

Anticipated acquisition by Pearson Professional Assessments Limited of the computer-based testing business of learndirect Limited

ME/6562/15

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 16 December 2015. Full text of the decision published on 7 January 2016.

Please note that [✂] indicates figures or text which have been deleted or replaced in ranges at the request of third parties for reasons of commercial confidentiality.

Background

1. Pearson Professional Assessments Limited, through its UK operating entity Pearson VUE (**Pearson VUE**), has agreed to acquire the computer-based testing (**CBT**) business of learndirect Limited (**learndirect**) (the **Merger**). Pearson VUE and learndirect are together referred to as the **Parties**.
2. On 2 December 2015, the Competition and Markets Authority (**CMA**) decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger, if carried into effect, will result in the creation of a relevant merger situation, and that this may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **UK**) (the **SLC Decision**).
3. On the date of the SLC Decision, the CMA gave the Parties notice of the SLC Decision pursuant to section 34ZA(1)(b) of the Act. However, in order to allow the Parties the opportunity to offer undertakings in lieu of a reference (**UILs**) to the CMA in accordance with section 73(2) of the Act, the CMA did not refer the Merger for a phase 2 investigation pursuant to section 33(3)(b) on the date of the SLC Decision.
4. Pursuant to section 73A(1) of the Act, if a party wishes to offer UILs, it must do so within the five working day period specified in section 73A(1)(a) of the Act. The SLC Decision stated that if no UILs were offered to the CMA by the end of this period (ie, by 9 December 2015), or the Parties indicated before this deadline that they did not wish to offer such UILs, then the CMA would

refer the Merger for a phase 2 investigation pursuant to sections 33(1) and 34ZA(2) of the Act.

5. Pursuant to section 34ZA(2) of the Act, the CMA is not prevented from making a reference under section 33 of the Act if it is considering whether to accept UILs under section 73 of the Act but no such UILs are offered or accepted.

The UILs offered

6. The Parties overlap in the supply of end-to-end post-school (16+) invigilated CBT services in the UK (**CBT Services**). In the SLC Decision, the CMA decided that it is or may be the case that the Merger may be expected to result in an SLC in the supply of CBT Services as a result of a loss of rivalry between the Parties which may lead to higher prices and/or a reduction in service quality for customers.
7. On 9 December 2015, the Parties offered to the CMA the following undertakings (the **Proposed UILs**) which they submitted would remedy, mitigate or prevent the identified SLC and any adverse effects arising from it:
 - (a) Pearson VUE would sub-contract back to learndirect the performance of the Life in the UK Test (for applicants for British citizenship) for the Home Office, which was awarded to learndirect on 23 October 2014 and currently runs to October 2019 (the **LitUK Contract**) (the sub-contractor arrangement being defined as the **LitUK Sub-Contract**). In the Parties' view, the LitUK Sub-Contract would enable learndirect to remain as an independent and effective competitor in the market for CBT Services post-Merger.
 - (b) In support of the Proposed UILs, learndirect submitted that retention of the LitUK Contract will enable it to retain the financial resources, expertise (including the managerial, operational and technical capability), incentive and intention to maintain and operate a viable and active business in competition with Pearson VUE and other competitors in the end-to-end CBT market.

Assessment of the Proposed UILs

8. The CMA has an obligation under the Act in the phase 1 stage of its review to have regard, when accepting UILs, to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it (section 73(3) of the Act). Accordingly, the remedies

proposed must be clear-cut and capable of ready implementation.¹ This means, amongst other things, that the CMA must be confident that all the potential competition concerns that have been identified in its investigation would be resolved by means of the UILs without the need for further investigation.

9. The CMA's starting point in deciding whether to accept a proposed UIL is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC (rather than accepting a remedy that simply mitigates the competition concerns).²

LitUK Sub-Contract

10. The Parties submitted that the Proposed UILs would restore the number of competitors to the same number as under pre-Merger conditions. The Parties argued that learndirect won the CBT Framework in 2012 on the back of serving the LitUK Contract, and that going forwards with the Proposed UILs learndirect would [REDACTED]. The Parties also submitted that learndirect would be able to leverage its experience serving the LitUK Contract to win additional CBT contracts in the future, including the Driver and Vehicle Standards Agency theory test contract from September 2016 (the **DVSA Contract**).
11. First, the CMA considered whether the Proposed UILs would restore learndirect to the competitive position as set out in the CMA's counterfactual in the SLC Decision. In its counterfactual, the CMA considered that learndirect would continue to serve the UK government's single supplier framework agreement for CBT services (the **CBT Framework**), including the DVSA Contract, the LitUK Contract and other contracts.³ With the Merger and the Proposed UILs, learndirect would only serve the LitUK Contract pursuant to a sub-contracting arrangement, that is, with no independent or direct contractual relationship with the customer, the Home Office. It would also have no other contracts in the CBT Services market. Taking this into consideration, the CMA believes that, following the Merger, if the Proposed UILs were to be accepted, learndirect would be a significantly weaker competitor than it would be under the CMA's pre-Merger counterfactual and that, therefore, the Proposed UILs

¹ *Mergers – Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122, December 2010) (**Exceptions Guidance**), adopted by the CMA as set out in *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), Annex D), paragraphs 5.6-7.

² *Exceptions Guidance*, paragraph 5.11.

³ In addition to the DVSA Contract and the LitUK Contract, learndirect has been awarded the following contracts under the CBT Framework since October 2013: (a) a contract with the Department for Education/Standards and Testing Agency for the provision of literacy and numeracy tests for trainee teachers; and (b) a contract with the Construction Industry Training Board for a non-invigilated online test. Learndirect also has a contract with the Civil Aviation Authority for [REDACTED] and a concession agreement with the Security Industry Authority ([REDACTED]).

would not restore learndirect's competitive strength to the level of the counterfactual.

12. Secondly, the CMA considered whether with the Proposed UILs, learndirect would pose a competitive constraint comparable to Pearson VUE's competitive strength absent the Merger (ie, rivalry between the Parties absent the Merger would be comparable with rivalry with the Merger and the Proposed UILs). As set out in the SLC Decision, the CMA considers that Pearson VUE will remain a strong competitor with the expertise, capabilities and reputation to continue serving its existing CBT customers and to compete for new customers against learndirect. Pearson VUE will continue to serve [REDACTED] CBT contracts⁴ [REDACTED].⁵ In contrast, if the Proposed UILs were accepted, learndirect would only continue to serve the Lit-UK Contract under a sub-contracting arrangement and would not have a similar range and number of CBT Service contracts as compared with Pearson VUE absent the Merger and, as such, would not have a comparable level of experience and reputation in the CBT Services market. Learndirect would therefore not be able to compete as effectively for new contracts going forward as Pearson VUE would be absent the Merger.
13. Thirdly, the remedy is also conditional on receiving the consent from the Home Office and the Cabinet Office. Moreover, the proposed arrangement is a sub-contracting arrangement which will create links between two independent rivals in the CBT Services market, providing a degree of transparency over cost and price, and learndirect will be entirely dependent on Pearson VUE for its main source of business for an unforeseeable period.
14. Accordingly, the CMA considers that the Proposed UIL is not capable of fully addressing the competition concerns identified in the SLC Decision and sufficiently clear-cut.

Decision

15. For the reasons set out above, after examination of the Proposed UIL, the CMA does not believe that it would achieve as comprehensive a solution as is reasonable and practicable to the SLC identified in the SLC Decision and the adverse effects resulting from that SLC.

⁴ Around [REDACTED] other CBT service contracts with a value of approximately [REDACTED] out of a current total market size of [REDACTED].

⁵ Pearson VUE internal document, [REDACTED].

16. Accordingly, the CMA has decided not to exercise its discretion under section 73(2) of the Act to accept UILs.
17. Therefore, pursuant to sections 33(1) and 34ZA(2) of the Act, the CMA has decided to refer the Merger to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 to conduct a phase 2 investigation.

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Competition and Markets Authority
16 December 2015