

Mergers - Exceptions to the duty to refer and undertakings in lieu

Draft guidance consultation document

October 2009

OFT1122con

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Scope of this consultation

Topic of this consultation	<p>The Office of Fair Trading (OFT) is conducting a public consultation on draft guidance Mergers – Exceptions to the duty to refer and undertakings in lieu guidance.</p>
Scope of this consultation	<p>The OFT wishes to consult on the text of revised guidance on the exceptions to the duty to refer and its ability to accept undertakings in lieu of reference to the Competition Commission (CC).</p> <p>This revised guidance will update the existing guidance found in chapters 7 and 8 of the OFT Mergers substantive assessment guidance (OFT516) in the light of six years of practical experience gained through the application of the Enterprise Act 2002 (the Act), and taking account of judicial guidance. It also takes into account the OFT's decisional practice since November 2007 in the application of its revised guidance on the Exception to the duty to refer: markets of insufficient importance (OFT516b), commonly known as the 'de minimis' guidance. Despite the relatively short time period that has elapsed since the publication of revised 'de minimis' guidance, the OFT has considered the exception in around 20 cases and has applied it in 10 cases.</p> <p>The enclosed consultation document comprises a draft of the OFT's proposed revised guidance on which we invite comments. At the end of chapters 2, 3, 4 and 5, specific questions are raised in consultation boxes on which the OFT is particularly keen to receive comments. Those questions can be found in consolidated form at Annex A.</p> <p>The consultation can also be found on the OFT's website, www.offt.gov.uk/consultations.</p>
Geographical scope	UK-wide

Impact assessment	Not applicable.
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Basic information

To	Whilst we expect that law firms and representatives of business will in particular wish to comment on the draft revised guidance, we welcome comments on the document from all sources. Respondents to this consultation are asked to supply a brief summary of the people and organisations they represent, where appropriate.
Duration	The consultation period began on 1 October 2009 and will run until 15 January 2010. We therefore ask that your comments on the proposed guidance are submitted to us no later than 15 January 2010. It may not be possible to take into account any suggested changes or comments after the deadline for receipt.
Enquiries	We are willing to take queries on this consultation document by telephone as well as in writing, but any suggested changes or comments must be submitted in writing (preferably by email, alternatively, by letter, as indicated below). Please note that the OFT can only consider suggested changes to the text of the guidance, not the underpinning legislation, as the latter is a matter for Parliament and outside the scope of the consultation exercise.

<p>How to respond</p>	<p>All responses, comments and questions should be sent to:</p> <p>Nicholas Scola Assistant Director (Legal) 9C / 05 Mergers Group Office of Fair Trading Fleetbank House 2-6 Salisbury Square London EC4Y 8JX</p> <p>Tel: 020 7211 8796 Fax: 020 7211 8916 Email: Nicholas.scola@oft.gsi.gov.uk</p>
<p>Additional ways to become involved</p>	<p>The OFT is considering running one or more workshops with stakeholders in December to discuss the proposed guidance. To the extent that you would be interested in attending such a workshop, please contact Nicholas Scola (details above) by 30 October 2008.</p>
<p>After the consultation</p>	<p>We will collate responses to the consultation and publish a formal summary of these. We are aiming to publish a final version of the amended Mergers – Exceptions to the duty to refer and undertakings in lieu guidance on our website in Spring 2010, taking into account comments made in response to this consultation.</p>
<p>Compliance with the Code of Practice on Consultation</p>	<p>This consultation complies with the Code of Practice on Consultation.</p>

Background

Getting to this stage	<p>The OFT published substantive guidance when the Act came into force – Mergers substantive assessment guidance (OFT516). That guidance covered the OFT's exceptions to the duty to refer (chapter 7) and the OFT's ability to accept undertakings in lieu of reference (chapter 8). The OFT subsequently published a revision to this guidance Exception to the duty to refer: markets of insufficient importance (OFT516b) in November 2007.</p> <p>Since then, the OFT has published jointly with the CC a consultation document on UK Merger assessment guidelines in April 2009, which are expected to be finalised by the end of the year. When published, these guidelines will not cover in detail the exceptions to the duty to refer or the OFT's ability to accept undertakings in lieu.</p>
Previous engagement	<p>The OFT receives regular feedback from stakeholders on the implementation of its existing guidance during the course of its case work. It has sought to address a number of concerns or queries raised by stakeholders in their dealings with the OFT on the exceptions to the duty to refer discretion and undertakings in lieu ability in this consultation document.</p>

Changes to the previous guidance

For ease of reference, and by way of summary, the main changes from the previous guidance included in the proposed guidance for consultation are:

- updating of the OFT's guidance on the 'de minimis' exception to take account of its decisional practice since November 2007, including in particular:
 - the OFT's approach to the relationship between the 'de minimis' exception and the potential availability of undertakings in lieu
 - the framework the OFT uses for considering whether the expected impact of a merger outweighs the public cost of a reference to the CC
 - the consideration by the OFT of deterrence as a factor when deciding whether to exercise its discretion not to refer to the CC, and
 - how the OFT may be able to take account of the availability of its discretion to reduce OFT merger review costs
- an explanation of the relationship between efficiencies considered as part of the substantial lessening of competition analysis and relevant customer benefits as an exception to the duty to refer, and
- general updating of the OFT's practice in undertakings in lieu cases, including in particular an explanation of the OFT's approach in some cases to requiring an upfront buyer in relation to divestment undertakings.

Feedback about this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

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A copy of the key criteria from the Better Regulation Executive's Code of Practice on Consultation can be found in Annexe C.

Data use statement for responses

Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. All information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may choose to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business.

If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.

Please note that Information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000 (FOIA). In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

PREFACE

This guidance forms part of the advice and information published by the Office of Fair Trading (the OFT) 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 OFT applies the available exceptions to the duty to refer and its ability to accept undertakings in lieu of reference in operating the merger control regime set out in the Act. It should be read alongside the OFT publication Mergers – Jurisdictional and procedural guidance (OFT527) and the joint OFT/Competition Commission (CC) publication UK Merger assessment guidelines (forthcoming).

This new guidance supersedes previously published information on the OFT's application of the exceptions to the duty to refer and acceptance of undertakings in lieu of reference to the CC, including chapters 7 and 8 of the OFT publication Mergers – substantive assessment guidance (OFT516) and the OFT publication Exception to the duty to refer: markets of insufficient importance (OFT516b), commonly known as the 'de minimis' guidance.

This guidance sets out the OFT's current practice (and intended future practice) as from the date of publication. This guidance reflects the views of the OFT 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 OFT's web site 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 OFT, 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 makes no claim 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 OFT will have regard to this guidance in handling mergers under the Act, the OFT will apply this guidance flexibly and may depart from the

approach described in the guidance where there are good reasons for doing so (in which case the OFT would expect to explain those reasons).

CONTENTS

Chapter/Annexe	Page
1 Purpose and scope of this guidance	1
2 Markets of insufficient importance ('de minimis')	2
3 Arrangements insufficiently far advanced/ insufficiently likely to proceed	27
4 Customer benefits	29
5 Undertakings in lieu of reference	36
A Summary of questions	59
B List of consultees	62
C Consultation criteria	64

1 PURPOSE AND SCOPE OF THIS GUIDANCE

- 1.1 This guidance is published pursuant to section 106(1) of the Act to provide guidance to companies and their advisers on the criteria applied by the OFT when considering whether to exercise an available discretion not to refer a merger to the CC for further investigation or when considering whether to accept undertakings in lieu of reference to the CC.
- 1.2 Subject to the limited exceptions discussed in this guidance, the OFT has a duty to refer a merger to the CC for investigation under section 22 or 33 of the Act, in relation to completed or anticipated mergers respectively, if it believes that it is or may be the case that:
- a relevant merger situation has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and
 - the creation of the relevant merger situation has resulted or may be expected to result in a substantial lessening of competition within any market or markets in the UK for goods or services.
- 1.3 This guidance explains how the OFT applies the discretionary exceptions to the duty to refer, namely where:
- the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference to the CC (chapter 2)
 - in the case of anticipated mergers, the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a reference to the CC (chapter 3), or
 - any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned (chapter 4).
- 1.4 The OFT also provides guidance on how it will exercise its ability not to refer if it accepts undertakings in lieu of reference to the CC (chapter 5).

2 MARKETS OF INSUFFICIENT IMPORTANCE ('DE MINIMIS')

Introduction and summary

2.1 Under sections 22(2)(a) and 33(2)(a) of the Act, the OFT may exceptionally in exercise of its discretion decide not to refer a merger to the CC if it believes that the market(s) to which the duty to refer applies are not of sufficient importance to justify a reference. By not making a CC 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.

2.2 By way of summary:

- the OFT considers that an affected market(s) will generally be of sufficient importance to justify a reference (such that the exception will not apply) where its/their annual value in the UK, in aggregate, is more than £10 million and
- where the annual value in the UK, in aggregate, of the market(s) concerned is less than £10 million, the OFT will consider the application of the exception by assessing whether the cost of a reference to the public purse is outweighed by the consumer harm that would result from the merger if the CC were to find a substantial lessening of competition.¹

2.3 In deciding whether or not to apply the 'de minimis' exception, the OFT will exercise its discretion, judging each case on its individual facts and circumstances. In so doing, the OFT will have regard to the principles set out in this guidance. The OFT has sought, notwithstanding the discretionary nature of the exception, to set out the principles it applies in as much detail as possible in order to enhance predictability and self-assessment for companies considering acquisitions in relatively small

¹ The OFT may periodically announce an adjustment to the relevant market size guideline figure to take into account its experience under the Act, as well as factors relevant to proportionality, such as changes to the average cost of relevant CC merger inquiries and inflation.

markets. Reference should also be made to the OFT's decisional practice in this area.

- 2.4 The OFT also sets out at the end of this chapter a number of ways in which it aims to use the 'de minimis' exception to reduce the burden of merger control at the OFT's stage of review.

Basis of the OFT's approach

Adoption of a broad cost/benefit analysis

- 2.5 The purpose of the 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 OFT should consider in exercising this discretion, but leaves the matter to the judgment and expertise of the OFT.
- 2.6 The OFT has, since publication of revised guidance in November 2007,² applied the discretion with regard to a broad cost/benefit analysis. That is, the OFT has taken the view that it is proportionate – and therefore justifiable – to refer a merger where the benefits of that reference, in terms of preventing or remedying the consumer harm that would otherwise result from the merger if the CC found a substantial lessening of competition, exceed the costs to the public purse of the reference.
- 2.7 When considering the cost of a reference, the OFT considers it appropriate only to take account of public costs, and not those costs that might be incurred by the parties in the event that the reference proceeds. This is because the merger control system is based, as with other competition policy tools, on a consumer welfare standard. Furthermore, in the case of merger control, 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 the merger control risk they assume.³

² *Exception to the duty to refer: markets of insufficient importance* (OFT516b).

³ This may include requiring that the acquisition be conditional on OFT clearance or may involve the parties addressing any competition concerns either in advance of the OFT decision or by way of undertakings in lieu offer.

- 2.8 The working average cost to the public purse of a CC reference is, the OFT understands, around £500,000. The OFT therefore considers whether, in broad terms, the benefit of a reference in terms of the potential consumer harm saved (taking account of the fact that not all references result in an anti-competitive finding) is materially greater than £500,000.
- 2.9 The expected consumer 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 magnitude of competition lost by the merger, the likelihood that that the substantial lessening of competition actually occurs, and the duration of the substantial lessening of competition. Prevention or remedying of an anti-competitive merger by the CC would therefore avoid this consumer harm.
- 2.10 In addition to this direct benefit, however, there may be an indirect benefit from preventing or remedying an anti-competitive merger in the form of deterring parties to other proposed transactions from pursuing them. Applying the 'de minimis' exemption to a merger prevents it from having this indirect benefit, and therefore it may also be appropriate to take this into account in exercising the discretion.⁴

Guidelines to stakeholders

- 2.11 The OFT 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, the OFT recognises the value of predictability for external stakeholders and has therefore sought to provide guidelines on when the exception will generally not apply, and when it would be more likely to apply.
- 2.12 The OFT considers that an affected market(s) will generally be of sufficient importance to justify a reference (such that the exception will not apply) where its/their annual value in the UK, in aggregate, is more

⁴ See paragraphs 2.43 to 2.51 below for a discussion of these deterrent benefits from merger control.

than £10 million.⁵ This is because the benefits of a CC reference would be expected to outweigh the costs for any market with a turnover above £10 million.

- 2.13 Given the cost/benefit approach adopted by the OFT, it is not possible to identify a firm 'safe harbour' in terms of market size below which the 'de minimis' exception will always be applied. This is because there is in principle no upper bound limit on the magnitude of competition that can be lost as a result of a merger, nor on the period over which the effects of that loss may be expected to be felt. Certain cases may also warrant the application of a sizeable deterrence multiplier. In any event, providing a firm 'safe harbour' threshold risks being inconsistent with the OFT's proper exercise of its discretion in the light of the facts and circumstances of each case.
- 2.14 However, on the basis of its experience to date, the OFT would expect the 'de minimis' exception generally to apply where the size of the affected market(s) is below £3 million (and where the OFT considers there are no clear-cut undertakings in lieu available – see paragraph 2.21 below). However, this is clearly without prejudice to the possibility of a particular factual matrix arising where it is appropriate to refer a merger where the market size is below £3 million.

Application of the cost/benefit analysis

- 2.15 In all cases below the £10 million market size threshold, the OFT will consider whether a reference, overall, would be proportionate on the basis of a broad cost/benefit analysis. However, as is evident from the way in which the OFT has derived the £10 million indicative threshold set out above, it does not follow that where the aggregate size of the

⁵ In determining this figure, the OFT had regard to the following scenario (the facts of which are purely illustrative and should not be read as precedential in relation to any individual criterion): the consumer saving from preventing an anti-competitive merger could be five per cent of market turnover; such an effect might last for just two years; the prospect of a substantial lessening of competition might be (in line with historic outcomes of CC references) around 50 per cent; and there is (relatively unusually) no deterrence multiplier factor that should be attributed to the merger. £500,000 cost of CC reference ÷ (50 per cent likelihood of a substantial lessening of competition x 5 per cent price rise x 2 years) gives a £10,000,000 market size.

affected market(s) is below £10 million the exception will generally be applied or is even likely to be applied.⁶

- 2.16 The exercise of the discretion is ultimately a matter for the OFT taking account of all relevant factors. However, in making this assessment of proportionality of a reference in relation to an individual case, the OFT will typically consider three issues:
- 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 consumer harm potentially resulting from the actual merger under investigation is likely to exceed materially the costs of a reference, taking account of the market size, the magnitude of competition potentially lost, the expectation of harm arising and the duration of any such effects, and
 - third, whether a reference would be proportionate when account is taken of the deterrent effect that would result from it, including effects potentially outside the market(s) in question.

These three considerations are each discussed below.

- 2.17 Whilst the OFT believes that it is informative to consider the potential quantum of consumer harm that could result from the merger – and which would be prevented by a reference – the OFT 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 consumer harm that would be expected to result from a merger may be useful directionally, this cost/benefit assessment is ultimately a judgment for the OFT to make in a particular

⁶ In Completed acquisitions by Stagecoach Group plc of Eastbourne Buses Limited, and Cavendish Motor Services 13 May 2009, where the OFT considered that the annual value of the market concerned for the purposes of the 'de minimis' assessment was likely to be in the region of £6 million, it was stated that: '[t]he OFT has not previously applied the de minimis exception in markets of this size and notes it will be unlikely to do so unless its assessment of the other relevant factors strongly suggest it should do so' (paragraph 76).

case depending on the facts and circumstances and taking any other relevant factors into account.

Interaction between 'de minimis' and potential undertakings in lieu⁷

2.18 The OFT is conscious of the significance and utility attached to its undertakings in lieu power by stakeholders. It is therefore keen not to diminish the benefits of the undertakings in lieu regime through its application of the 'de minimis' exception. This section explains how the OFT will approach its 'de minimis' discretion in the context of its ability to accept undertakings in lieu of reference to the CC.

Legislative framework

2.19 Sections 22 or 33 of the Act require the OFT to consider as a first question whether it is under a duty to make a reference to the CC. If it is, the OFT 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 OFT may alternatively accept undertakings in lieu of reference under section 73(2) of the Act.

2.20 Although the Act is clear on the sequence of questions that the OFT must ask itself, the Act leaves open to the OFT the considerations it should take into account in exercising its 'de minimis' discretion. Consequently, it is open to the OFT, when exercising its 'de minimis' discretion, to have regard to all relevant considerations, including whether the potential consumer harm in the case in question could have been avoided by the provision of clear-cut undertakings in lieu.

Proportionality of a reference where undertakings are available

2.21 Where clear-cut undertakings in lieu of reference could be offered to resolve the competition concerns identified, the OFT's general policy is to refer the merger to the CC unless such undertakings in lieu are in fact offered by the parties to the merger. This is because the recurring

⁷ See Completed acquisition by Dunfermline Press Limited of the Berkshire regional newspapers business from Trinity Mirror plc 4 February 2008.

benefits of avoiding consumer harm by means of the provision of undertakings in a given case, and all future cases resolvable by undertakings in lieu, outweigh the one-off costs of a reference in that particular case. The considerations underlining this thinking are as follows.

- Undertakings in lieu of reference to the CC avoid the risk of consumer harm implied by an OFT finding of a realistic prospect or expectation of a substantial lessening of competition – yet at the same time avoid in full the costs of reference.
- If the OFT were wholly to disregard the availability 'in principle' (as opposed to undertakings that have actually been offered) of clear-cut undertakings in lieu, merging parties would in future have less incentive to offer undertakings in lieu in cases that are potentially susceptible to the 'de minimis' exception.
- It is clear from the OFT's deterrence evaluation work that OFT undertakings in lieu decisions, like CC remedies and prohibition decisions, have a significant impact on private merger activity and planning and structuring decisions across the economy and therefore beyond the individual case itself.⁸
- Accordingly, the costs of a reference in such a case⁹ are outweighed by the long-run and recurring benefit of remedial and/or deterrent action at the OFT stage that, in aggregate, has resulted and would continue to result in substantial welfare savings for consumers and which would itself potentially result (if the CC found a substantial lessening of competition) from the deterrence effect of the reference in the case in question.
- It is ultimately at the parties' discretion, faced with the prospect of reference, as to whether to choose to offer undertakings in lieu or to pursue their case at the CC. The OFT cannot impose a first-phase

⁸ See further paragraphs 2.43 to 2.51 below.

⁹ That is in any given case where undertakings are 'in principle' available but are not in fact offered by the parties (such that a reference actually follows and the costs of a reference to the public purse are incurred).

remedy via order (as can the CC in appropriate second-phase cases) and the OFT'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.

OFT's assessment of when undertakings in lieu are available

- 2.22 The OFT'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 OFT 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 OFT's ability to accept undertakings under section 73(2) and is not relevant at this stage of the OFT's consideration.
- 2.23 In practical terms, therefore, the OFT 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 the CC: see paragraph 6.61 of the OFT's Mergers – Jurisdictional and procedural guidance. It is for this reason that the OFT requests that parties detail any undertakings in lieu offer in a separate document to their response to the issues letter (see paragraph 8.14 of the OFT's Mergers – Jurisdictional and procedural guidance).
- 2.24 The 'in principle' judgment as to whether undertakings in lieu could be offered must be reasonable and consistent with the standard articulated in the OFT's guidance, which emphasises that a clear-cut remedy is one that is effective in relation to the concerns arising.
- 2.25 Cases 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.
- 2.26 By contrast, the OFT will not consider that undertakings in lieu are in principle available where the OFT'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.¹⁰ 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.

2.27 The OFT will take a conservative approach to assessing whether undertakings are in principle available. To the extent that there is any doubt as to whether an undertaking would meet the 'clear-cut' standard, it will not be included in the 'in principle' assessment.¹¹ 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. For this reason, it is entirely conceptually possible that the OFT may:

- first consider for the purpose of its 'de minimis' analysis that clear-cut undertakings in lieu are not available (such that whether to apply the 'de minimis' exception should be considered further)
- then decline to apply the 'de minimis' exception on the basis of other considerations not related to undertakings in lieu (see below), such that it otherwise intends to refer, and
- then consider seriously undertakings in lieu that have actually been submitted by the parties notwithstanding that the OFT did not include them when making its 'in principle' assessment.¹²

¹⁰ See Anticipated acquisition by BOC Limited of the packaged chlorine business and assets carried on by Ineos Chlor Limited 29 May 2008, paragraph 111.

¹¹ For example, in the Completed Acquisition by Capita Group plc of IBS OPENSsystems plc 19 November 2008, paragraph 112, the OFT discounted as an 'in principle' remedy at this stage the divestment of IBS' 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 (eg 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.

¹² The OFT has considered undertakings in lieu that have actually been offered by the merging parties having first decided 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

Assessment of the expected consumer harm from the merger

2.28 Where the OFT concludes that clear-cut undertakings in lieu of reference are not available, it will consider whether the merger impact is expected materially to outweigh the public costs of a reference. In assessing the consumer welfare impact of an individual merger, the OFT will generally pay close attention to the interaction of four key variables:

- the size of the market
- the strength of the OFT's concerns that harm will occur as a result of the merger
- the magnitude of competition lost by the merger, and
- the durability of the merger's impact.

2.29 It is important to understand that the OFT will consider each of these four features in an individual case in the round, reflecting the fact that the OFT is exercising a discretion under the Act not to refer mergers in markets that it considers to be of insufficient importance. The fact that one of these factors may point towards or against exercise of the discretion should therefore not be regarded as decisive in any individual case: what matters is the overall assessment of whether the expected impact of the merger is likely to exceed materially the costs of a reference.

minimis' on this ground) – 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.

Size of the market

2.30 In line with the wording of the Act, the starting point for the OFT's considerations is the size of the market(s) concerned. The smaller the size of the market concerned, the more likely it is that the OFT will apply the 'de minimis' exception (in any event the market will always be expected to fall within the £10 million threshold¹³). The OFT applies the following principles in determining the size of the market.

- Only markets in relation to which the OFT concludes there is a realistic prospect of a substantial lessening of competition qualify as 'markets concerned'.¹⁴
- The market size is the sum of all suppliers' annual turnover in the UK in that affected market (and not solely the annual turnover of the parties).
- If the geographic scope of any affected market is wider than the UK, turnover generated outside the UK will not be taken into account.¹⁵
- The OFT 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.¹⁶

¹³ Where the annual value of the affected market(s) only marginally exceeds £10 million, the OFT 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. In such circumstances, the case would clearly need to be extremely 'marginal' for the exception to be applied.

¹⁴ For example, in Completed acquisition by Stagecoach Bus Holdings Limited of Cavalier Contracts Limited 18 September 2008, 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).

¹⁵ This reflects the fact 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).

¹⁶ See Anticipated acquisition by Spectris plc of Lochard Ltd 29 January 2009, paragraphs 120 to 126.

- As a general statement, in lumpy markets, the OFT considers it artificial to consider the value of contracts for one particular year only as the appropriate figure, as this may inflate or underestimate the true annual value of the overall market. In such circumstances, the OFT is likely to err on the side of caution in determining the annual size of the market.¹⁷
- The relevant market size may exceptionally be adjusted for the purposes of the 'de minimis' exception where it is clear that the size of any consumer detriment will be experienced by only a subset of the overall market. For example:
 - in the OFT's decision in National Express Group/Intercity East Coast Rail franchise,¹⁸ the OFT disregarded the rail revenue for the purposes of calculating the market size given that the theory of harm in the case in question related only to merger effects on coach services and not on rail, and
 - in the OFT's decision in FMC Corporation/Alginates business of ISP Holdings (UK) Limited,¹⁹ the OFT took account of the fact that the vast majority of the market was accounted for by sales to one purchaser with substantial countervailing buyer power; the exceptionally differentiated position of that customer meant that its purchases should not be considered together with those of other customers in calculating the affected market size for the purposes of the 'de minimis' exception.²⁰

¹⁷ See Completed acquisition by Capita Group plc of IBS OPENSsystems 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.

¹⁸ National Express Group / Intercity East Coast Rail franchise 20 December 2007.

¹⁹ Anticipated acquisition by FMC corporation of the alginates business of ISP holdings (UK) Limited 30 July 2008.

²⁰ See also Anticipated acquisition by Orbital Marketing Services Group Ltd of Ocean Park Ltd 14 November 2008 paragraph 77 where the OFT considered that the position of the top two customers was clearly and conceptually distinct (in terms of their ability to sponsor or encourage entry) from those of the remaining customers in the market such that the parties' turnover

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

Strength of the OFT's concerns

- 2.31 The OFT will take into account the prospect that the merger will have an adverse effect on competition and, in turn, on consumer welfare. This is captured by the strength of the OFT's belief that the merger will have an anti-competitive effect.
- 2.32 The OFT's assessment under the Act is in essence a predictive exercise concerning the competitive impact of the merger. As the Court of Appeal ruled in *IBA Health*,²¹ the OFT's duty to refer can in principle be triggered by a belief that may be no higher than 'more than fanciful' at one end of the spectrum. However, it may alternatively extend to, at the other extreme, a very high degree of confidence.
- 2.33 The likelihood of consumer harm – which can be avoided by the CC remedying, mitigating or preventing a substantial lessening of competition and thus protecting consumers – is clearly a relevant component to the OFT's cost/benefit analysis of a CC reference under its 'de minimis' discretion. The OFT considers it appropriate to attach weight to the strength of its belief that a substantial lessening of competition and resultant detriment will occur. This is because consumers 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 strength of the OFT's belief that a substantial lessening of competition will occur.²²

attributed to these customers should be excluded from consideration when determining the size of the 'affected' market for the purposes of the 'de minimis' exception.

²¹ *IBA Health v OFT* [2004] EWCA Civ 142.

²² Although, historically, approximately 50 per cent of OFT references have resulted in substantial lessening of competition findings by the CC, the OFT believes that – in exercising its 'de minimis' discretion – it should, when considering an individual case, have regard to what it assesses to be the likelihood that a substantial lessening of competition will arise in that case, rather than treating there as being a 50 per cent likelihood of a substantial lessening of competition materialising in every case.

2.34 In a number of cases in which the OFT has applied the 'de minimis' exception to date, the OFT therefore attached weight to the fact that its level of belief was merely on the 'may be the case' standard, rather than a 'more likely than not' standard.²³

Magnitude of competition lost by the merger

2.35 In all cases in which the OFT has concluded that its duty to refer is met, it follows that it must have judged that the potential lessening of competition must at least be 'substantial' in scale. However, above this threshold, the magnitude of the OFT's substantive competition concerns will vary between different cases.

2.36 The OFT'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 or non-price effect: for example, the differential between a five, 15 or 30 per cent price increase.²⁴ Where there are factors that would directly constrain any price increase in the market (even if insufficient to prevent a realistic prospect of substantial lessening of competition from arising at all) these will be relevant in this context.²⁵

2.37 By way of general illustration, where the OFT considers each merging party to be the only significant competitor to the other (a '2 to 1' merger) or one of only two (a '3 to 2' merger), the merger would typically be expected to lead (absent countervailing competitive

²³ An example of an exception to this is the decision in FMC Corporation/Alginates business of ISP Holdings (UK) Limited of 30 July 2008, in which the high likelihood of a substantial lessening of competition arising was 'outweighed' by other factors pointing towards the exercise of the discretion.

²⁴ In assessing the magnitude of competition that would be lost if the substantial lessening of competition posited actually materialises, the OFT will take into account evidence that the amount of competition between the parties has been limited: see Anticipated acquisition by Orbital Marketing Services Group Ltd of Ocean Park Ltd 14 November 2008, paragraph 81.

²⁵ 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 an increase on multi-operator tickets, the constraint on Stagecoach's own tickets posed by multi-operator tickets, and the role played by the Council on limiting and vetoing price increases.

constraints) to large price increases and/or quality or innovation cutbacks.

- 2.38 In considering the magnitude of competition concerns that could result from a merger, the OFT 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 – for example, by preventing or slowing down the emergence of competition that disrupts the coordination, or otherwise facilitating more durable, effective or widespread coordination.
- 2.39 The OFT is likely to place particular weight on the magnitude of competition lost by the merger where a substantial proportion of the likely detriment is suffered by vulnerable consumers.

Durability of the merger's impact

- 2.40 The OFT 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.
- 2.41 This will therefore often include consideration of the extent to which any barriers to entry into the market are substantial and durable. The OFT may conclude that it is confident that effective new entry will ultimately occur, but not in the sufficiently short term to prevent competition concerns from arising in the first place. Equally, the OFT may consider the durability of a merger's impact will be limited because technological or market transformation will render merger effects relatively short-lived.
- 2.42 Such evidence may be insufficient to establish that there is no realistic prospect of a substantial lessening of competition, but may still be relevant to the OFT's consideration of the likely impact of the merger.²⁶

²⁶ See in this respect Anticipated acquisition by FMC corporation of the alginates business of ISP holdings (UK) 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 (that is, after the two year period set out in the OFT guidance), and as such it did not consider that the negative impact of the merger would definitely persist for the foreseeable future.

Deterrence benefit of merger control decisions

Introduction: deterrence in merger control

- 2.43 A reference of a merger that is actually anti-competitive **directly** reduces consumer harm in the form of preventing an increase in price, or a decrease in quality, range or service that would otherwise have resulted from that merger. However, research by Deloitte in 2007²⁷ confirms it also results in an **indirect** benefit by deterring other anti-competitive mergers that would otherwise have taken place.
- 2.44 The research for Deloitte's Deterrent Effect Report suggests as a lower bound a multiple of five times the impact of any remedial intervention by the OFT (undertakings in lieu) or CC (second-phase substantial lessening of competition finding).²⁸
- 2.45 Account must be taken, however, of the existence of the mergers regime itself, which would catch a number of (non-notified) cases through the OFT's own own-initiative investigation process. Out of five anti-competitive mergers that are not deterred, but go ahead, it would be expected that half²⁹ of these would in fact be detected, investigated and reviewed (such that no consumer harm resulted from them).³⁰

²⁷ 'The deterrent effect of competition enforcement by the OFT: a report prepared for the OFT by Deloitte' (OFT962, November 2007) (the Deterrent Effect Report).

²⁸ This was on the basis that the Deterrent Effect Report's survey of lawyers suggests that over the period 2004-06, at least five proposed mergers were abandoned or modified on competition grounds before the OFT became aware of them for each one merger blocked or modified following intervention by the UK competition authorities.

²⁹ This is on the basis that the Deterrent Effect Report suggests that for every one substantial lessening of competition or undertakings in lieu case, there was one merger that went undetected.

³⁰ The OFT notes that Deloitte's Deterrent Effect Report was written in 2007, before the OFT appointed a dedicated Mergers Intelligence Officer tasked with bringing in problematic non-notified transactions (see paragraph 4.9 of the OFT's *Mergers – Jurisdictional and procedural guidance*). The OFT therefore believes that the proportion of problematic mergers that go undetected would in fact now be expected to be lower than the number of substantial lessening of competition and undertakings in lieu cases.

2.46 Taking these two findings together, the OFT therefore considers it reasonable to conclude that, on average, for every one reference or OFT undertakings in lieu case, there are two to three cases that are deterred that would not otherwise have been notified or detected and investigated by the OFT. This deterrent effect is taken into account when considering the indirect consumer harm that would result from the application of the 'de minimis' discretion in an individual case.

Consideration of deterrence in 'de minimis'

2.47 The OFT is concerned to ensure that its application of the 'de minimis' criteria should not undermine the deterrent effect of the merger control regime. It therefore believes that it is appropriate for it to take account of the deterrent effect that would be lost (if the merger were found to be anti-competitive by the CC) by application of the 'de minimis' discretion in an individual case.³¹

2.48 Failing to discourage obviously harmful mergers via the 'de minimis' exception (even in a small market) would be perverse: consistency would require that the application of the 'de minimis' discretion by the OFT in one case should equally be applied for every like case, which would mean that the OFT's action in that first case would cumulatively lead to aggregate consumer harm far in excess of the costs of referring the problematic merger at hand. Equally, it would be undesirable to exempt the first transaction via the 'de minimis' exception, incentivise like successor transactions because the parties would expect 'de minimis' treatment, and then confound expectations and incur the public costs of prohibiting the next transaction.

³¹ This should not be read as suggesting that no direct or indirect public benefit arises from the merger clearance decisions of a competition authority such as the OFT or CC. A sound merger regime is predicated on a proportion of cases being cleared after in-depth inquiry, as well as after first-phase inquiry. However, the deterrent effect that results from a reference of an anti-competitive merger is clearly lost by the application of the 'de minimis' discretion.

2.49 The OFT believes that it is not appropriate for it to apply a standard 'deterrence multiplier' to every case in which application of the 'de minimis' discretion is at issue. Rather, the OFT believes that in exercising its discretion, it should properly distinguish between different types of cases having regard to the economic rationale behind an individual transaction.³² The considerations underlying the OFT's approach in this area are as follows.

- Transactions that are essentially benign or pro-competitive should not be deterred by merger control.³³
- Part of the purpose of any credible merger regime is not only to prohibit a certain class of, say, merger to monopoly, but to deter like transactions from being contemplated or pursued.
- Mergers in small markets may be motivated by the acquisition 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.
- Focusing on the economic rationale behind an individual transaction provides a reasonable proxy for determining the extent to which it

³² 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.

³³ This is particularly the case where any competition issues that arise are severable (that is such that they may be fixed via remedies) because there is no public policy reason why the unproblematic elements of the transaction should not proceed. However, in practice, the issue of deterrence tends not to arise in such cases given the OFT's approach to 'de minimis' where it considers that undertakings in lieu are clearly available: see paragraphs 2.18 to 2.27 above.

may be appropriate to place a reduced or enhanced value on deterring similar transactions.³⁴

2.50 The primary consideration for the OFT in taking account of the economic rationale behind an individual transaction is whether the acquisition of market power was the driver of the merger, or merely incidental to it.³⁵ This typically involves considering the nature of the transaction and the circumstances that led to the merger. It may also involve considering the extent to which the rationale behind the merger could have been achieved without creating competition concerns (that is the extent to which the competition concerns were, in some sense, avoidable).

2.51 The OFT will regard deterrence as a particularly important consideration in a case in which the merger in question is one of a potentially large number of similar mergers that could be replicated across the sector in question. Although the affected market in each merger might otherwise be regarded as 'de minimis' taken on its own, the amount of consumer harm that could result from similar consolidation across the entire sector might well be considerable. Such consolidation should therefore properly be deterred by the mergers regime.

Impact of 'de minimis' to reduce the costs of first phase review

2.52 The primary aim of the 'de minimis' discretion is to avoid the cost³⁶ of a second phase investigation by the CC where the market(s) concerned is of insufficient importance to justify the making of a reference.

2.53 However, the OFT is also mindful of the value of reducing the overall costs of first phase review where this is possible without compromising

³⁴ See paragraph 104 of the Completed merger of Seniorlink Eldercare and Aid Call resulting from the completed merger between Help the Aged and Age Concern England 21 July 2009.

³⁵ See paragraph 78 of the of the Completed acquisition by Stagecoach Group plc of the East Midlands Franchise 4 February 2008 (which focused on the peculiar 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.

³⁶ As explained in paragraph 2.7 above, the OFT focuses only on the cost to the public purse of a reference in considering whether to exercise the discretion.

the performance of the OFT's duties under the Act and/or the rights of private parties (merging parties and third parties).

2.54 The OFT 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 OFT taking into account the discretion when deciding whether to send an enquiry letter
- second, through the availability of informal advice on the application of the discretion, and
- third, through consideration of whether the discretion is applicable in suitable cases at an early stage of the OFT's review.

These three measures are discussed below.³⁷

Consideration of 'de minimis' when sending enquiry letters

2.55 The OFT seeks to ensure that the general burden of first phase merger review is kept to a proportionate level by sending enquiry letters to trigger an own-initiative investigation only where it considers that the case in question is one in which there is a reasonable prospect that the duty to refer may be met.³⁸

2.56 In certain cases, expected to occur very rarely, it may be very clear to the OFT (without receiving any notification from the merging parties) that the market in which a non-notified merger may have an impact is too small in monetary terms to justify the making of a reference to the CC even if the duty to refer were met.

³⁷ The procedures for the OFT's decision making process, including application of the 'de minimis' discretion, are set out in full in the OFT's *Mergers – Jurisdictional and procedural guidance*. However, the OFT considers it useful in this context to highlight these points that relate to the 'de minimis' discretion.

³⁸ See OFT *Mergers – Jurisdictional and procedural guidance*, paragraph 4.15.

- 2.57 The OFT will therefore have regard to the existence and potential applicability of its 'de minimis' discretion in deciding whether or not to send an enquiry letter to trigger an own-initiative investigation.
- 2.58 Where the OFT is very confident that the affected market(s) is of insufficient importance to justify a reference, regardless of the magnitude, likelihood or duration of any substantial lessening of competition, and taking into account any potential deterrent effects that could arise from the reference, then the OFT is likely to conclude that there is no sensible justification for it to call the case in for a first phase review.
- 2.59 However, this does not preclude the possibility of the OFT ultimately deciding to apply the 'de minimis' discretion to a case it has investigated of its own initiative. As is clear from the discussion in paragraphs 2.28 to 2.51 above, whether to apply the 'de minimis' discretion will – in markets worth less than £10 million – often turn on factors that may become clear only after a full or partial first phase investigation by the OFT.

Availability of informal advice on 'de minimis'

- 2.60 Merging parties may decide that it is unnecessary to notify their transaction to the OFT on the basis that they believe the OFT would, in any event, apply the 'de minimis' discretion if the duty to refer were met.
- 2.61 This guidance and the detail in the OFT's published decisional practice covering the 'de minimis' discretion are intended to assist parties and their advisers in assessing when the OFT would be likely to apply the 'de minimis' discretion to a given case.
- 2.62 However, in cases where merging parties and their advisers remain in doubt as to the application of the discretion, then the OFT (via the Mergers Group) will offer informal advice on this point, subject to the caveats generally applicable to such advice.³⁹

³⁹ See paragraphs 4.28 to 4.41 of the OFT's *Mergers - Jurisdictional and procedural guidance*.

- 2.63 Seeking proper advice at the transaction planning stage, supplemented where necessary by informal advice from the OFT, will be preferable to proceeding with a merger on misplaced expectations as to the OFT's likely decision. This is especially true with respect to this exception to the duty to refer, as the proposed transaction at issue will often be small, and the cost of a CC inquiry to the parties, relative to the size of the transaction, will be substantial.
- 2.64 In the context of 'de minimis', it should be noted that the OFT's normal requirement that the request for informal advice relates to a transaction that raises a genuine issue as to referral is relaxed in circumstances where the party seeking informal advice is a private enterprise that is unable to afford external competition law advice.⁴⁰

Consideration of 'de minimis' at an early stage by the OFT

- 2.65 When a merger is notified to the OFT, either voluntarily by the parties or following receipt of an enquiry letter from the OFT, the OFT will consider at an early stage of its investigation whether the case is a candidate for application of the 'de minimis' discretion.
- 2.66 In cases where it becomes clear to the OFT during its investigation that the affected market(s) is of insufficient importance to justify a reference, regardless of the magnitude, likelihood or duration of any substantial lessening of competition, then the OFT is likely to move swiftly towards a decision not to refer on the basis of the 'de minimis' exception.
- 2.67 This will particularly be the case where it would obviously be quicker and more efficient to determine that the discretion would be applied than it would be for the OFT to reach the requisite level of belief that the transaction in question does not in fact trigger the duty to refer.
- 2.68 In such circumstances, the OFT would discuss with the parties whether they would be willing to waive their procedural rights to a full investigation (including an issues letter and issues meeting) to the extent

⁴⁰ See paragraph 4.33 of the OFT's *Mergers - Jurisdictional and procedural guidance*.

that the OFT is minded to apply the 'de minimis' discretion.⁴¹ In some cases, it may be clear that the OFT's duty to refer is met, but that the discretion is being applied; in other cases, the OFT may leave open the question of whether its duty to refer is met on the basis that its conclusion is that even if the duty is met, then the discretion would be applied.⁴²

⁴¹ For example, see paragraph 8 of the Completed acquisition by Govia Limited of South Central Rail Franchise 6 August 2009.

⁴² Such a conclusion might be particularly suitable in a case such as 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 affected market amounted to substantially less than £10 million.

Questions about markets of insufficient importance

- Q1** Do you agree that assessing whether to exercise the 'de minimis' discretion on the basis of a broad brush cost/benefit approach is a reasonable approach to this discretion?
- Q2** Do you agree that the OFT should only take account of public – and not private – costs in considering the cost of a reference, given that it generally takes decisions based on a consumer – and not total – welfare basis?
- Q3** Do you agree that the OFT's Dunfermline Press policy position with respect to the proportionality of a reference where undertakings in lieu are available is a reasonable one?
- Q4** Is it clear what the OFT means when it refers to undertakings in lieu being 'in principle' available in the context of de minimis? If not, what further guidance would be useful?
- Q5** Do you agree that the OFT should take account of deterrence when considering whether to apply its 'de minimis' discretion? If so, how?
- Q6** Is it reasonable for the OFT, in considering whether to apply a 'deterrence multiplier', to have regard to the economic rationale behind a merger?
- Q7** The OFT stated in its previous guidance that it might consider use of the exception 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. Do you consider this caveat should be retained?
- Q8** Do you agree with the OFT's stated intention to use 'de minimis' to reduce, where possible, the costs of a phase one investigation?
- Q9** Are there any other mechanisms, other than those listed, by which the OFT should use the 'de minimis' discretion to reduce the burden of merger control?

Q10 Are there any concerns about parties being willing to waive their procedural right to an issues letter and issues meeting if the OFT would, in any event, apply the de minimis exception?

Q11 Is the right level of detail given in relation to how the OFT exercises its 'de minimis' discretion? If more detail is required, in what areas should this be?

3 ARRANGEMENTS INSUFFICIENTLY FAR ADVANCED/ INSUFFICIENTLY LIKELY TO PROCEED

- 3.1 The intention 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.
- 3.2 In particular, this provision will ensure that the duty to refer is not triggered when the OFT is informed of transactions on a confidential basis in order for the parties to seek guidance. Hence, merging parties will not be inhibited from seeking informal advice from the OFT.⁴³
- 3.3 The OFT would usually expect a transaction to be sufficiently advanced to justify reference where:
- the parties to a transaction have publicly announced a completed 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 In practice, and where this is justified, the OFT would take a view soon after notification as to whether a full competition analysis was not required because of the early stage of proceedings.

⁴³ Although the OFT has not relied on this exception in a published decision, its existence means that there is no danger of the duty to refer being triggered at the stage when parties approach the OFT for informal advice (when it might otherwise be thought that arrangements are 'in contemplation' such that the duty to refer arises under section 33 of the Act). Note that the OFT is not obliged under section 107(1)(a) of the Act to publish a decision not to refer on the basis of this exception.

