Mergers

Exceptions to the duty to refer and undertakings in lieu of reference guidance

Summary of responses to draft guidance consultation document

14 December 2010
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1 INTRODUCTION AND BACKGROUND

1.1 On 1 October 2009, the OFT issued for public consultation the text of revised guidance covering the OFT’s ability to exercise an exception to the duty to refer or to accept undertakings in lieu under the Enterprise Act 2002 (the Act).

1.2 The existing guidance was contained in chapters 7 and 8 of the OFT Mergers - substantive assessment guidance (OFT516) as revised by Exception to the duty to refer: markets of insufficient importance (OFT516b), commonly known as the ‘de minimis’ guidance.

1.3 The OFT received a total of 17 responses to its consultation, comprising submissions from one barrister, 11 law firms, two representative bodies and three individuals. Where permission was given, the OFT has published the responses in full on its website.¹

1.4 The majority of the respondents to the consultation welcomed the OFT’s initiative to update its guidance, in particular to take account of the developments that have occurred in the way the OFT applies the ‘de minimis’ exception since publication of the guidance on this in November 2007 (OFT516b).

1.5 This document, published for information purposes, provides a broad summary of the responses received. In particular, it refers to each of the specific questions on which the OFT sought responses in its consultation document. In relation to the sections concerning the markets of insufficient importance exception and the availability of undertakings in lieu of reference, a brief outline of the key issues on which stakeholders focused in their responses is also provided at the start of the section.

1.6 This summary document does not attempt to be exhaustive in relation to all issues raised in the responses received, and exclusion of a particular

issue from this summary does not imply that the OFT has not considered the issue during its consultation.

1.7 The OFT has also set out in relation to each question its finalised position on the issues considered in this document, as reflected in the OFT’s *Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122), to be published at the same time as this response document.
2 MARKETS OF INSUFFICIENT IMPORTANCE (‘DE MINIMIS’)

Key issues

2.1 The 'de minimis' exception was the area of the consultation on which respondents had most comment.

2.2 Respondents welcomed use of the exception by the OFT, but some were concerned about elements of the OFT’s policy approach.

2.3 In particular, some respondents argued that:

- the OFT should increase the level of certainty and predictability around the use of the exception by providing a stronger (if not absolute) safe harbour threshold under which the exception would always be exercised

- the OFT should take account of private costs when considering the cost/benefit analysis of making a reference to the Competition Commission (CC)

- the OFT should not discount use of the ‘de minimis’ exception simply because the parties could have offered undertakings in lieu of reference in the case in question, and

- more generally, the OFT should consider whether to apply the ‘de minimis’ exception on the basis of the case itself, and should not have regard to 'precedent' or 'deterrent' considerations in determining whether the cost of a reference exceeds the benefit expected to be gained from it.

2.4 On the other hand, other respondents were more supportive of the OFT’s draft position on these points. Further detail, together with responses to these particular points, are set out in relation to the specific questions posed by the OFT in its consultation, below.
Responses to OFT questions

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?

2.5 Respondents were generally supportive of the use of a cost/benefit analysis.

2.6 A number of responses noted that the Act apparently refers only to the size of the market ('market(s) of insufficient importance') but most respondents considered it acceptable for the OFT to have regard to factors other than the size of the market(s) in exercising its discretion.

2.7 However, a significant proportion of respondents raised strong concerns that the complexity of the cost/benefit analysis undertaken by the OFT reduced the predictability of the way in which the discretion would be employed. For reasons of enhanced certainty, and to promote simple self-assessment for businesses, around half of respondents urged the OFT to adopt either a safe harbour market size threshold (below which mergers would always be regarded as 'de minimis') or alternatively to establish a threshold below which the OFT would only exceptionally regard a merger as justifying a reference.

2.8 Several respondents argued that the threshold for consideration of 'de minimis' was set significantly too low. One respondent, for example, urged that the market size threshold be set at £100 million (together with turnover threshold for any of the parties of £10 million) on the basis that intervention below this level acts as a deterrent to efficiency improving mergers among small and medium sized enterprises. That respondent also urged the OFT to have regard in its competition assessment to whether merging parties would in fact be able to increase price post-merger, given the constraints that they might face (such as buyer power).

2.9 The OFT intends to continue using a broad cost/benefit analysis that gives significant weight to the size of the market(s) concerned, but also takes into account other considerations.
2.10 The OFT does not regard it as appropriate, in the context of a discretion, to give a 'safe harbour' below which it would automatically exercise the 'de minimis' exception, but will state in its finalised guidance that where the annual value in the UK of the market(s) concerned is less than £3 million, the OFT will generally not consider a reference justified provided that there is not in principle a clear-cut undertaking in lieu of reference available.

2.11 The OFT’s experience of applying the 'de minimis' exception since the £10 million threshold was introduced in November 2007 has not provided evidence to it to indicate that it would be appropriate to increase this threshold. Nor, however, does the OFT consider it appropriate to reduce this threshold, notwithstanding that the stated average public cost of a CC reference has been reduced from £500,000 to £400,000; to do so would suggest an artificial degree of precision in the way the OFT approaches the use of 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?

2.12 There was near unanimity of views amongst respondents that private costs should be taken into account if the OFT continues to operate a cost/benefit analysis. It was pointed out that these private costs can be significant in comparison to the public costs.

2.13 Some respondents considered that there was no reason as a matter of principle why the OFT should disregard costs incurred by businesses during a CC investigation. Other responses were sympathetic to the OFT’s adoption of a consumer-welfare standard but considered that customers could suffer as a result of a reference (in the form of delayed benefits from a merger, potential deterioration of the businesses, risk of distraction in management and so forth). Some respondents also believed that the costs of a reference might also be passed on to customers in the form of higher prices.
2.14 The OFT continues to believe that it is right to adopt a consumer welfare standard when assessing the costs/benefits of a reference and therefore not to have regard to private costs. The OFT notes that 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.²

2.15 The OFT would not expect that the fixed costs to the parties of a reference would generally be passed through to customers. Although the OFT acknowledges the possibility that there could be some effects on businesses involved in a reference, it notes that the CC aims to minimise these effects (for example through the use of interim undertakings). It also notes that any indirect 'costs' of a reference flowing from such effects are impossible to calculate.

2.16 For all these reasons, the OFT continues to believe that private costs should not be included in its consideration.

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?

2.17 Responses to this question were relatively evenly spread. One set of responses was supportive of the OFT’s approach as it stood. Another set recognised the policy justification behind the OFT’s approach, but considered it led to the peculiarity that the same SLC finding might be the subject of apparently inconsistent treatment, depending on whether or not it was part of a larger transaction. The remaining set of responses considered the OFT’s approach to be unlawful or unjustified on the basis that undertakings in lieu are relevant only when a decision to refer has been taken; a number of responses stated clearly that whether a market

² 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.
was of insufficient importance to justify a reference should not depend on the availability or otherwise of a hypothetical remedy.

2.18 The OFT believes that its policy position, as first set out in its Dunfermline Press\(^3\) decision, is lawful. At the stage of considering the 'de minimis' exception to the duty to refer, the OFT is not concerned about whether the parties have offered undertakings in lieu of reference; but it is relevant to its consideration whether they could reasonably do so.

2.19 The OFT believes that the basic policy justification for not exercising the 'de minimis' discretion when the parties could offer remedies is sound. 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. Alternatively, companies should be encouraged to structure their transactions so that they avoid competition concerns in the first place.

2.20 The OFT believes that the policy considerations explaining the approach it adopted to this question in its Dunfermline Press decision outweigh the potential critique of the policy that can be made at the margins of its application. As such, the 'in principle' availability of undertakings in lieu of reference in a given case remains a key consideration in whether or not the OFT will exercise its 'de minimis' discretion.

2.21 Based on the responses to the consultation received, and the questions that have arisen through the OFT's decisional practice, the OFT has attempted to ensure in the revised guidance that the policy is explained clearly and that it is workable in practice.

\(^3\) Completed acquisition by Dunfermline Press Limited of the Berkshire regional newspapers business from Trinity Mirror plc 4 February 2008.
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?

2.22 To the extent that the OFT continued to apply the policy set out in its Dunfermline Press decision, most respondents were comfortable with this concept. However, a number of respondents sought additional clarification, most commonly on whether the OFT would regard there as being an undertaking in lieu in principle available where the available clear-cut remedy would require divestment of a business beyond that generating the substantial lessening of competition.

2.23 The OFT will clarify in its guidance that it will not consider for the purposes of its ‘de minimis’ analysis that undertakings in lieu are in principle available where the minimum structural divestment that would be required to ensure the remedy was effective would be wholly disproportionate in relation to the concerns identified.

Q5 Do you agree that the OFT should take account of deterrence when considering whether to apply its ‘de minimis’ discretion? If so, how?

2.24 Responses to this question were somewhat mixed. A significant proportion of respondents believed that considerations related to ‘deterrence’ were inappropriate in the context of a mergers regime given that mergers are presumed benign and are not unlawful (in contrast, for example, to cartels). Many respondents stated that they believed that each merger should be assessed on its own facts, and that considerations relating to deterring future mergers were irrelevant. One respondent suggested that the OFT should be explicit that the fact that the OFT applied the discretion in one case would not mean that it would necessarily do so in a future such case.

2.25 A proportion of responses were more nuanced, arguing that the OFT should be entitled to take account of the fact that a particular transaction might have an anti-competitive rationale. However, these responses tended to warn that whether a transaction had an anti-competitive rationale could be regarded as speculative and that, in any event,
consideration of such a factor should be the exception rather than the rule.

2.26 In summary, there was a strong call for caution on the OFT's consideration of 'deterrence' in the context of merger control.

2.27 The OFT fully appreciates respondents' concern that mergers (as a generality) should not be deterred by the merger control regime. The OFT/CC Merger assessment guidelines recognise explicitly that many mergers are either pro-competitive or benign in their effect on rivalry.4

2.28 However, the OFT is conscious of the need for consistency and predictability in the way it exercises its 'de minimis' discretion. It therefore believes that it should have regard to the wider implications of any decision it takes to exercise its 'de minimis' discretion for the treatment of other potentially anti-competitive future transactions.

2.29 The OFT believes that the application of the 'de minimis' discretion in one case should mean that the discretion is also applied to an analogous future case in the same sector where competitive conditions are comparable. For this reason, the OFT considers 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.

2.30 Going forward, the OFT will therefore take account of the replicability of a merger in a particular sector in determining whether to exercise the 'de minimis' discretion.

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?

2.31 See the response to question 5 above. Most respondents that supported the use of deterrence in some form considered that this should be done

4 OFT1254, paragraph 4.1.3.
only in exceptional cases rather than as a standard approach to all mergers.

2.32 See the response to question 5 above. Going forward, the OFT will not apply a standard 'deterrence multiplier' to all mergers in which it has found the duty to refer is met. However, it will have regard to the replicability of a merger in a particular sector.

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?

2.33 The majority of responses considered that the OFT should not retain this caveat, with a representative response being that it was not fair to burden a particular merger with the expense of becoming a precedent. A minority of respondents considered that it should be retained, albeit that it should be used only rarely.

2.34 As indicated above (see response to question 5), the OFT has expressly stated in its guidance that it will take account of the potential replicability of a given set of facts within a particular sector in deciding whether to exercise its 'de minimis' discretion. The previous, more widely-drafted caveat will not be retained in the new guidance.

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?

2.35 Respondents welcomed the OFT’s initiative in this respect. The reservation that some respondents expressed – linked to the OFT’s use of a cost/benefit analysis – is that the complexity of the OFT’s approach means that it will not be possible to achieve this regularly.

2.36 The OFT remains committed wherever possible to employing the exception to reduce costs: this can include costs at phase one as well as at phase two in appropriate cases. Although there will be cases that are
sufficiently marginal that a full phase one investigation is needed to determine whether it is appropriate to exercise the discretion, the OFT will state in its guidance that it will front-load this question where appropriate.

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?

2.37 Most respondents did not identify any additional mechanisms. One respondent suggested that informal advice on 'de minimis' should be available without the parties having to advance a credible theory of harm, whilst another suggested that the availability of the 'de minimis' exception could be raised in enquiry letters and could be discussed in pre-notification meetings.

2.38 The OFT notes that its 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. The OFT generally seeks questions about overall market size when requesting a submission on a merger and will state in its guidance that it is willing to discuss 'de minimis' in pre-notification discussions.

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?

2.39 The large majority of respondents agreed that parties should be entitled to waive these procedural rights, although a number suggested that the OFT should leave expressly open the question of whether a substantial lessening of competition had been reached in such cases. Several respondents noted that it was important that the parties’ rights to challenge an adverse finding should be preserved in the event that the

5 See paragraph 4.33 of the OFT’s Mergers - jurisdictional and procedural guidance (OFT527).
OFT’s ‘de minimis’ decision were successfully to be challenged by a third party. One respondent noted that this process raised concerns about the content of the final decision and queried whether the parties could view a draft of the decision in order to comment on it.

2.40 The OFT will continue to offer this option to parties in appropriate cases. It will be made clear in the guidance that this is without prejudice to the parties’ views on whether the duty to refer would in fact be met. The OFT sees no justification for giving parties sight of a draft decision in such cases.

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?

2.41 Responses on this were mixed. A number highlighted specific areas where they wished for further detail. Equally, a number of stated that the OFT’s approach in this area – and by implication the guidance – was too complicated.

2.42 The OFT retains committed to providing the clearest and most straightforward guidance possible, whilst ensuring that this gives sufficient detail for parties on the OFT’s approach. The OFT has reviewed the guidance in the light of the consultation with a view to making it simpler and shorter where this has been possible.
3 ARRANGEMENTS INSUFFICIENTLY FAR ADVANCED/INSUFFICIENTLY LIKELY TO PROCEED

Responses to OFT questions

Q12 Do you believe there are any types of situation in which the OFT has not historically employed this exception but where it should do so going forward?

3.1 Most respondents either did not comment on this question or stated that they were unaware of any such situation.

3.2 One respondent raised the situation of competing bids, noting that there may be situations in which third parties may announce a potential interest in making a bid in order to influence, or participate more actively in, a merger review process. In these situations, it may be appropriate to exercise this exception to the duty to refer where an expression of interest is made for ulterior purposes.

3.3 Without commenting on the specific considerations in paragraph 3.2 above, the OFT does not consider that it needs to provide specific guidance on the use of this exception in this context.
4 RELEVANT CUSTOMER BENEFITS

Responses to OFT questions

Q13 Is the OFT applying the correct evidential standard in relation to customer benefits?

4.1 The large majority of respondents stated that they believed that the OFT was applying the correct evidential standard to this exception to the duty to refer. A couple of respondents noted that the 'clear and compelling' standard applied by the OFT was very high, with one respondent speculating that this might mean that this exception might never be used. Another respondent, whilst agreeing with the evidential standard applied by the OFT, emphasised that the OFT must be willing to engage with parties on this issue.

4.2 The OFT considers that, as a first phase authority exercising a discretion not to refer to the CC a merger that gives rise to a realistic prospect of a substantial lessening of competition, it is appropriate for it to require that any claimed relevant customer benefits must be clear, and the evidence in support of them must be compelling.

4.3 The explanatory notes to the Act make it clear that relevant customer benefits were not expected to arise very often. Nevertheless, the OFT is conscious of the existence of the exception and is willing to engage constructively with parties in seeking to identify and substantiate relevant customer benefits in appropriate cases.

Q14 Do you agree with the OFT's explanation of the relationship between efficiencies that prevent a substantial lessening of competition from occurring and relevant customer benefits that outweigh an identified substantial lessening of competition?

4.4 The majority of respondents to the consultation agreed with the description of the relationship between efficiencies that prevent a substantial lessening of competition and relevant customer benefits set out by the OFT in the consultation document.
4.5 One respondent took issue with the language of the second sub-bullet of the first bullet in paragraph 4.4 of the consultation document (‘no worsening of any aspect of competition’) on the basis that this was conceptually difficult and reliant on potentially artificial distinctions between different aspects of products and services. That respondent also believed it to be inconsistent with the first example of a relevant customer benefit given in paragraph 4.13 of the consultation document. That respondent urged the OFT to refocus the distinction based on ‘rivalry enhancing efficiencies’. Another respondent also suggested that, whilst it believed the difference to be clear in theory, it was less easy to differentiate in practice and that constructive engagement was necessary from the OFT.

4.6 Since publication of the consultation document, the OFT has considered the relationship between efficiencies and relevant customer benefits in more detail in the context of finalisation of the OFT/CC Merger assessment guidelines.6

4.7 The OFT believes that, following further consideration, and having regard to the comments discussed above, it is clearer to describe efficiencies that are relevant in determining whether there is a substantial lessening of competition as being those that impact on rivalry. This is consistent with the description of a substantial lessening of competition in paragraphs 4.1.1 to 4.1.3 of the Merger assessment guidelines. In explaining the relationship between efficiencies and relevant customer benefits, the guidance will therefore mirror the discussion given in paragraphs 5.7.1 to 5.7.3 of the Merger assessment guidelines.

Q15 Is it right to consider evidence on customer benefits on a sliding scale?

4.8 All respondents to the consultation agreed with the OFT’s use of a sliding-scale to consider evidence on relevant customer benefits. One respondent

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6 Merger assessment guidelines (OFT1254), section 5.7.
noted that the type of customer benefit in question may be more important than its size, whilst another commented that this approach was difficult to do in practice.

4.9 The OFT intends to have regard both to the magnitude of the benefits and the probability of them occurring and to set this against the scale of the identified anti-competitive effects and the probability of them occurring. The more powerful and more likely the anti-competitive effects of the merger, the greater and more likely the relevant customer benefits must be to meet and overcome such concerns.

Q16 Why have parties been unable to substantiate a customer benefits exception at phase one under the Act to date?

4.10 There were a range of responses to this question. Several respondents considered that suitable circumstances would be rare and/or had potentially not arisen to date. A number of respondents made mention of the high evidential standard required, with one respondent noting that this did not encourage parties to raise relevant customer benefit claims.

4.11 One respondent pointed to the OFT’s recent Global/GCap merger decision as leaving plenty of scope for the exception to be argued, such that this may encourage parties going forward. That respondent also argued that there may be a place for relevant customer benefits to be identified in the case of a near-failing firm, and cited European Commission decisional practice on this issue.

4.12 One respondent suggested that the OFT was sceptical of relevant customer benefits arguments. Another noted that, in the absence of decisional practice on this issue, the OFT should supplement its guidance to show what evidence was required and could encourage parties to advance arguments on this issue at an early stage without prejudice to the existence or otherwise of a substantial lessening of competition.

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7 Completed acquisition by Global Radio UK Limited of GCap Media plc ME/3638/08, 8 August 2008.
4.13 The OFT would encourage parties to submit evidence on relevant customer benefits when they genuinely believe they will arise. The presentation of such evidence will not be taken by the OFT as acceptance by the parties that the merger will result in a substantial lessening of competition and the new guidance will emphasise this point.
5 UNDERTAKINGS IN LIEU OF REFERENCE TO THE COMPETITION COMMISSION

Key issues

5.1 Respondents were generally supportive of the OFT’s approach to undertakings in lieu of reference. These are generally regarded as a useful and proportionate means of remedying the harm that could be caused by a merger without having to incur the costs of a second phase investigation.

5.2 Most respondents were generally of the view that the OFT’s concern in relation to undertakings in lieu offered by the parties should be limited to assessing whether they were sufficient to address the competition harm identified. Issues of over-enforcement and of proportionality in the context of the wider transaction were for the parties in deciding whether to offer undertakings in lieu.

5.3 The area of concern for respondents was largely focused on the use of the upfront buyer mechanism (that is where the OFT requires that the parties identify a suitable buyer before it accepts undertakings in lieu). Most respondents considered there was a place for this mechanism, but were worried that it was being over-used by the OFT.

5.4 Further detail on each of the above points, together with responses to them, are set out in relation to the specific questions posed by the OFT in its consultation, below.

Responses to OFT questions

Q17 In what circumstances, if any, should the OFT be willing to accept a mitigatory remedy given that there remains the possibility of a reference to the CC?

5.5 The large majority of respondents expressed support for the approach set out by the OFT in paragraph 5.16 of the consultation document. One respondent referred to the Competition Appeal Tribunal’s judgment in Co-
Operative Group (CWS) Limited v OFT\textsuperscript{8} clarifying that where undertakings in lieu are offered that would clearly address the substantial lessening of competition then these should be accepted even if they do not fully restore competition to pre-merger levels.

5.6 The OFT guidance will incorporate the approach set out in the consultation document, namely that: the OFT would be extremely cautious before accepting a purely mitigatory remedy, and would be very unlikely to do so save where it was abundantly clear that the CC (notwithstanding its order making powers, ability actually to prohibit a merger and the increased time available in the context of a second phase inquiry to consider more detailed remedies) would be materially no better placed than the OFT to achieve a remedy that would restore the levels of competition that existed pre-merger.

Q18 Should the OFT be concerned about a risk of over-enforcement in terms of accepting undertakings in lieu (potentially requiring significant divestments), particularly given the level of the reference test?

5.7 The large majority of the respondents who answered this question considered that the OFT should not be concerned about the risk of enforcement given the level of the reference test. The fact that a remedy would be required by the OFT to address concerns found on the 'may be the case' standard was a matter for the parties: if they were prepared to offer undertakings in lieu of reference to cover these concerns, that was their choice.

5.8 One respondent queried whether the OFT should take a greater set of remedies than might be required by the CC. In particular, that respondent noted that parties would often be keen to avoid a CC reference but this did not absolve the OFT of the need to act proportionately.

\textsuperscript{8} [2007] CAT 24.
5.9 For the reasons given in paragraph 5.21 of the consultation document, an undertaking in lieu may be required to resolve a concern on the 'is or may be the case' standard where a remedy might not be required on the balance of probabilities standard, which is that applied by the CC.

5.10 Nevertheless, the OFT is very conscious that the scope of the undertakings in lieu should not go beyond what is necessary in order to remedy identified competition concerns (based on the OFT’s test for reference) in any particular case. Provided this principle is respected, the OFT believes that it is for the parties to decide whether they are prepared to accept the risk of over-enforcement in giving undertakings in lieu.

Q19 Should the OFT be prepared to allow parties to abandon/totally unwind a transaction through undertakings in lieu?

5.11 The large majority of responses to this question supported the view that parties should be allowed to abandon/totally unwind a transaction through undertakings in lieu. No respondent believed that there was value in requiring the parties to go through a CC reference if they were prepared to abandon/unwind the transaction.

5.12 One respondent noted that, in the case of an anticipated merger, the parties should be permitted to make a simple statement to the OFT that they had abandoned the transaction, as they would do at CC stage.

5.13 The OFT believes that, in the context of a completed merger, there is no reason why it should not permit parties to abandon/totally unwind a transaction through undertakings in lieu where the undertakings in lieu would otherwise be acceptable as an effective remedy. The OFT notes that, in the case of anticipated mergers, where the OFT has found the duty to refer is met, the parties are able to provide the CC with an assurance that they have abandoned the proposals in order to cancel an inquiry.
Q20 Do you agree that proportionality of the divestment in the context of the wider transaction is irrelevant at OFT stage?

5.14 All respondents stated that proportionality of the divestment in the context of the wider transaction is irrelevant at the OFT stage, although one respondent noted that, in practical terms, the parties' views would be influenced from guidance received from the OFT case team during the investigation.

5.15 **The OFT agrees that, when considering actual offered undertakings in lieu,** the question of proportionality in terms of the remedy in the context of the wider transaction is a commercial issue for the parties to consider when deciding whether they are willing to offer undertakings in lieu.

Q21 Do you agree that the OFT does not have the power to accept undertakings in lieu from a purchaser of divestment assets?

5.16 The majority of respondents who answered this question agreed that the OFT does not have the power to accept undertakings in lieu from a purchaser of divestment assets (for the reasons given in footnote 51 of the consultation document).

5.17 One respondent did not agree with this analysis, arguing that a purchaser of divestment assets could be treated as a 'party concerned' for the purposes of section 73(2) of the Act. That respondent considered that such undertakings could be used to make a purchaser acceptable to the OFT (for example by requiring it to divest overlapping assets) but that behavioural undertakings should not be sought from third parties.

5.18 **The OFT believes that it does not have the power to accept undertakings in lieu** (for example, a commitment as to future use of an asset) from a

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9 Note that proportionality concerns are potentially relevant in the context of the application of the *Dunfermline Press* principle (when the OFT is considering whether undertakings in lieu are 'in principle' available such that the 'de minimis' exception is not applied) – see paragraph 2.23 above.
purchaser of divestment assets (given that such a purchaser would not be a 'party concerned' in relation to the original relevant merger situation).

5.19 (By way of clarification, the OFT would have the power to accept undertakings in lieu in relation to a separate relevant merger situation, arising from a divestment, that itself created a realistic prospect of a substantial lessening of competition. However, in practical terms, the guidance will state that the OFT will approve a divestment purchaser only where it is confident that the acquisition by that proposed purchaser does not itself create a realistic prospect of a substantial lessening of competition within any market or markets in the UK.\textsuperscript{10})

Q22 In what circumstances, if any, should the OFT seek informal ongoing behavioural commitments from a purchaser of divestment assets or a divestment business?

5.20 Respondents were somewhat divided on this issue.

5.21 One set of respondents considered that the OFT should not seek informal commitments from a purchaser of divestment assets on the basis that there was no mechanism for enforcing these. Several respondents raised doubts about the OFT’s practice (discussed in footnote 74 of the consultation document) of requiring a warranty from a divestment purchaser to the selling merging party for similar reasons. Several respondents queried whether a purchaser should be approved when the OFT believed it was necessary to consider asking for such informal assurances. One respondent also considered that such commitments – by which the OFT could be said to be seeking to control long-term outcomes – went beyond merger control.

5.22 On the other hand, several respondents considered there might be a place for such assurances, for example where the divestment assets could be used for a range of purposes.

\textsuperscript{10} See also paragraph 8.41 of the OFT’s Mergers - jurisdictional and procedural guidance.
5.23 The OFT is conscious of the limitations inherent in the use of such informal assurances, including those associated with a warranty given by the purchaser of divestment assets to the selling merging parties. However, the OFT believes that it may be appropriate to require such contractual commitments in the sale documentation as a way of focusing the divestment purchaser’s mind on the issues in question. The OFT is conscious also that requiring specific written statements from the divestment purchaser can be helpful given the existence of the 'false and misleading' provisions in section 117 of the Act.

Q23 Do you agree that the OFT's use of the upfront buyer mechanism provides a proportionate means of addressing divestment risk? Are there any risks around this mechanism that might be addressed?

5.24 The large majority of respondents considered that the use of an upfront buyer provision was appropriate in certain cases.

5.25 One respondent queried whether it was consistent with parliamentary intention given that express provision was not made for it at the time of the Enterprise Act 2002. Several respondents pointed out that the OFT had strong powers under section 75 in the event that undertakings in lieu were not fulfilled.

5.26 The main force of the responses to this question concerned the threshold at which the OFT would seek an upfront buyer. Several respondents noted the additional time that this added to the phase I process and noted the commercial difficulty this presented for merging parties. As a result, many respondents urged that the onus be on the OFT to establish the need for an upfront buyer and argued that upfront buyers be reserved only for exceptional cases. Several respondents were concerned that upfront buyer appeared to be becoming the norm, whilst another suggested that it should not be used widely outside difficult economic conditions.

5.27 The OFT considers that an upfront buyer mechanism is permitted under the current legislation (given that the OFT may suspend its duty to refer a merger to the CC in order to seek undertakings in lieu).
5.28 Although the OFT has order-making powers under section 75 of the Act in the event that undertakings are not being fulfilled, this is of limited benefit where the failure to divest the business is because there is genuinely no buyer, rather than because the parties are not making appropriate efforts to sell. In addition, the OFT does not believe that it is appropriate for it, as a first phase body that has a limited time period to review a merger, to place undue reliance on the fall-back availability of order-making powers under section 75 of the Act.

5.29 Before being willing to accept undertakings in lieu of reference, the OFT believes that it should have a suitable degree of confidence that a suitable purchaser or purchasers exist. Hence, the OFT continues to believe that the upfront buyer mechanism is appropriate in certain circumstances.