Completed acquisition by SSCP Spring Topco Limited of Acorn Care and Education Group

Decision that undertakings might be accepted

ME/6640/16

Introduction

1. On 3 August 2016, SSCP Spring Topco Limited (**SSCP Spring**), acting through its subsidiary SSCP Spring Bidco Limited (**SSCP Bidco**), a holding company of the National Fostering Agency Group[1] (**NFA**), acquired the entire issued share capital of Acorn Care 1 Limited and its subsidiaries (**Acorn**) (the **Merger**). NFA and Acorn are together referred to as the **Parties**.

2. On 30 January 2017, the Competition and Markets Authority (**CMA**) decided under section 22(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger constitutes a relevant merger situation that has resulted or may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**).

3. On the date of the SLC Decision, the CMA gave notice to SSCP Spring of the SLC Decision pursuant to section 34ZA(1)(b) of the Act. However, the CMA did not refer the Merger for a phase 2 investigation pursuant to section 22(3)(b) on the date of the SLC Decision in order to allow SSCP Spring the opportunity to offer undertakings to the CMA in lieu of such reference for the purposes of section 73(2) of the Act.

4. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings for the purposes of section 73(2) of the Act, it must do so within the five working day period specified in section 73A(1)(a) of the Act. Accordingly, on 6 February 2017, SSCP Spring offered undertakings to the CMA for the purposes of section 73(2) of the Act.

5. The CMA now gives notice, pursuant to section 73A(2)(b) of the Act, to SSCP Spring that it considers that there are reasonable grounds for believing that

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[1] The National Fostering Agency Group comprises Belton Associates (Group Holdings) Limited (Company 07875698) and all its subsidiaries.

the undertakings offered, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act and that it is considering the offer.

The undertakings offered

6. Under section 73 of the Act, the CMA may, instead of making a reference, and for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from such of the merger parties concerned as it considers appropriate undertakings to take such action as it considers appropriate.

7. The SLC Decision found that the Merger gives rise to a realistic prospect of an SLC in relation to the supply of fostering placement services by independent fostering agencies (**IFAs**) to Local Authorities (**LAs**) at the framework level with respect to the All Wales framework, the framework agreement area comprising Luton, Central Bedfordshire and Bedford (the **Luton framework**) and the Norfolk framework. In particular, the SLC Decision noted that:

   (a) The fostering placement services sector is characterised by significant capacity constraints, and the scale of an IFA's existing carer network is likely to be a strong indicator of its competitive strength within a particular framework;

   (b) In each of the All Wales, Luton and Norfolk frameworks, the Parties would have a strong market position post-Merger;

   (c) The remaining fringe of IFAs on each of these frameworks would not be sufficient to constrain the Parties post-Merger. In each case, the market position of the remaining IFAs is considerably smaller than the merged entity and, in light of the capacity constraints that characterise the sector and limited evidence of recent expansion, these IFAs may be unable to expand their capacity sufficiently to constrain the Parties; and

   (d) There is no realistic prospect that LA in-house provision would be able to expand to the extent necessary to defeat a price rise or reduction in quality post-Merger.

8. To address these SLCs, SSCP Spring has offered to give undertakings in lieu of a reference. The proposed undertakings comprise the divestment of three Acorn businesses serving each of the relevant frameworks where the CMA found a realistic prospect of an SLC (collectively the **Proposed Undertakings**). The Proposed Undertakings comprise:

(a) The divestment of Acorn's Pathway Care Limited (**PCL**) business (including all relevant carer capacity and any related employees and assets that may be required by a purchaser), a stand-alone business that is currently active on the Wales framework (the **Wales Divestment Business**);

(b) The divestment of Acorn's business (including all relevant carer capacity and any related employees and assets that may be required by a purchaser) in relation to the Norfolk framework (the **Norfolk Divestment Business**); and

(c) The divestment of Acorn's business (including all relevant carer capacity and any related employees and assets that may be required by a purchaser) in relation to the Luton framework (the **Luton Divestment Business** and, together with the Wales Divestment Business and the Norfolk Divestment Business, the **Divestment Businesses**).

9. Under the Proposed Undertakings, SSCP Spring has also offered to enter into a purchase agreement with a buyer or buyers approved by the CMA before the CMA finally accepts the Proposed Undertakings (**Upfront Buyer Condition**).

The CMA's provisional views

10. The CMA considers that undertakings in lieu of a reference are appropriate when they are clear-cut and capable of ready implementation. The CMA's starting point when assessing undertakings is to seek an outcome that restores competition to the level that would have prevailed absent the merger.[2]

11. The CMA believes that the Proposed Undertakings, or a modified version of them, might be acceptable as a suitable remedy to the SLC identified by the CMA. This is because the transfer of the carer capacity provided by the Divestment Businesses restores competition in relation to the supply of fostering placement services to the level that would have prevailed absent the Merger within each of the three framework areas.

12. The CMA therefore currently believes that the Proposed Undertakings may be capable of amounting to a sufficiently clear-cut and effective resolution of the CMA's competition concerns. The CMA also currently believes that the

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[2] *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance (OFT1122)*, December 2010, Chapter 5 (in particular paragraphs 5.7 to 5.8 and 5.11). This guidance was adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*, January 2014, Annex D).

Proposed Undertakings may be capable of ready implementation through the transfer of the Divestment Businesses to an IFA that has the expertise and infrastructure to support such a transfer.

13. The Upfront Buyer Condition means that the CMA will only accept the Proposed Undertakings after SSCP Spring has entered into agreements with nominated buyer(s) that the CMA considers to be suitable.[3] It also means that, before acceptance, the CMA will consult publicly on the suitability of the nominated buyer(s), as well as on other aspects of the Proposed Undertakings. In order to consider the proposed buyer(s) as being suitable, the CMA will need to be satisfied that the standard purchaser approval criteria are met. These include the requirement that the proposed purchasers have the financial resources, expertise, incentive and intention to maintain and operate the divestment business as part of a viable and active business in competition with the merged party in the relevant market.[4]

14. In this case, the CMA considers that an Upfront Buyer Condition is necessary for each of the Divestment Businesses in order to minimise purchaser risks (given that there may be only a small number of suitable candidate purchasers) and to minimise risks relating to the composition of the Divestment Businesses (within which carers are of integral importance). The CMA also notes that the Norfolk and Luton Divestment Businesses are not existing stand-alone businesses.[5]

15. For these reasons, the CMA currently thinks that there are reasonable grounds for believing that the Proposed Undertakings, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act.

16. The CMA's decision on whether ultimately to accept the Proposed Undertakings or refer the Merger for a phase 2 investigation will be informed by, among other things, third party views on whether the Proposed Undertakings are suitable to address the competition concerns identified by the CMA. In particular, before ultimately accepting the Proposed Undertakings, the CMA must be confident that the nominated buyer(s) is effective and credible such that the competitive constraint provided by Acorn absent the Merger is replaced to a sufficient extent.

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[3] The Parties have submitted that the Divestment Businesses are operationally separate at present. Accordingly, the CMA considers that the Divestment Businesses may be sold to a single purchaser or separately to different purchasers.
[4] See *Exceptions to the duty to refer and undertakings in lieu of reference guidance*, paragraph 5.26.
[5] See *OFT1122*, paragraphs 5.31–5.37, and *CMA2*, paragraph 8.34.

Consultation process

17. Full details of the undertakings offered will be published in due course when the CMA consults on the undertakings offered as required by Schedule 10 of the Act.[6]

Decision

18. The CMA therefore considers that there are reasonable grounds for believing that the Proposed Undertakings offered by SSCP Spring, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act. The CMA now has until 10 April 2017 pursuant to section 73A(3) of the Act to decide whether to accept the undertakings, with the possibility to extend this timeframe pursuant to section 73A(4) of the Act to 9 June 2017 if it considers that there are special reasons for doing so. If no undertakings are accepted, the CMA will refer the Merger for a phase 2 investigation pursuant to sections 22(1) and 34ZA(2) of the Act.

Sheldon Mills
Senior Director, Mergers
Competition and Markets Authority
13 February 2017

[6] *CMA2*, paragraph 8.29.