

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

Decision on relevant merger situation and substantial lessening of competition

ME/6640/16

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 30 January 2017. Full text of the decision published on 20 February 2017.

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

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SUMMARY

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 Group¹ (**NFA**), acquired the entire

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

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. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that the Parties' enterprises have ceased to be distinct and that the turnover test is met. The four-month period for a decision, as extended, has not yet expired. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.
3. The Parties overlap in the supply of fostering placement services to local authorities (**LAs**) in Great Britain. Fostering placement services may be provided either through the LA's in-house network of foster carers or through independent fostering agencies (**IFAs**), such as the Parties. The available evidence indicates that IFA provision is a 'spill-over' market that is separate from LA in-house provision, because LAs typically seek to place children with their in-house networks of carers first and therefore do not, in practice, choose between placing a child into foster care through an IFA or through their in-house network.
4. Fostering placement services provided by IFAs are typically procured through framework agreements (operated either by a single LA or a consortium of LAs) which provide the key commercial terms on which fostering placements are made with IFAs. When an individual LA has a child to place into foster care (and is unable to do so within its in-house network of foster carers), the LA will contact IFAs on the framework. Having taken into account this context in which LAs procure fostering placement services, as well as the local nature of demand for these services, the CMA believes that it is appropriate to assess the effect of the Merger both at the level of the framework agreement area and at the level of the individual LA.
5. With respect to the framework level assessment, the CMA believes that the Merger gives rise to a realistic prospect of a substantial lessening of competition (**SLC**) as a result of horizontal unilateral effects in three framework agreement areas: the All Wales framework, the framework agreement area comprising Luton, Central Bedfordshire and Bedford (the **Luton framework**) and the Norfolk framework (comprising the Norfolk LA only). The CMA's investigation found that:
 - (a) The fostering placement services sector is severely capacity constrained, and therefore the scale of an IFA's existing carer network is likely to be a significant indicator of its competitive strength within a particular framework;

- (b) In each of the All Wales, Luton and Norfolk frameworks, the Parties will have a strong market position post-Merger;
 - (c) The remaining fringe of IFAs would not be sufficient to constrain the Parties post-Merger. The market position of the remaining IFAs on each of these frameworks is considerably smaller than the merged entity and, in light of the capacity constraints in the market and the 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.
6. With respect to the LA level assessment, the CMA's investigation found that nearly all of the key parameters of competition are set during the framework tender stage and apply across all LAs on the framework. While the CMA's investigation found that there is scope, in some cases, for some commercial parameters to be varied at the individual LA level or placement stage, the extent of any rivalrous competition between IFAs is very limited. On this basis, the CMA believes that competition between IFAs occurs principally at the framework level and that the Merger does not give rise to a realistic prospect of an SLC at the LA level.
7. The CMA therefore believes that the Merger gives rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the supply of fostering placement services by IFAs to LAs at the framework level with respect to the All Wales, Luton and Norfolk frameworks.
8. The CMA is therefore considering whether to accept undertakings under section 73 of the Enterprise Act 2002 (**the Act**). SSCP Spring has until 6 February 2017 to offer an undertaking to the CMA that might be accepted by the CMA. If no such undertaking is offered, then the CMA will refer the Merger pursuant to sections 22(1) and 34ZA(2) of the Act.

ASSESSMENT

Parties

9. Stirling Spring Capital Partners, a private equity firm, controls SSCP Spring. SSCP Spring is the indirect parent of SSCP Bidco, which is in turn the holding company of NFA. NFA is a provider of independent fostering placement

services in the UK. The turnover of NFA in the financial year ended 31 March 2016 was approximately £[redacted], all of which was generated in the UK.²

10. Acorn is a provider of independent fostering placement services, residential care and special needs education in the UK. The turnover of Acorn in the financial year ended 31 March 2015 was approximately £[redacted], all of which was generated in the UK.

Transaction

11. On 3 August 2016, SSCP Spring, acting through SSCP Bidco (the holding company of NFA) acquired the entire issued share capital of Acorn (the **Merger**).

Jurisdiction

12. As a result of the Merger, the enterprises of NFA and Acorn have ceased to be distinct.
13. The UK turnover of Acorn exceeds £70 million, so the turnover test in section 23(1)(b) of the Act is satisfied.
14. The Merger completed on 3 August 2016 and was first made public on the same date. The four month deadline for a decision under section 24 of the Act is 16 February 2017, following extensions under section 25(2) of the Act.
15. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.
16. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 1 December 2016 and the statutory 40 working day deadline for a decision is therefore 30 January 2017. The Merger was considered at a Case Review Meeting.³

Counterfactual

17. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For completed mergers the CMA generally adopts the pre-merger conditions of competition as the counterfactual against which to assess the impact of the merger. However,

² The CMA understands that Stirling Spring Capital Partners does not provide independent fostering placement services through any other entity in its portfolio and has no other interest in such services in the UK.

³ See [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), January 2014, from paragraph 7.34.

the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it believes that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions.⁴

18. In this case, there is no evidence supporting a different counterfactual, and the Parties and third parties have not put forward arguments in this respect. Therefore, the CMA believes the pre-Merger conditions of competition to be the relevant counterfactual.

Background

19. LAs have a statutory duty to safeguard and promote the welfare of children looked after by them, referred to as 'looked after children' (**LACs**).⁵ This involves dealing with extremely vulnerable children, often in emergency situations. Before a child is placed into foster care, the LA must be satisfied that fostering is the best way to fulfil this duty, and that the specific placement is the most appropriate having regard to all the circumstances.⁶ As discussed in further detail below, LAs will seek to place LACs into foster care either through their own in-house network of foster carers, or through IFAs.
20. Fostering placement services provided by IFAs are typically procured through framework agreements,⁷ operated either by a single LA or a consortium of LAs (in the latter case with one LA typically taking the lead as the framework operator). Framework agreements provide the commercial terms on which the sole LA or consortium will seek to make fostering placements with IFAs.
21. When a framework agreement is tendered, IFAs bid to participate in the framework and submit the prices at which they will offer their services. If successful, the IFA will join the framework as a provider. When an LA has an LAC which it needs to place into foster care (and is unable to do so within its

⁴ *Merger Assessment Guidelines* (OFT1254/CC2), September 2010, from paragraph 4.3.5. The *Merger Assessment Guidelines* have been adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), January 2014, Annex D).

⁵ The term 'looked after' was introduced by the Children Act 1989 and refers to children and young people under the age of 18 who live away from their parents or other family members and are supervised by a social worker from the local council children's services department (ie the LA). Section 22 of the Children Act 1989 says: (1) In this section, any reference to a child who is looked after by a local authority is a reference to a child who is - (a) in their care; or (b) provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) which are social services functions within the meaning Children Act 1989 of the Local Authority Social Services Act 1970, apart from functions under sections 17, 23B and 24B. (2) In subsection (1) 'accommodation' means accommodation which is provided for a continuous period of more than 24 hours.

⁶ Regulations 22 and 23 Care Planning, Placement and Case Review (England) Regulations 2010.

⁷ Some LAs also use preferred supplier lists. However, the CMA understands that the pricing in such cases is also agreed in advance between IFAs and the relevant LA. Accordingly, where this decision refers to 'frameworks', this includes procurement through preferred supplier lists.

own in-house network), the LA will contact IFAs on the framework and seek to make the placement that offers the best available care (the ‘best match’) for the LAC, typically at the price submitted by the IFA at the framework tender stage.

Frame of reference

22. Market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as it is recognised that there can be constraints on merger parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. The CMA will take these factors into account in its competitive assessment.⁸
23. The Parties overlap in the supply of fostering placement services to LAs in Great Britain.⁹

Product scope

24. As a starting point, the CMA adopted a frame of reference for the supply of fostering placement services to LAs. The CMA then assessed the extent to which: (i) it should assess the impact of the Merger separately for different types of fostering placements; and (ii) fostering placement services provided in-house by LAs should be included within the same frame of reference as fostering placement services provided by IFAs.

Segmentation by placement type

25. From the submissions of the Parties and third parties, the CMA understands that the requirements of each LAC placed into foster care, and therefore the type and nature of foster care required, will differ depending on a large number of factors (including the age, ethnicity, educational and behavioural issues of the child and the duration of the placement). The CMA also understands that, for the purposes of frameworks, which try to establish a supplier set which is able to capture all these diverse individual needs, IFAs and customers may categorise placements under broad headings (such as by

⁸ [Merger Assessment Guidelines](#), paragraph 5.2.2.

⁹ NFA is also active in Northern Ireland, however Acorn is not.

age, acuity, or level of complexity) and that some frameworks may be split into different framework 'lots'¹⁰ based on these factors.

26. LAs and framework operators confirmed to the CMA, however, that the majority of IFAs provide services for all or most placement types,¹¹ and therefore that IFAs are typically viewed as largely undifferentiated in service offering. Indeed, both Acorn and NFA supply fostering placement services to the different categories of placements across the various frameworks, as do the other most significant IFAs in the areas of overlap. The CMA therefore believes that it is appropriate to assess the Merger based on the overall supply of fostering placement services, rather than focusing on any particular category. This approach is further supported by the views of LAs and framework operators on the potential impact of the Merger, the majority of which related to the overall supply of fostering placement services rather than to any particular type of placement.¹²
27. On this basis, the CMA believes that it is not appropriate to assess the Merger by reference to separate frames of reference according to any particular characteristics of the placement in this case.¹³

Segmentation by provision of services by IFAs and LAs

28. Third party responses received by the CMA confirmed that an LA will tend to have its own in-house network of foster carers. The Parties submitted that the appropriate frame of reference is fostering placement services, including placements arranged both by LAs (ie placements to the LA's in-house network) and IFAs because:
- (a) The Parties regard all fostering placement services, including placements arranged by LAs and IFAs, as a single 'market' in the ordinary course of business and consider that LAs and IFAs compete with each other to recruit carers;

¹⁰ IFAs submit separate bids for each lot, which set out the prices/terms on which the IFA will supply fostering placement services for the placement type covered by that lot. Each bid will be assessed separately at the framework tender stage.

¹¹ The CMA understands that a small number of IFAs specialise in providing placement services for LACs with complex needs.

¹² Albeit that some third parties noted that there are more severe carer shortages for some types of placement. These views are consistent with the LaingBuisson report 'CHILDREN'S CARE & SPECIAL EDUCATION SERVICES UK MARKET REPORT' (2015) which notes supply shortages of carers for certain placement types including: teenagers, siblings, ethnic minorities, asylum seekers and disabled children.

¹³ The CMA also did not receive any evidence to support further narrowing of the frame of reference according to the mechanism through which placements are procured (ie through frameworks, spot purchasing, etc). Responses from most LAs confirmed that, in general, the great majority of fostering placement services are purchased via frameworks.

- (b) Placements made with the LA's in-house carer network tend to account for the majority of the placements made by an LA; and
 - (c) LAs are in a strong position to discipline IFAs to ensure effective competition through the LA's control of the allocation of LACs and the LA's ability to grow its in-house network. To support this position, the Parties noted that they had lost substantially more carers to LAs than to other IFAs and that LAs could offer incentives (such as higher utilisation rates, lower-complexity placements and council tax exemptions) which IFAs could not.
29. The evidence received by the CMA does not support the Parties' proposed frame of reference. The evidence indicates that IFA provision is a 'spill-over' market that is separate from LA in-house provision because LAs do not, in practice, choose between placing an LAC with an IFA or through their in-house network of carers. More specifically:
- (a) LAs almost always seek to fulfil placement referrals using the LA's in-house carers first, only resorting to external provision in the event they are not able to meet demand in-house;
 - (b) In-house provision is not included within any of the frameworks that IFAs are listed on. LAs therefore do not, in practice, compare the offering from IFAs on a framework against the cost/quality of using their in-house network;
 - (c) There are often significant differences between in-house and IFA provision in terms of complexity and cost. Evidence from third parties indicates that the fees charged by IFAs are typically considerably higher than those incurred in in-house provision and that IFAs generally cater to more complex placements than LAs;¹⁴ and
 - (d) Most IFAs who responded to the CMA's investigation stated that they did not take the extent of LA provision into account when deciding their pricing strategy.
30. Notwithstanding these significant differences, it might nevertheless be appropriate to include in-house provision within the frame of reference if an LA would be able to timeously expand its in-house network of carers in order to counter any potential price increase by IFAs.

¹⁴ One respondent noted that this price differential may be attributable to some extent to the fact that in-house pricing does not reflect overheads. However, another respondent stated that exclusion of overheads would not account for the full differential. The CMA notes that views varied on exactly how much fees differ when comparing like-for-like placements. However, many third parties indicated that IFA fees are higher.

31. The evidence received by the CMA indicates, however, that the sector is characterised by significant capacity constraints and that the recruitment of carers (including by LAs) is challenging. While some LAs noted having had limited success in expanding their carer base, the majority of LAs confirmed that, despite sustained and costly recruitment efforts, they had been unable to expand their in-house networks sufficiently to meet growing demand for placement of LACs.¹⁵ The evidence received by the CMA also indicates that the speed of recruitment of foster carers is typically slower for LAs than for IFAs.
32. In light of the evidence described above, the CMA believes that it is not appropriate to include provision by LAs within the relevant frame of reference. To the extent appropriate, the CMA has taken into account the constraint that LA in-house provision may exert on IFAs within the competitive assessment.

Conclusion on product scope

33. For the reasons set out above, the CMA has assessed the impact of the Merger on the supply of fostering placement services by IFAs to LAs.

Geographic scope

34. The Parties submitted that the appropriate geographic frame of reference for framework agreement areas is the respective framework area, and not individual LAs, on the basis that all competitive parameters are set at the framework level and there is no scope for competition at the LA level. For the minority of LAs that choose to procure IFA services unilaterally, the Parties submitted that the LA area is not the relevant geographic frame of reference because such LAs can, and probably would, join broader purchasing consortia if a hypothetical IFA monopolist attempted to impose a 5% price rise in the LA area. Further, the Parties noted that some LAs have begun to pool their in-house resources and to place LACs with other LAs.
35. The Parties, framework operators and LAs told the CMA that there is a strong preference to place LACs locally (eg close to their school, birth parents etc), even if this is not necessarily the only consideration when choosing a carer.¹⁶ In this context, although the CMA understands that a significantly higher proportion of LACs placed with IFAs are placed outside the referring LA's

¹⁵ Some LAs noted that it was a challenge to compete for carers against IFAs who can offer greater financial rewards. Others noted that IFAs were perceived by some as being able to offer better training or support to their foster carers.

¹⁶ This is consistent with [REDACTED].

boundary, the evidence available to the CMA indicates that most LACs are placed with carers located either within the boundary of the referring LA (or close to it) and/or within 20 miles of the child's own home.¹⁷

36. In determining the appropriate frame of reference for the purposes of its assessment of the Merger, the CMA has taken into account this local demand while also assessing the context in which LAs procure fostering placement services at both (i) the framework level and (ii) the LA level.

Framework-level frame of reference

37. The CMA's investigation confirmed that in the majority of instances IFAs compete to be included on frameworks and that nearly all of the key parameters of competition are set in those tenders and apply across all LAs on the framework. The CMA investigation also found that competitive conditions vary from framework to framework (eg different competitor sets of IFAs have typically been active in bidding across each framework). This is considered in Theory of Harm 1 below.

LA-level frame of reference

38. The Parties submitted that there is no material competition on price or service quality that takes place at the individual LA or 'sub-framework agreement' level during the lifetime of the framework agreement and that the only appropriate geographic frame of reference is therefore the framework area.
39. The evidence available to the CMA indicates that supply conditions can, in some cases, vary across LAs that form part of the same framework. More specifically, the evidence indicates that the market presence of different IFAs (including those of the Parties), as represented by shares of supply based on number of placements, can vary between different LAs that form part of a single framework area. The CMA has also received evidence from LAs and competitors of the Parties that some further degree of commercial negotiation can, at least in some cases, take place at the LA level regarding terms not agreed at the framework level. In relation to a particular placement, negotiation can also take place at LA level regarding the variation of terms agreed at the framework level.

¹⁷ For instance [DfE data](#) shows that, in England, about 74% of LAC placements were made within 20 miles of the child's residence and 61% of LAC are placed within the boundary of the responsible LA itself. Further, [Ofsted data](#) shows that the majority of fostered children (88%) in England were placed within 10 miles of the referring LA's boundary.

40. For these reasons, the CMA believes that it is appropriate to also assess the Merger with reference to the geographic area covered by each LA.¹⁸ This is considered in Theory of Harm 2 below.

Conclusion on geographic scope

41. For the reasons set out above, the CMA has assessed the impact of the Merger at the framework level and at the LA level.

Conclusion on frame of reference

42. For the reasons set out above, the CMA has considered the impact of the Merger on the supply of fostering placement services by IFAs to LAs:
- (a) at the framework level, in each of the framework areas in which the Parties overlap; and
 - (b) at the level of the LA, in each of the LAs in which the Parties overlap.

Competitive assessment

Horizontal unilateral effects

43. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or degrade quality on its own and without needing to coordinate with its rivals.¹⁹ Horizontal unilateral effects are more likely when the merger parties are close competitors. The CMA assessed whether it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC in relation to:
- (a) Unilateral horizontal effects in the supply of fostering placement services by IFAs at the framework level (Theory of Harm 1); and/or
 - (b) Unilateral horizontal effects in the supply of fostering placement services by IFAs at the LA level (Theory of Harm 2).

¹⁸ The CMA recognises that carers from outside the geographical boundaries of an LA may be used to place LACs which are the responsibility of that LA. However, the CMA also notes that LAs generally seek to place LACs within or near their boundaries, as this will tend to be where the LAC attends school, etc.

¹⁹ [Merger Assessment Guidelines](#), from paragraph 5.4.1.

Theory of Harm 1: Horizontal unilateral effects at the framework level

44. The CMA's concern under this theory of harm is that the Merger may significantly reduce competition between IFAs at the framework level, resulting, in particular, in an increase in price or deterioration in the quality of bids submitted in future tenders. The CMA has assessed whether an SLC may arise on this basis in each of the areas relating to a framework where the Parties overlap. The Parties submitted that there are 36 frameworks in the UK. Of those frameworks located in Great Britain,²⁰ as at 31 March 2015 (the most recent year for which the Parties submitted placement share data), the Parties overlap in all but four of them.²¹
45. In assessing whether horizontal unilateral effects may arise, the CMA may consider whether a merger results in a firm with a large market share (and whether the remaining fringe of firms would be sufficient to constrain the merged firm),²² and/or whether the merger eliminates a significant competitive force from the market.²³
46. The Parties suggested that competition concerns could not arise within any framework area because a large number of IFAs typically bid for a place on framework contracts and because the Parties do not consider themselves to be close competitors (in light of the large numbers of bidders for each framework and the Parties' suggestion that they are not consistently positioned on the same 'tier' of frameworks).
47. Before assessing the potential impact of the Merger within individual framework areas (in paragraph 77 onwards), the CMA first provides a summary of the evidence received in relation to competitive dynamics in fostering placement services (in paragraph 48 onwards), which provides the relevant market context for these local analyses. The CMA also briefly explains (in paragraph 72 onwards) the approach that has been taken to assessment in the local areas in which the Parties overlap.

²⁰ As noted in footnote 9, the Parties do not overlap in Northern Ireland.

²¹ Poole, Lincolnshire, North Yorkshire and Southend-on-Sea, all of which operate single-LA frameworks. In all of the remaining frameworks, the Parties both had at least some placements with one or more LAs on the framework as at 31 March 2015 (even if not both were 'on framework' providers). The Parties also both provide services to Leicester City Council and Redbridge Council, which the CMA understands are currently not part of a framework and procure all of their fostering placement services on the spot market.

²² [Merger Assessment Guidelines](#), from paragraph 5.4.4.

²³ [Merger Assessment Guidelines](#), from paragraph 5.4.5.

The operation of framework bidding processes

48. The framework bidding process generally ranks a group of IFAs that may be suitable for placement in the future based on the bids submitted by those IFAs.
49. On many frameworks, this ranking process is achieved through placing IFAs on a number of tiers, with IFAs that score more highly in the tender process (typically through submitting lower prices) being placed on higher tiers.²⁴ In general, when an LA has a placement to make, it will send the referral request to IFAs on Tier 1 first. If no 'best match' is identified in Tier 1, the LA will approach IFAs on Tier 2, followed by Tier 3, and so on. As stated in paragraph 64(a) however, the CMA understands that this process may not be followed in all cases, and some referral requests may be sent to all framework providers at the same time. If the LA is unable to find a 'best match' with any provider on the framework, it may approach 'off framework' providers in what is referred to as the spot market.
50. Therefore, when an IFA submits a bid for a framework tender (or prepares for it by, for example, building its carer network) it will take into account the expected benefits and costs of submitting a higher price (or lower quality) bid, weighing the higher price per placement won against the lower likelihood of receiving referral requests and consequently winning placements.
51. It is, however, important to note that this is not a 'winner takes all' bidding market in which an IFA wins either all or no placements as an outcome of the framework bidding process. Instead, the framework bidding process may determine the tier that an IFA is positioned on and this may, to some extent, influence the number of referrals/placements subsequently won by the IFA. However, the evidence available indicates that other factors – in particular the size of an IFA's carer network – will also influence where placements are made for the reasons explained in paragraph 52 onwards.

The competitive significance of an IFA's existing carer network

52. As noted above, the evidence available to the CMA indicates that the fostering placement services sector is characterised by significant capacity constraints. As explained in further detail in paragraph 138 onwards, carer recruitment is a material challenge, involving significant time and expense.
53. The available evidence therefore indicates that LAs would probably not be able to react to any loss of competition brought about by the Merger by

²⁴ In general, there is no further ranking within a tier, ie all IFAs placed on Tier 1 are equally ranked.

allocating substantially increased proportions of placements to rival suppliers (or by switching to 'in-house' provision). For this reason, the CMA considers that the existing capacity of IFAs (as represented by their shares of placements) is likely to be a particularly relevant indicator of competitive strength within this sector.

54. The Parties submitted that focusing on the relative scale of IFAs (as represented by shares of placements as a proxy for shares of capacity) as a measure of competitive strength is inappropriate because:
- (a) Shares are volatile and current shares are not necessarily an indicator of future success in securing placements; and
 - (b) The capacity offered by an IFA is generally not taken into account by a framework operator when considering bids, and therefore IFAs focus on achieving the best tier possible.
55. The Parties also submitted econometric analysis that they suggest confirms that there is no statistically significant relationship between the level of concentration (at both the LA and framework level) and any of price, quality or margins.²⁵
56. The available evidence does not, however, support the Parties' position for the following reasons:
- (a) Shares of supply are relatively stable. In contrast to the Parties' submissions, their shares of placements have been relatively stable over the period 2013-15 on the vast majority of frameworks.²⁶
 - (b) The capacity of rival IFAs has a material impact on an IFA's bidding strategy. For the most part, framework operators (and LAs) do not consider an IFA's capacity when assessing where that IFA should be ranked. The available evidence indicates, however, that an IFA will condition its bid on the basis of how it expects its largest rivals to bid, rather than on the expected bidding strategy of each of its numerous much smaller rivals. Accordingly, for the purposes of framework level competition, a larger IFA is likely to be a more significant constraint on a given IFA than a smaller IFA, even where those smaller IFAs make up a large collective position in the aggregate. This is consistent with the evidence in [redacted].

²⁵ Carried out by PricewaterhouseCoopers (PWC).

²⁶ To the extent that any fluctuation has occurred, this has been taken into account as relevant within the local area assessment set out below.

- (c) Tier position has a limited impact on an IFA's bidding strategy, as explained in paragraphs 60 to 66 below.
- (d) The [redacted] emphasise the commercial benefits of holding a significant amount of capacity. These note, for example [redacted],²⁷[redacted],²⁸[redacted].²⁹
- (e) Customer concerns about the Merger placed considerable emphasis on the fact that the Parties would acquire a significant share of placements/carer capacity in their area. In particular, customer concerns (whether at the LA-level and/or the framework-level) noted the increase in market concentration, the reduction in the number of larger providers and the consequent decrease in the existing competitive constraint that IFAs face. In particular, customer concerns were more acute in those framework areas in which the Parties' share of placements is more significant.

57. By their own account, the Parties recognise that only limited weight could be placed on the econometric analysis submitted.³⁰ The CMA notes that such analyses can be a valuable source of evidence but are technically complicated, particularly when applied to complex markets, and considerable time may be required to design, carry out and run suitable robustness checks. In this case, the analysis was submitted at a late stage in the CMA's investigation. The CMA raised several significant concerns about the methodology used with the Parties,³¹ which it has not been possible to resolve to the CMA's satisfaction within the time available. The CMA has therefore been able to attribute only very limited weight to this evidence.
58. The CMA also notes that the competitive significance attached to shares of placements is consistent with the evidence received that, notwithstanding the often complex nature of LACs' needs and the work undertaken by foster carers, the services offered by fostering placement services providers, such as the Parties, are not considered to be materially differentiated (either by customers or by competitors). As the CMA's guidance makes clear, when the

²⁷ For example, [redacted].

²⁸ [redacted].

²⁹ [redacted].

³⁰ Paragraph 5.11 to the Parties' response to the Issues letter.

³¹ Such concerns included (but were not limited to): (a) The model containing variables that the analysis is trying to test for (so called 'bad controls'), eg the model controlling for the relative tier that a brand is placed on although this is, itself, an outcome of the competitive process; (b) The analysis using measures of concentration that are derived from IFA revenue data which, again, is itself an outcome of the bidding process; and; (c) The model being over specified, as it includes a large number of controls, some of which seem to be capturing the same effects (for example, IFA placements and population both measure the size of the local market).

services supplied are undifferentiated, measures of market share are more meaningful in indicating market power and closeness of competition.³²

59. Based on the available evidence, the CMA therefore considers that the scale of an IFA's existing carer network is a significant indicator of competitive strength. To this end, for the purposes of the local area assessments, the CMA has assessed:
- (a) Whether the Merger will result in a firm with a large existing network of carers where the remaining fringe of firms would not be sufficient to constrain the Parties (in light of the significant capacity constraints that characterise the sector); and/or
 - (b) Whether the Merger will result in the elimination of a significant competitive force (because the Parties are two of the larger existing players on a framework).

The competitive significance of tier positions

60. The Parties submitted that securing a high tier position has a material impact on an IFA's bidding strategy. More specifically, the Parties submitted that acquiring a relatively high ranking on a framework is key to determining the number of referrals and placements that an IFA is likely to receive. For this reason, the Parties consider that framework participation at the highest possible tier is 'critical' to their commercial strategy, in particular because foster carers are 'savvy' and that, as a consequence, the tier achieved by an IFA will have a material impact the number of carers an IFA can recruit and retain.
61. The Parties therefore suggested that the desire to secure a higher tier position would have a more significant impact than the share of capacity that they would hold on the Parties' commercial incentives to bid competitively post-Merger. The Parties also suggested, more generally, that the fact that they are not consistently positioned on the same tier of frameworks indicates that they are not close competitors.
62. The available evidence does not, however, support either of the Parties' propositions.
63. The CMA recognises that an IFA is typically likely to have a material incentive to achieve a good ranking for the purposes of maintaining and growing its carer base. The evidence available to the CMA indicates, however, that such

³² [Merger Assessment Guidelines](#), paragraph 5.3.4

an incentive would not necessarily constrain the merged entity where it held a significant share of capacity on a given framework post-Merger. In particular:

- (a) Evidence provided by the Parties regarding the ‘delisting’ (ie failure to obtain a place on the framework at any tier) [redacted]³³ [redacted],³⁴
- (b) [redacted]³⁵ supports the proposition that the delisting was not particularly harmful to [redacted], on the basis of the limited capacity of other players;
- (c) The evidence submitted by the Parties does not establish that attaining a high tier position is necessary to achieve high carer utilisation, or that a lower tier position results in a lower level of carer recruitment/retention. [redacted];
- (d) [redacted] explains that it can be optimal to submit higher prices and to be situated on a lower tier;³⁶ and
- (e) Evidence provided by the Parties regarding the effect on [redacted].

64. The Parties’ suggestion that they are not close competitors by virtue of their respective tier positioning also received only limited support in the CMA’s investigation. In particular:

- (a) Few framework operators that responded to the CMA’s investigation identified tier position (or ranking) as a measure of closeness of competition between IFAs. By contrast, a number of competitors stated that they compete equally with all IFAs on a given framework (regardless of tier position) or that tier position is often ‘irrelevant’ (with some third parties suggesting that referrals may be sent to all tiers simultaneously);
- (b) Views expressed by one competitor and [redacted]³⁷ indicated that tier position may be less relevant for larger IFAs, who are able to secure a large number of placements (irrespective of tier position) because of their higher carer numbers.

65. In any case, even if the tier on which an IFA is ranked in a framework agreement were to be considered to provide a good measure of closeness of competition, the CMA notes that the Parties (for at least some of their brands

³³ [redacted].

³⁴ [redacted].

³⁵ [redacted].

³⁶ [redacted].

³⁷ [redacted]. However, the CMA nevertheless considers that this statement may have wider relevance for overlap geographic areas under review.

and in respect of some lots) are ranked on the same tier in a significant number of framework organisations, [REDACTED].³⁸

66. For the reasons set out above, the CMA therefore considers that the competitive significance of tier positions is only of limited relevance for its competitive assessment (and that considerably more emphasis has to be placed on the scale of an IFA's existing carer network).

The role of LA provision

67. As noted in the analysis above on the proposed frame of reference,³⁹ the Parties submitted that the provision of fostering placement services by LAs forms part of the same 'market' as those provided by IFAs in the ordinary course of business. The Parties also submitted that LAs are the '*closest strategic competitor*' that they face, in particular because the majority of carers that the parties lose to 'rivals' move to LAs.
68. As explained in paragraphs 29 to 32 above, the CMA does not believe that it is appropriate to include LA in-house provision within the frame of reference. The CMA has, however, taken into account the constraint that LA in-house provision may exert on IFAs within the competitive assessment.
69. In particular, the CMA believes that the extent to which LAs rely on IFA provision for their overall fostering placement requirements may be relevant to the competitive assessment within specific local areas. This is because an LA that is currently more heavily reliant on IFA provision is likely to require a more significant expansion in existing capacity if it were to seek to mitigate any price rise from IFAs by handling more of its requirements in-house. Given the capacity constraints in the market and the challenges of carer recruitment, this is likely to be difficult to achieve where existing IFA reliance is more extensive.
70. The Parties' suggestion that carer diversion between providers is an appropriate measure of closeness of competition in the supply of fostering placement services is also not supported by the available evidence.
71. No third parties identified carer diversion ratios as an appropriate measure of closeness of competition in the supply of fostering placement services. More generally, closeness of competition to win carers is not necessarily reflective of closeness of competition to supply fostering placement services. The fact that there is more significant carer diversion between each of the Parties and

³⁸ [REDACTED].

³⁹ Paragraph 28.

the LAs, rather than between the Parties, does not preclude the fact that the Parties can be close competitors for placements by LAs in certain local areas.

The CMA's approach to Local Area assessment

72. As explained above, the CMA considers that the scale of an IFA's existing carer network is a significant indicator of competitive strength. For each of the local areas in which the Parties overlap, the CMA has therefore assessed:
- (a) Whether the Merger will result in a firm with a large existing network of carers where the remaining fringe of firms would not be sufficient to constrain the Parties (in light of the significant capacity constraints that characterise the sector); and/or
 - (b) Whether the Merger will result in the elimination of a significant competitive force (because the Parties are two of the larger existing players on a framework).
73. Within these assessments, the CMA has considered in particular:
- (a) The Parties' pre-Merger shares of placements (which, as noted above, is considered by the CMA to be a reasonable measure of capacity);
 - (b) The Parties' pre-Merger shares of supply based on revenues (and those of other IFAs where available);
 - (c) Evidence from third parties, including framework operators, LAs, and competitors, about competitive conditions in each local area; and
 - (d) Evidence from the Parties' internal documents relevant to any aspects of the competition conditions within each framework area.
74. The CMA's guidance notes that where the CMA uses market shares and relies on them, it does not do so mechanistically. The CMA's guidance also notes, however, that unilateral effects concerns are more likely to arise in markets for undifferentiated products or services in which the merging parties' combined shares exceed 40%.⁴⁰ As set out above,⁴¹ the CMA has found that the parties' services are largely undifferentiated.

⁴⁰ [Merger Assessment Guidelines](#), paragraph 5.3.5.

⁴¹ Paragraph 26.

75. The CMA has considered the levels of concentration brought about by the Merger in conjunction with a number of other factors that can indicate that horizontal unilateral effects may arise as a result of the Merger. In particular:
- (a) A significant number of customers have expressed reasoned concerns⁴² about the impact that the Merger could have on competition, with customer concerns being more acute in those framework areas in which the Parties' share of supply is higher;
 - (b) The CMA has identified that IFAs face high barriers to entry and expansion (see paragraphs 134 to 144);
 - (c) [REDACTED];⁴³
 - (d) Customers may have limited price sensitivity, in particular because they have no option to 'exit' the market should prices increase (because their statutory duties leave them no credible alternative to placing a child with an IFA once LA in-house capacity has been exhausted); and
 - (e) Similarly, it may be difficult for customers to monitor changes in the Parties' commercial offering post-Merger, given that there appears to be a material degree of confusion among some customers over the ownership and independence of the different agencies owned by the Parties.
76. On this basis, the CMA has identified three local areas that give rise to a realistic prospect of an SLC, as set out below.

All Wales framework

77. The All Wales framework is split into four lots. Two of these lots apply to distinct geographic areas: North Wales⁴⁴ and South Wales.⁴⁵ The Parties are both currently present on each of the North and South Wales lots and have agencies on the same tier. The framework comprises 22 LAs overall.

⁴² In particular, customers were concerned regarding the ability and incentive of the merged entity to increase prices, manipulate the framework/placement process and withdraw from the framework entirely or supply 'off-framework' at higher prices or worse terms etc.

⁴³ For instance, [REDACTED]. The *Merger Assessment Guidelines* state that 'when interpreting information on market shares and concentration, the CMA may have regard to the following factors: ...The level of variable profit margins. If the margins are high the same market shares can indicate great potential price effects' (para 5.3.2). The *Merger Assessment Guidelines* state that evidence about variable margins can come from internal documents containing accounting information (para 5.2.15(b)).

⁴⁴ Which includes the following LAs: Conwy, Denbighshire, Flintshire, Gwynedd, Isle of Anglesey and Wrexham.

⁴⁵ Which includes the following LAs: Blaenau Gwent, Bridgend, Caerphilly, Cardiff, Carmarthenshire, Ceredigion, Merthyr Tydfil, Monmouthshire, Neath Port Talbot, Newport, Powys, Rhondda Cynon Taf, Swansea, Torfaen and Vale of Glamorgan. The CMA understands that [REDACTED].

78. The Parties submitted that the Merger does not raise competition concerns in Wales in particular because:
- (a) Competition on the framework is 'intense', because the current agreement has 29 providers, 11 of which are ranked on Tier 1;
 - (b) The most recent data for the Parties' shares of placements does not reflect their current market position (following the renegotiation of Wales framework agreement in early-2016);
 - (c) [REDACTED];
 - (d) [REDACTED]; and
 - (e) The framework holds significant buyer power, as evidenced by the imposition of a levy and payment fee at the last framework negotiation.
79. The CMA notes, however, that there are a number of factors that indicate that horizontal unilateral effects may arise as a result of the Merger in Wales.
- *The Parties will have a strong market position post-Merger*
80. Post-Merger, the Parties will account for a high share of placements in Wales. Placement data submitted by the Parties shows that their combined share of placements was [40-50]% as at 31 March 2015 (with the Merger bringing about an increment of [20-30]%) and has been relatively stable over the past three years.
81. This is also consistent with more recent data provided by [REDACTED] which indicates that the Parties had a combined share of placements of [REDACTED]% as at 31 March 2016.
82. One of the Parties' internal documents [REDACTED].⁴⁶
83. There is also evidence to suggest that NFA considers Acorn to be a significant competitor in Wales: [REDACTED].⁴⁷
- *The remaining fringe of IFAs in Wales would not be sufficient to constrain the Parties post-Merger*
84. The available evidence indicates that the Parties are the two largest IFAs on the framework and there are currently no rivals of a similar size operating in

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

Wales. [REDACTED]⁴⁸ [REDACTED],⁴⁹[REDACTED]⁵⁰[REDACTED]. The CMA considers, as explained in paragraphs 52 to 59 above, that the capacity of rival IFAs has a material impact on an IFA's bidding strategy.

85. In Wales the framework limits higher tier positions to IFAs having more than a certain threshold number of carers.⁵¹ As explained in paragraphs 60 to 66 above, the available evidence suggests that tier positions are of limited relevance to competitive assessment. Nevertheless, the thresholds in the Welsh framework mean that smaller IFAs are more likely to be placed on lower tiers (and therefore that larger IFAs are particularly likely to be closer competitors to each other, compared to smaller IFAs, within this framework area).
86. The Parties therefore appear to be significant competitors in Wales, and the remaining competitors in Wales would each have a considerably smaller market position than the merged entity. For this reason, the CMA considers that remaining players would not continue to impose a sufficient competitive constraint on the Parties post-Merger in Wales.
87. Moreover, as noted in paragraph 31 above, the sector is characterised by severe capacity constraints (including in Wales). For this reason, competing suppliers may not have the capacity to meet demand from LAs who would like to switch in the event of a price rise post-Merger, and would be unable to expand their capacity timeously to sufficiently constrain the Parties.
88. The CMA therefore believes that the remaining fringe of IFAs in Wales would not be sufficient to constrain the Parties post-Merger.
 - *The potential expansion of in-house provision by LAs would not be sufficient to constrain the Parties post-Merger in Wales*
89. The CMA notes that the LAs in Wales, overall, have a lower dependency on IFA provision than some other framework areas.⁵² The extent of IFA provision is, nevertheless, significant, and the CMA therefore considers that there is no realistic prospect (given the capacity constraints described above) that LA

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ The Parties submitted that the framework requires that providers demonstrate they have foster carers who can provide a minimum of 20 placements/beds, in the region being tendered for, in order to be eligible for classification as Tier 1 (dropping to 10 placements/beds for Tier 2 and then no specific requirement for Tier 3).

⁵² [20-30]% of placements on the Welsh framework were to IFAs as at 31 March 2015: Annex 7 to the Merger Notice.

provision would be able to expand to the extent necessary to defeat a price rise/reduction in quality post-Merger.

- *Conclusion on horizontal unilateral effects in Wales*

90. For the reasons set out above, the CMA believes that the Merger will result in a firm with a strong market position in Wales and that the remaining fringe of firms would not be sufficient to constrain the Parties post-Merger (in particular because of the significant capacity constraints that characterise the sector, including in Wales).
91. Accordingly, the CMA believes that the Merger gives rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the supply of fostering placement services in the All Wales framework.

Luton framework (Luton, Central Bedfordshire and Bedford)

92. The framework comprising the LAs of Luton, Central Bedfordshire and Bedford (the **Luton framework**) consists of a single lot and providers are not ordered by tiers. NFA is a provider on the framework but Acorn is not currently (although it still has a notable share of placements, as discussed below).
93. The Parties submitted that the Merger does not raise competition concerns in the Luton framework in particular because :
 - (a) While the Parties' combined share of placements is significant, the increment brought about by the Merger is only around [0-10]%, and the Parties' shares have fluctuated over time (being five percentage points lower in 2014);
 - (b) [REDACTED];
 - (c) LA spend data suggests that the placement data is likely to overstate the merged entity's competitive significance;
 - (d) [REDACTED]; and
 - (e) As in all English frameworks, no score is attributed in the framework bidding process to the size of the IFA's carer network and, in the Luton framework area specifically, there is no requirement for IFAs to have a threshold number of carers to join the framework. The Parties therefore face competition from IFAs of all sizes.

94. The CMA notes, however, that there are a number of factors that indicate that horizontal unilateral effects may arise as a result of the Merger in the Luton framework.
- *The Parties will have a strong market position post-Merger*
95. Post-Merger, the Parties will account for a high share of placements. Placement data submitted by the Parties shows that their combined share of placements was [40-50]% both as at 31 March 2015 and 31 March 2014 (meaning that the Merger would bring about an increment of [0-10]% based on the 2015 data). The Parties' share of placements is broadly consistent with the Parties' share of supply based on revenues.
96. The CMA notes that the Parties' shares of placements have been growing steadily in recent years. This may indicate, contrary to the Parties' submissions, that the existing share data understate the Parties' competitive significance in this area.
97. Moreover, the evidence provided by the Parties does not establish that [X] the Parties' competitive significance is materially less than as indicated by their current share of placements.
98. In particular, the CMA notes that the Parties have stated that the carers of [X] are currently in the process of being transferred to [X], which currently serves LAs on the Luton framework through the spot market (and therefore that the Parties' current share of capacity may overstate their competitive significance). The CMA understands that [X] is not currently on the Luton framework, but that the Luton framework is currently retendering for its fostering placement services.⁵³ The CMA also notes that the Parties have not submitted any evidence to suggest either that a significant proportion of [X] are unlikely to transfer to [X] or that [X] is unlikely to continue to receive placements (whether on the spot market or on the framework post-retendering).
- *The remaining fringe of IFAs in the Luton framework would not be sufficient to constrain the Parties post-Merger*
99. The available evidence indicates that the merged entity will be the largest player in the Luton framework post-Merger by a considerable margin. In particular, as a result of the Merger, the merged entity will be more than [0-5] times the size (and have a revenue share which is more than [20-30]

⁵³ The CMA understand that the consortium [X].

percentage points greater) than the next largest player, Foster Care Associates.⁵⁴

100. The CMA considers, as explained in paragraphs 52 to 59 above, that the capacity of rival IFAs has a material impact on an IFA's bidding strategy. The competitive set taken into account by the merged entity in setting its bidding strategy will therefore be far narrower than the 38 alternative suppliers suggested by the Parties.
101. Moreover, as noted in paragraph 31 above, the sector is characterised by severe capacity constraints (including in the Luton framework). For this reason, competing suppliers may not have the capacity to meet demand from LAs who would like to switch in the event of a price rise post-Merger, and would be unable to expand their capacity timeously to sufficiently constrain the Parties.
102. For these reasons, the CMA considers that remaining players would not continue to impose a sufficient constraint on the Parties post-Merger in Luton.
 - *The potential expansion of in-house provision by LAs presents a weak competitive constraint in Luton*
103. Based on the available evidence, the CMA considers that the potential expansion of in-house provision by LAs presents a weak competitive constraint in the Luton framework. This is primarily because LAs in the Luton framework are highly dependent on IFA provision for fostering placements (45% of all fostering placements are made with IFAs).
104. The CMA therefore considers that there is no realistic prospect (given the capacity constraints described above) that LA provision would be able to expand to the extent necessary to defeat any price rise/reduction in quality post-Merger.
 - *Conclusion on horizontal unilateral effects in the Luton framework*
105. For the reasons set out above, the CMA believes that the Merger will result in a firm with a strong market position in Luton and that the remaining fringe of firms would not be sufficient to constrain the Parties post-Merger (in particular because of the significant capacity constraints that characterise the sector, including in the Luton framework).

⁵⁴ Combined share of revenue of [30-40]% for the Parties vs. [10-20]% for Foster Care Associates.

106. Accordingly, the CMA believes that the Merger gives rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the supply of fostering placement services in the Luton framework.

Norfolk framework

107. The Norfolk framework has been restructured in December 2016. The new framework consists of four lots and does not have a tier system. The earlier framework in Norfolk consisted of three lots by type of placement and providers were placed onto four tiers. NFA and Acorn both had brands on tier 1 for all categories. The framework comprises a single LA, Norfolk.
108. The Parties submitted that the Merger does not raise competition concerns in Norfolk in particular because:
- (a) While the Parties' combined share of placements is significant, the increment brought about by the Merger is only around [0-10]% and the Parties' combined share has fluctuated over time (being [10-20] percentage points lower in 2014). [REDACTED];
 - (b) A number of significant competitors will remain post-Merger including three providers who are at least as large as Acorn by LA spend. The three IFAs with higher share than Acorn will continue to constrain the merged entity;
 - (c) A further ten competitors present on the framework with smaller amounts of LA spend emphasise the wide range of choice available to LAs, the low barriers to market entry and the scope for expansion by existing market participants in order to constrain the merged entity;
 - (d) [REDACTED]; and
 - (e) As in all English frameworks, no score is attributed in the framework bidding process to the size of the IFA's carer network and, in Norfolk specifically, there is no requirement for IFAs to have a threshold number of carers to join the framework. The Parties therefore face competition from IFAs of all sizes.
109. The CMA notes, however, that there are a number of factors that indicate that horizontal unilateral effects may arise as a result of the Merger in Norfolk.
- *The Parties will have a strong market position post-Merger*
110. Post-Merger, the Parties will account for a high share of placements in Norfolk. Placement data submitted by the Parties shows that their share of

placements was [40-50]% both as at 31 March 2015 and 31 March 2014 (with the Merger bringing about an increment of [10-20]% in 2015), and slightly higher as at 31 March 2013. The Parties' share of placements is broadly consistent with the Parties' share of supply based on revenues.

111. The CMA notes that Acorn's share of placements [X]. This may indicate, contrary to the Parties' submissions, that the existing share data understate the Parties' competitive significance in this area.
- *The remaining fringe of IFAs in Norfolk would not be sufficient to constrain the Parties post-Merger*
112. The available evidence indicates that the merged entity will be the largest player in Norfolk post-Merger by a considerable margin. In particular, as a result of the Merger, the merged entity will be almost [0-5] times the size of the next largest player, Anglia Fostering Agency (**AFA**), with a revenue share which is almost [30-40] percentage points greater.⁵⁵
113. The CMA understands that AFA has entered the market in the past six years and has grown its carer base significantly during that period. However, post-Merger its position would still be substantially smaller than the combined position of the Parties and the CMA does not have any evidence to indicate that any further expansion would be timely, likely or sufficient to be able to constrain the merged entity.
114. The CMA considers, as explained in paragraphs 52 to 59 above, that the capacity of rival IFAs has a material impact on an IFA's bidding strategy. The competitive set taken into account by the merged entity in setting its bidding strategy will therefore be far narrower than that the 15 alternative suppliers suggested by the Parties.
115. Moreover, as explained in paragraphs 31 above the sector is characterised by severe capacity constraints (including in Norfolk). For this reason, competing suppliers may not have the capacity to meet demand from LAs who would like to switch in the event of a price rise post-Merger, and would be unable to expand their capacity timeously to sufficiently constrain the Parties.
- *The potential expansion of in-house provision by LAs presents a weak competitive constraint in Norfolk*
116. Based on the available evidence, the CMA considers that the potential expansion of in-house provision by LAs presents a weak competitive

⁵⁵ Combined share of revenue of [40-50]% for the Parties vs. [10-20]% for AFA.

constraint in Norfolk. This is primarily because the Norfolk LA is highly dependent on IFA provision for fostering placements (49% of all fostering placements are made with IFAs).

117. The CMA therefore considers that there is no realistic prospect (given the capacity constraints described above) that LA provision would be able to expand to the extent necessary to defeat any price rise/reduction in quality post-Merger.

- *Conclusion on horizontal unilateral effects in Norfolk*

118. For the reasons set out above, the CMA believes that the Merger will result in a firm with a strong market position in Norfolk and that the remaining fringe of firms would not be sufficient to constrain the Parties post-Merger (in particular because of the significant capacity constraints that characterise the sector, including in Norfolk).

119. Accordingly, the CMA believes that the Merger gives rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the supply of fostering placement services in the Norfolk framework.

Framework areas in which the Parties overlap in which the Merger does not give rise to a realistic prospect of an SLC

120. In the remaining framework agreement areas in which the Parties overlap, the market position held by the merged entity post-Merger will generally be limited. With one exception, Leicester City Council, considered further below, the Parties' combined share of placements post- Merger would be below [40-50]% (and, for the most part, below [30-40]%).⁵⁶ In relation to each of these framework areas, the CMA has considered the limited levels of concentration post-Merger, the sufficiency of the remaining fringe of firms to constrain the Parties, and the factors described in paragraph 73, and believes that the Merger does not give rise to a realistic prospect of an SLC in these areas.

121. The merged entity will account for a high share of placements post- Merger in the Leicester City Council area ([50-60]% as at 31 March 2015). The merged entity's market position within this area is, however, essentially attributable to the existing NFA business (which accounted for [50-60]% of placements in this area as at 31 March 2015), with the limited increment attributable to the Acorn business resulting from a single placement. The CMA therefore

⁵⁶ As noted in the [Merger Assessment Guidelines](#), unilateral effects concerns are less likely to arise in markets for undifferentiated products or services in which the merging parties' combined shares are less than 40%.

considers that Merger will not bring about a meaningful change in market structure in the Leicester City Council area. The CMA notes, in addition, that it has not received any customer complaints in relation to the Leicester City Council area and that this LA has a relatively limited reliance on IFAs.⁵⁷ Accordingly, the CMA believes that the Merger does not give rise to a realistic prospect of an SLC in the Leicester City Council area.

Conclusion on Theory of Harm 1: Horizontal unilateral effects at the framework level

122. For the reasons explained above, the CMA believes that the Merger gives rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to the supply of fostering placement services in the All Wales, Luton, and Norfolk frameworks.

Theory of Harm 2: Horizontal unilateral effects at LA level

123. Under this theory of harm, the CMA assessed whether the Merger may substantially reduce competition between IFAs outside of framework tenders e.g. when responding to individual LA placement requests. The CMA also considered whether, and to what extent, there is scope for any parameters to be varied outside of framework tenders and, if so, to what extent this occurs as a result of any competitive rivalry between IFAs.
124. The Parties submitted that all competition occurs at the framework level and that there is therefore no material competition between IFAs at referral and placement stage, in particular because:
- (a) LAs engage in a rigorous procurement process at the framework tender stage (and agree all key competitive parameters at that stage) to ensure that commercial negotiations do not need to be reopened by LAs at the time of placement (when time and resources are limited);
 - (b) Where discussions occur at the placement stage regarding prices/other terms not set at the framework level (or regarding which prices/other terms on the framework should apply) these discussions are not driven by competitive rivalry (and, in particular, rivalry between the Parties).
 - (c) Indeed, the statutory duty to find the best match for the LAC means that LAs only very rarely have discretion to choose between IFAs at the placement stage and an IFA would not typically know whether there was an alternative offer from another IFA (ie whether, in practice, the

⁵⁷ 8% of placements on the Leicester City Council framework were to IFAs as at 31 March 2015: Annex 7 to the Merger Notice.

placement type could be met by more than one IFA) so would not compete on this basis;

- (d) LAs do not seek to 'play off' IFAs against one another at the point of making individual placements;
- (e) Withholding a carer would have a negative effect on the motivational and economic impact on the carer. Further, 'idling' a carer would require the IFA to sacrifice revenue (the unpaid carer also implies an unpaid IFA), while having to maintain the costs of carer support.

125. The CMA's investigation found some evidence, both from third party responses and from the Parties' internal documents, that IFAs can vary parameters of the services that they offer to LAs outside of framework tenders. For example:

- (a) Statements from third parties and [redacted] noted discounts being offered by IFAs (or requested by LAs) outside of the framework tender process, either for all placements made with a particular LA or with respect to individual placements;
- (b) The introduction by LAs of a process of 'mini competitions' for individual placements ie where price may be re-determined for individual placements based on IFA offers for that particular placement;⁵⁸
- (c) Third parties told the CMA that the LA and IFA may discuss aspects of individual placements such as which fee level on the framework applies to a placement (eg the categorisation of a placement as standard or complex) and whether additional costs/services should apply for a particular placement (eg transport costs, costs for additional therapeutic services). Some LAs told the CMA that their choice of IFA for some placements had been impacted by these discussions;
- (d) Several LA customers raised concerns that, as a result of the Merger, the Parties may have an increased ability and incentive to negotiate higher placement fees (by increasing the complexity of the placement category or through the inclusion of more 'add-on' services) and/or respond 'tactically' to LA referral requests (for instance, by not initially bidding for a

⁵⁸ One LA explained that the 'mini competition' system involved the LA sending out each request to all IFAs on the framework at the same time, with the view a view to providing an opportunity to IFAs to offer a lower price (or offer additional discounts) than that agreed on the framework. However, in practice, the LA stated that a lower price was only received in 1-2% of cases.

placement on the expectation that the LA may need to be re-categorised as a complex placement).⁵⁹

126. The evidence received by the CMA suggests that there is scope, in some cases, for some commercial parameters to be varied at the LA level / placement stage.⁶⁰ The evidence also indicates, however, that the extent of any rivalrous competition between IFAs is very limited.
127. [REDACTED] evidence showing that the very large majority of their placements (ie around [90-95]%) are made at framework-agreed terms and prices, and, of the remaining [0-5]%, some of these are within the 'spirit' of the framework pricing and, for instance, relate to instances the framework was not comprehensive of all circumstances:
- (a) [REDACTED].
- (b) [REDACTED].
128. The Parties also submitted evidence that demonstrated only a very small proportion of their placements are reclassified [REDACTED]⁶¹ [REDACTED].
129. All competitors said that competition occurs at the framework tender stage and several stated this is the point where competition primarily occurs. Several competitor responses indicated that prices/terms bid at the framework stage are only infrequently varied at the placement stage in response to competition with other IFAs. Reasons given include that discussions took place after the placement was made or without any regard to whether another IFA was bidding for it.⁶²

⁵⁹ Some LAs also raised concerns that where the Parties operate multiple brands/agencies with different price points on the same framework, they may also choose to only submit bids from their higher priced brands when they have a strong local position.

⁶⁰ The extent to which commercial parameters are set at the LA will be more significant for LAs that procure all their placements through spot purchasing arrangements. As noted above, the CMA understands that there are only two LAs – ie Leicester City Council and Redbridge Council – that procure services only on a spot basis. For the reasons stated in paragraph 121 the CMA believes that the Merger does not give rise to a realistic prospect of an SLC in the Leicester City Council area. With respect to the Redbridge Council area, the CMA notes that as at 31 March 2015 the Parties had a combined share of less than [0-10]% (all of which was attributable to NFA). To the extent that more recent data is available, this suggests that the Parties' activities remain modest (NFA had [REDACTED] placements and Acorn had only [REDACTED] placements as at November 2016). The CMA therefore also believes that the Merger would not give rise to a realistic prospect of an SLC in the Redbridge Council area on this basis.

⁶¹ Solo placements are those where the foster carer must not have any other children in their care. This may be required for children with more complex needs or behavioural issues.

⁶² For example:

- One IFA said that there may be negotiation with an LA over whether a placement is standard or complex but this is usually after the IFA has been chosen. It is also rare for an LA to request a discount on the basis they have a cheaper offer from another IFA.
- Another IFA said that they compete for referrals but they do not usually negotiate terms of a placement with an LA and would only occasionally offer an LA something 'off contract';

130. Responses received from LAs, although mixed, supported the position that, for a significant proportion of referral requests, an LA will receive only one IFA response. Further, in those instances where LAs do receive multiple responses from IFAs, LAs told the CMA that they primarily choose the IFA on the basis of the match with the child (price was often a secondary consideration or only considered in a minority of cases). Some third parties told the CMA that discussions between an LA and IFA over aspects of a placement are bilateral and take place after the IFA had been identified as the 'best match' or after the placement was made.
131. Overall, the CMA considers that these responses are broadly consistent with the Parties' proposition that, in practice, LAs rarely have a choice between more than one 'best match' at the placement stage and that there is therefore limited scope for competition.
132. The CMA has not found any specific evidence (whether in the Parties' internal documents or in responses from customers or competitors) of the Parties altering their competitive offering in response to the other Party, or taking into account the competitive offering that may be made by the other Party, at the LA or placement stage.
133. On this basis, the CMA believes that competition between IFAs occurs principally at the framework level. The CMA therefore believes that the Merger does not give rise to a realistic prospect of an SLC at the LA level.

Barriers to entry and expansion

134. Entry, or expansion of existing firms, can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no SLC. In assessing whether entry or expansion might prevent an SLC, the CMA considers whether such entry or expansion would be timely, likely and sufficient.⁶³
135. The Parties argued that the fostering placement services market is dynamic with extremely low barriers to entry and expansion. The Parties submitted that it is common for small partnerships of one or two social workers who have worked in LAs to set up their own IFAs. The Parties submitted that to enter a market an IFA only has to build a network of carers (with as little as one to five

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- One IFA said that they regularly negotiate terms of a placement (e.g. transport costs, enhanced placements negotiated as standard fee) but that they only compete with other IFAs for an extremely limited number of placements;
 - Another IFA said they do discuss each placement but only using pre-agreed costs and there is not a sense that they are in competition with other IFAs at this point.

⁶³ [Merger Assessment Guidelines](#), from paragraph 5.8.1.

carers being sufficient to begin to compete for a place on a framework), establish relationships with LAs (which such social workers typically already have) and complete an Ofsted registration.⁶⁴

136. The Parties further submitted that, given framework agreements are typically in place for at least four years and can often be extended, competitor IFAs have sufficient time to boost their own carer network so as to challenge the market incumbent, while contract ‘refreshes’ facilitate new entry and expansion in the lifetime of the framework agreement. The Parties also submitted that frameworks do not ‘discriminate’ against smaller players, in so far as none of the English frameworks assign a scorecard element to number of carers/size of carer capacity, and few have any meaningful minimum capacity requirements. Finally, the Parties provided a list of 63 new IFAs that have registered with Ofsted within the last five years.
137. The CMA contacted framework operators, LAs and competitors in relation to barriers to entry. The evidence received from third parties does not indicate that entry or expansion will be timely, likely or sufficient to mitigate a realistic prospect of an SLC.
138. The majority of competitors that responded to the CMA’s investigation stated that carer recruitment was a significant challenge, involving considerable time and expense (estimated between £10,000 and £26,000 per carer).⁶⁵ This is supported by [REDACTED],⁶⁶[REDACTED],⁶⁷[REDACTED].
139. Given the challenges of expanding organically, a number of competitors stated that the main source of growth is through acquisition. This is supported by evidence submitted by the Parties. Of the listed 63 IFAs with new Ofsted registrations in the past five years, the top three by market share (the largest with a share of only 6.2%) were not new entrants, but acquisitions of existing players. The remaining 60 IFAs have acquired only very small market shares (less than 0.5%), each with only a local presence.
140. Contrary to the Parties’ submissions, the CMA has also received some evidence from competitors to suggest that expansion (and gaining market power) is particularly difficult for smaller players:
- (a) One competitor submitted that it was difficult to compete for carers against bigger players like NFA and Foster Care Associates;

⁶⁴ Annex 9.2 to Merger Notice and Annex 6.1_Recent entrants to response to 14 October RFI.

⁶⁵ The Parties submitted that this would be significantly less for a smaller IFA, however no evidence was submitted to this effect.

⁶⁶ [REDACTED].

⁶⁷ Paragraph 14.2.2 of Merger Notice.

- (b) Another competitor noted that it was difficult to expand into new areas, as an IFA must build up a critical mass of carers to cover costs and make itself attractive to LAs, who also take into account capacity; and
- (c) Further competitors stated that it was necessary to have a ‘track record’ and an ‘established carer base’ in order to tender and successfully join a framework.
141. The CMA infers from these competitor comments that smaller players without a significant carer base may find it more difficult to attain position in the market than the Parties submissions suggest.
142. Further, the CMA notes that [REDACTED].⁶⁸ This not only indicates that the smaller players are less able to compete effectively with large IFAs in general but also that even in cases where a new player manages to enter the market and start operating with a small number of carers they would not pose an effective constraint on large IFAs like the Parties.
143. The limited degree of new entry or expansion (or the potential for it) was further supported by framework operators. While one framework provided an example of an IFA entering the region and challenging another IFA via a strategy of low prices, the new IFA in this example was NFA and not a small/local player. Further, as set out in the local area assessment at paragraph 77 onward, the Parties were unable to identify any significant new entry in Wales or Luton, and (as noted in paragraph 113) the only new entrant identified in Norfolk (AFA) remains substantially smaller than the Parties.
144. For the reasons set out above, while the CMA acknowledges that there is some evidence of new entry/expansion in these markets, the CMA believes that it is limited in nature and that there is therefore limited threat that sufficiently large scale entry/ expansion would constrain the Parties and thereby prevent a realistic prospect of an SLC as a result of the Merger.

Countervailing buyer power

145. In some circumstances, an individual customer may be able to use its negotiating strength to limit the ability of a merged entity to raise prices. The existence of such countervailing buyer power will be a factor in making an SLC finding less likely.⁶⁹ For countervailing buyer power to prevent an SLC, it is not sufficient that it merely existed before the merger. It must also remain

⁶⁸ [REDACTED].

⁶⁹ [Merger Assessment Guidelines](#), paragraph 5.9.1.

effective following the merger. The CMA will therefore consider the impact of the merger on any countervailing buyer power.⁷⁰

146. The Parties submitted that LAs have significant buyer power, on the basis that each is a monopoly purchaser of foster care services within its local area. For those LAs that group together into framework consortia, the Parties submitted that this individual buyer power is consolidated on an even greater scale, and leveraged during framework contract negotiations. The Parties submitted that the monopsony buyer power of LAs vis-à-vis IFAs is clearly demonstrated by a number of common market practices including, for example, by LAs rolling existing placements onto new contracts, extending existing contracts at their sole discretion and imposing additional fees or fee caps. The Parties also submitted that LAs have the ultimate power to ‘sanction’ IFAs who provide unfavourable terms, by lowering their tier position or delisting them entirely from a framework. Finally, the Parties submitted that the monopsony position of LAs gives them a clear advantage over IFAs in terms of carer recruitment, and that it is not uncommon for LAs to use their insight to ‘poach’ IFA carers; which the Parties submitted is a further example of LA buyer power.
147. The evidence obtained during the CMA’s investigation does not indicate that buyer power exercised by LAs or frameworks would be sufficient to counteract any possible SLC. Instead, the views received from LAs and framework operators indicated that the buyer power that LAs may otherwise wield as a monopsonist purchasers is limited by (i) the LA’s statutory duty as corporate parent which means it has to place the child with a suitable foster carer when available (ie it is not able to use other types of care); and (ii) the capacity constrained nature of the market, which limits the pool of IFAs which have available carers. In this context some LAs and framework operators expressed concerns about the effectiveness of frameworks in generating competition, given that the largest IFAs still receive the majority of placements, while another commented that the market was not very competitive given that most IFAs were ‘full’.⁷¹
148. Further, the CMA’s investigation does not indicate that the ‘threat’ of dropping a tier or being delisted from the framework provides any clear indication of the strong buyer power of LAs/frameworks. In particular:
- (a) Responses received from framework operators indicated that very few frameworks limited the number of IFAs on the framework, with several

⁷⁰ [Merger Assessment Guidelines](#), paragraph 5.9.8.

⁷¹ [REDACTED].

stating that they actively try to include as many IFAs as possible to maximise capacity; and

(b) Evidence set out in paragraphs 63(a) and 63(e) regarding [REDACTED].

149. The CMA does not consider that the ability of LAs to expand their in-house carer networks by ‘poaching’ IFA carers is likely to mitigate any loss of competition as a result of the Merger. For instance, data provided by NFA showed that it lost only [REDACTED] carers in total to LAs in the year to 31 March 2016, which represents [REDACTED]% of all NFA carers (it also gained [REDACTED] carers over the same period).
150. The majority of LAs who responded to the CMA’s investigation stated that recruitment was difficult and only a minority indicated that current recruitment efforts were proving successful in increasing in-house capacity. Some LAs added that it was a challenge to compete for carers against IFAs who can offer greater financial rewards. [REDACTED].⁷²
151. For the reasons set out above, the CMA therefore does not believe that the insight of LAs regarding IFA recruitment practices affords significant buyer power that would counteract any possible SLC. [REDACTED]⁷³ [REDACTED].
152. Finally, as set out in the CMA’s guidance, an individual customer’s negotiating position will be stronger if it can easily switch its demand away from the supplier. Typically the ability to switch away from the supplier will be stronger if there are several alternative suppliers to which the customer can credibly switch, or the customer has the ability to sponsor new entry.⁷⁴ As noted above, the CMA believes that the Merger will result in a material reduction in the competitive alternatives available to LAs within the All Wales, Luton and Norfolk frameworks. In this respect, the CMA believes that the Merger is likely to reduce any countervailing buyer power that the framework operators may exert in these framework agreement areas.

Conclusion on substantial lessening of competition

153. Based on the evidence set out above, the CMA believes that it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC as a result of horizontal unilateral effects in relation to the supply of fostering placement services by IFAs to LAs at the framework tender stage with respect to the All Wales, Luton and Norfolk frameworks.

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ [Merger Assessment Guidelines](#), paragraph 5.9.2 and 5.9.3.

Decision

154. Consequently, the CMA believes that it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC within a market or markets in the United Kingdom.
155. The CMA therefore believes that it is under a duty to refer under section 22(1) of the Act. However, the duty to refer is not exercised⁷⁵ whilst the CMA is considering whether to accept undertakings⁷⁶ instead of making such a reference. SSCP Spring has until 6 February 2017⁷⁷ to offer an undertaking to the CMA.⁷⁸ The CMA will refer the Merger for a phase 2 investigation⁷⁹ if SSCP Spring does not offer an undertaking by this date; if SSCP Spring indicates before this date that it does not wish to offer an undertaking; or if the CMA decides⁸⁰ by 13 February 2017 that there are no reasonable grounds for believing that it might accept the undertaking offered by SSCP Spring, or a modified version of it.
156. The statutory four-month period mentioned in section 24 of the Act in which the CMA must reach a decision on reference in this case expires on 16 February 2017. For the avoidance of doubt, the CMA hereby gives SSCP Spring notice pursuant to section 25(4) of the Act that it is extending the four-month period mentioned in section 24 of the Act. This extension comes into force on the date of receipt of this notice by SSCP Spring and will end with the earliest of the following events: the giving of the undertakings concerned; the expiry of the period of 10 working days beginning with the first day after the receipt by the CMA of a notice from SSCP Spring stating that it does not intend to give the undertakings; or the cancellation by the CMA of the extension.

Sheldon Mills
Senior Director, Mergers
Competition and Markets Authority
30 January 2017

⁷⁵ Section 22(3)(b) of the Act.

⁷⁶ Section 73 of the Act.

⁷⁷ Section 73A(1) of the Act.

⁷⁸ Section 73(2) of the Act.

⁷⁹ Sections 22(1) and 34ZA(2) of the Act.

⁸⁰ Section 73A(2) of the Act.