) the magnitude of the competition lost was likely to be quite low particularly for non-fashion customers due to elements of self-supply and ease of switching; (iii) the durability of any harm was likely to be limited as the market showed dynamic features such as low barriers to entry and there had been recent new entry; (iv) given the dynamic features of the market ie where there were features of entry as opposed to consolidation, the potential for replicability appeared to be less significant; (v) finally, undertakings would be tantamount to prohibition and therefore ‘in principle’ unavailable.

49. By contrast, the CMA did not apply the ‘*de minimis*’ exception in *Reckitt Benckiser/K-Y*. The CMA found, at the end of its Phase 1 investigation, a realistic

¹⁷ Data up to date as at September 2017.

¹⁸ There were approximately 67 phase 2 reference cases and 578 phase 1 cases between December 2010 and September 2017.

¹⁹ ME/6409/14, Completed acquisition by WSGN Inc. of Stylesight Inc., [Decision on SLC](#), CMA, 25 June 2014.

prospect of an SLC in the supply of personal lubricants in the UK.²⁰ The total market size was estimated at around £6.7 million (and was therefore relatively close to the lower bound of £3 million in force at that time). The CMA judged that the consumer harm that could arise as a result of the transaction would be sufficiently high to justify the cost of a reference as: (i) the likelihood of an SLC being found was quite high; (ii) the magnitude of the competition lost was significant – the merging parties were the two main suppliers of personal lubricants in the UK; (iii) the evidence available indicated that barriers to entry were high and as such the durability of harm would be significant; and (iv) there were potential replicability issues as the merging parties were leading consumer brands sold in grocery retail outlets. The potential for consumer harm was confirmed by the phase 2 analysis, which concluded that remedies would be necessary. A subsequent impact assessment of the benefit of imposing such remedies for the purposes of the CMA’s direct benefit assessment indicated that the benefit of this intervention had substantially outweighed the general administrative costs of a reference.

4.2. Relevance of availability of undertakings in lieu

50. In addition, certain features that would restrict availability of the ‘*de minimis*’ exception, such as the in-principle availability of undertakings in lieu, do not appear to have led to significant under-application of the exception. Since the introduction of the 2010 Guidance, the ‘*de minimis*’ exception has not been applied on the basis of UILs being ‘in principle’ available in only two cases.

51. For example, in the *Reckitt Benckiser/K-Y* case cited above, the ‘*de minimis*’ exception was not applied as a result of an assessment of the potential customer harm the transaction could imply and not as a result of the availability of undertakings in lieu. In fact, the CMA considered and explicitly rejected their availability on the basis that, in the context of the structure of the transaction, a remedy would have been in the form of a brand licencing arrangement with a third party. The CMA noted that it had some doubts as to the extent to which a licence for the K-Y brand in the UK would be clearly and effectively separable from the remainder of the K-Y brand, and whether it would be a viable and attractive package to a potential third party purchaser. The CMA noted that such concerns might ultimately be surmountable, but that the ‘*de minimis*’ guidance has made it clear that the CMA will take a conservative approach in assessing whether undertakings in lieu are in principle available for the purposes of its minimis assessment, such that if there is any doubt, they will not be considered ‘in principle’ available. As such, given its doubts, the CMA did not consider undertakings in lieu in principle available.²¹

52. The conservative nature of this approach was further reinforced by the fact that once the CMA had determined that the ‘*de minimis*’ exception should not be applied, the CMA seriously considered accepting a licencing agreement but did not ultimately do so due to issues around the length of the licence being offered but not the nature of the remedy per se.²²

²⁰ ME/64448/14, Anticipated acquisition by Reckitt Benckiser of the K-Y brand from Johnson & Johnson, [Decision on SLC](#), CMA, 19 December 2014.

²¹ *Reckitt Benckiser/K-Y*, [SLC decision](#), paras 263-266.

²² *Reckitt Benckiser/K-Y*, [Reference decision](#), CMA, 7 January 2015, paras 18-20.

4.3. Timing of application

53. Since the CMA was created from the merger of the OFT and Competition Commission in April 2014, the discretion has been applied with increasing frequency at earlier stages of the investigation. At the CMA, of the 14 cases where the exception was applied, eight did not progress as far as a case review meeting.²³ At the OFT, this was the case in only four of 12 cases where the exception was applied.

54. As such the '*de minimis*' exception has been increasingly used to deliver its stated aim of also reducing phase 1 costs and burdens.

5. Conclusion

55. The CMA's approach to applying the '*de minimis*' exception has been revised several times since it was introduced. There are, however, a number of consistent themes and principles that have emerged during its evolution and continue to underpin the approach in force today, namely:

- The importance and suitability of a cost/benefit approach in determining use of the exception and minimising the risk of underenforcement and the unsuitability, in this context, of bright-line safe harbours, which could allow a disproportionate amount of customer harm;
- In order to enhance predictability, the provision of some guiding presumptive thresholds based on market size;
- An understanding that while these presumptive market size thresholds are intended to be consistent with a cost-benefit approach, they should provide an illustrative proxy of potential consumer harm and not a detailed quantitative one. As such, there has been a consistent recognition that market size thresholds should be reflective of and consistent with general case practice;
- A recognition that, given the complexities of estimating customer harm, the assessment of whether the exception should be applied below or above any presumptive thresholds is ultimately qualitative and conducted in the round based on a range of clear factors;
- A recognition of the need to ensure consistent outcomes across cases, and to consider the wider implications of the application of the '*de minimis*' exception in one case to the treatment of other potentially anti-competitive future transactions;
- A balancing of the potential burden of a cautious approach by focusing on *particularly significant* customer harm or a requirement for the harm to *materially* outweigh the costs of a reference;
- A recognition that clear guidance, and therefore earlier application, could deliver benefits in terms of cost savings beyond the administrative costs of a phase 2 reference. In particular, for the CMA, which since the merger of the OFT and CC is now working for as unitary authority, avoiding a reference may also allow an opportunity to avoid competitive harm in other contexts by using the relevant

²³ Data up to date as at September 2017. See [Mergers: Jurisdiction and Procedure Guidance: CMA2](#) (January 2014), paragraphs 7.32–7.49 for an explanation of the phase 1 decision-making process and case review meetings.

resource in the delivery of the CMA's discretionary functions such as market investigations, competition investigations or consumer enforcement actions.

56. The CMA believes that its current approach to applying the '*de minimis*' exception is the right one in the context of its statutory duties and its previous detailed considerations of its guidance, which aim to balance the risk of underenforcement with the desire to reduce burden overall. Although the cost/benefit nature of the guidance reflects a generally cautious approach to limit the risk of underenforcement, application in practice has reflected a careful consideration of the facts at hand and does not appear to have been overly narrowly interpreted such as to limit the '*de minimis*' exception's general use. In this context, the CMA notes that the '*de minimis*' exception has been applied regularly and has had a significant impact on the overall number of Phase 2 cases. Further to its most recent review, the CMA believes that the '*de minimis*' exception will deliver increased benefits, particularly due to earlier application of the exception. The CMA remains committed to reviewing the guidance on the '*de minimis*' exception, particularly in light of any changes to its functions.