

Completed acquisition by SSCP Spring Bidco Limited (trading as National Fostering Agency) of Boston Holdco A Limited (trading as Outcomes First Group)

Decision on relevant merger situation and substantial lessening of competition

ME/6844-19

The CMA's decision on reference under section 22 (1) of the Enterprise Act 2002 given on 11 December 2019. Full text of the decision published on 20 December 2019.

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

SUMMARY

1. On 30 July 2019, SSCP Spring Bidco Limited (trading as the National Fostering Agency (“**NFA**”)) acquired Boston Holdco A Limited (trading as the Outcomes First Group (“**OFG**”)) (the **Merger**). NFA and OFG are together referred to as the **Parties**.
2. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that each of NFA and OFG is an enterprise; that these enterprises have ceased to be distinct as a result of the Merger; 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 the following services in the UK:
 - (a) children's homes for children and young people with Special Educational Needs and Disabilities ('**SEND**') and Social, Emotional and Mental Health ('**SEMH**') conditions;

- (b) specialist schools for children and young people with (i) SEND for low functioning autism ('**ASD**') and complex learning difficulties ('**LDs**') and (ii) general SEMH conditions; and
 - (c) foster care placement services.
- 4. Local Authorities ('**LAs**') have a statutory duty to provide the above services to qualifying children and young adults.¹ LAs can offer these services in-house or they can procure them from independent providers such as the Parties. LAs have a strong preference to place a child in one of their in-house services, resulting in independent providers competing in a 'spill-over' market for remaining placements.
- 5. The CMA received evidence that some providers operate nationally and also that pricing for some types of placements is not limited to local catchments. At the same time, the CMA also found that procurement by LAs has a strong local dimension. Where LAs are unable to make placements using their in-house provision, they seek to find placements that best meet the needs of each child as close to their original community as possible. Accordingly, the CMA considered the impact of the Merger both at a national and local level.
- 6. When assessing the Merger at a local level, the CMA followed its approach in the recent *CareTech/Cambian*² case in relation to children's homes and specialist schools, distinguishing between different SEND and SEMH services in three potential geographic frames of reference:
 - (a) 80% catchment areas;
 - (b) 20-mile catchment areas; and
 - (c) 50-mile catchment areas.
- 7. In relation to foster care placement services, the CMA followed the approach adopted in *Core Assets Group/PICS*³ and assessed the Merger in the supply of foster care placement services at both a framework level and LA level.
- 8. The CMA assessed whether it is or may be the case that the Merger has resulted, or may be expected to result, in a substantial lessening of competition (**SLC**) in relation to:

¹ See: Children Act 1989; Local Authority Social Services Act 1970; Regulations 22 and 23 of the Care Planning, Placement and Case Review (England) Regulations 2010; Education Act 1996; and Children and Families Act 2014.

² Completed acquisition by CareTech Holdings plc of Cambian Group plc, case ME/6775-18.

³ Completed acquisition by Nutrius UK Bidco Limited of Partnerships in Children's Services Limited and Boston HoldCo B Limited, case ME/6799/19.

- (a) horizontal unilateral effects in the supply of children's homes or specialist schools at both the national and local level; and
 - (b) conglomerate effects in relation to:
 - (i) bundling children's homes and specialist schools in order to foreclose competing providers of specialist schools or children's homes; and/or
 - (ii) bundling fostering and specialist school services in order to foreclose competing providers of specialist schools.
- 9. At the national level, the CMA found that the Merger does not give rise to horizontal unilateral effects in the supply of children's homes or specialist schools because the Parties have low combined national shares, they are not close competitors and there are a number of other large and credible providers at the national level.
- 10. At a local level, consistent with the recent precedent in *CareTech/Cambian*, the CMA used a combined share of supply filter of 30% for children's homes and specialist schools to identify local overlap areas in which to conduct a more detailed assessment. On a cautious basis, the CMA also applied the same 30% filter with respect to fostering services in order to identify relevant framework agreements and LAs in which the Parties currently overlap.
- 11. The CMA identified an overlap between two of the Parties' specialist schools in the West Midlands area that have shares of supply close to 30% on a 20-mile basis. However, the CMA does not consider that this overlap gives rise to competition concerns as the Parties' schools do not appear to compete closely. This is reflected in:
 - (a) The difference in acuity needs that can be met at each school, with OFG's school typically educating children with higher acuity needs than NFA's schools.
 - (b) The difference in fees between the Parties' schools, with OFG's schools charging higher prices than NFA (which may reflect the focus on different acuity needs noted above).
 - (c) The presence of alternative competitors in the relevant catchment area.
 - (d) Evidence from the Parties' internal documents which suggests that the Parties are not close competitors and that other competitors' schools are closer competitors to the Parties than each other.
 - (e) The lack of third-party concerns related to this local overlap in specialist school provision.

12. The CMA found that there is no geographic area in which the Merger results in a combined share exceeding 30% in children's homes and fostering services.
13. The CMA's assessment of the two conglomerate theories of harm indicates that the Parties lack the ability to engage in the respective bundling activities, as they do not have geographically overlapping services which could be bundled in any of the areas where one of the Merger Parties may have market power.
14. In light of these findings, the CMA considers that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral or conglomerate effects.
15. The Merger will therefore **not be referred** under section 22(1) of the Enterprise Act 2002 (the **Act**).

ASSESSMENT

Parties

16. NFA is a controlled portfolio company of Stirling Square Capital Partners, a private equity firm. NFA is an independent fostering agency (**IFA**) and a provider of specialist education and residential care for children in the UK. The UK turnover of NFA was £[~~] in the financial year 2018.~~
17. OFG is a provider of specialist educational and residential care for children in the UK. In addition, OFG also operates a small IFA. The UK turnover of OFG was £[~~] in the financial year 2018.~~

Transaction

18. On 30 July 2019, NFA acquired OFG by way of an acquisition of OFG's entire issued share capital. The terms of the transaction are set out in the Share Purchase Agreement dated 18 July 2019 and in the Minority Share Purchase Agreement dated 30 July 2019.

Jurisdiction

19. Each of NFA and OFG is an enterprise. As a result of the Merger, these enterprises will cease to be distinct.
20. The UK turnover of OFG in the financial year 2018 was £[~~]million and therefore satisfies the £70 million turnover test in section 23(1)(b) of the Act.~~

21. The Merger completed on 30 July 2019. The four month deadline for a decision under section 24 of the Act is 20 December 2019, following an extension under section 25(2) of the Act.
22. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.
23. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 24 October 2019 and the statutory 40 working day deadline for a decision is therefore 18 December 2019.

Counterfactual

24. 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.
25. In this case, the CMA has seen 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.

Frame of reference

26. 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 merging 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.⁴

Product scope

27. The Parties overlap in the provision of:
 - (a) children's homes for children and young people with (i) SEND; and (ii) general SEMH conditions;

⁴ [Merger Assessment Guidelines](#), paragraph 5.2.2.

- (b) specialist schools for children and young people with (i) SEND for ASD and LD; and (ii) general SEMH conditions; and
- (c) foster care placement services.
28. LAs have a statutory duty to provide the above services to qualifying children and young adults and can offer these services in-house or procure them from independent providers such as the Parties.
29. The CMA considered whether it should assess separately the impact of the Merger on (i) services provided by LAs in-house and services provided by independent providers, and (ii) different types of children's homes, specialist schools and foster care placements.

Segmentation by independent providers and LAs

30. When procuring these services from independent providers, LAs can do so through framework agreements,⁵ which are operated either by a single LA or a consortium of LAs (with one LA typically taking the lead), or on a case-by-case (or 'spot') basis.
31. In *CareTech/Cambian*,⁶ the CMA found that LAs typically seek to place children in-house first and tend to utilise independent provision only when an in-house placement is difficult or not available. In that case, the CMA noted, in relation to specialist schools, that LAs must have regard to the views of the child and the child's parents. However, the LA remained the ultimate decision-maker and, as with children's homes and fostering, LAs generally had a preference for in-house provision. LA in-house provision was therefore, on a cautious basis, excluded from the relevant frames of reference.
32. The Parties submitted that services provided by LAs compete with independent providers in relation to the overlapping services and disagreed with the approach in *CareTech/Cambian*. In particular, the Parties submitted that independent providers are constrained by LAs in many of the services and geographies in which they operate (particularly in relation to SEND schools).
33. However, the CMA did not receive evidence during its investigation to indicate that the markets for relevant services have changed materially since *CareTech/Cambian*.

⁵ Framework agreements set out the commercial terms on which independent providers agree to provide certain services.

⁶ CareTech Holdings plc/Cambian Group plc. Also in relation to fostering: Completed acquisition by SSCP Spring Topco Limited of Acorn Care 1 Limited, case ME/6640/16.

34. Therefore, on a cautious basis, the CMA has assessed the impact of the Merger in the supply of services provided by independent providers (ie excluding services provided by LAs in-house).

Segmentation by type of service

Children's homes

35. Children's homes cater to children and adolescents with a wide range of complex needs. Some of these children may struggle to communicate easily with others, to understand their own feelings or needs, or to manage relationships and situations. For some children, this is due to a disability, whilst for others it is due to trauma, neglect or abuse.
36. The Parties agree that the segmentation of children's homes adopted in *CareTech/Cambian* is appropriate, ie:
- (a) SEND conditions – this includes children and young people diagnosed with: ASD; Asperger's Syndrome (**AS**)⁷; and severe LDs.
 - (b) SEMH conditions:
 - (i) Children who have suffered from sexual trauma;
 - (ii) Children who exhibit harmful sexualised behaviour;
 - (iii) Children who are deaf and affected by SEMH conditions;
 - (iv) A general SEMH category comprising a range of emotional, behavioural, developmental and attachment problems, who can generally be housed together.
37. The CMA considered the following issues in relation to the product frame of reference for children's homes:
- (a) Whether the frame of reference should be segmented according to SEND conditions;
 - (b) Whether the frame of reference should be segmented according to SEMH conditions; and

⁷ The CMA understands that Asperger's Syndrome is no longer a diagnostic term used in the UK, and that children who would previously have been diagnosed with Asperger's Syndrome typically are now given the diagnosis of high functioning autism.

- (c) Whether all children's homes should be aggregated into a single frame of reference due to supply-side substitution.
- *Segmentation of children's homes for children and young people with SEND*
38. In relation to children's homes for children and young people with SEND, the Parties submitted that no further segmentation is necessary because many residential homes admit a mix of children and young people with different types of SEND, and children may be diagnosed with more than one condition.
39. The evidence received by the CMA does not indicate any need to deviate from the approach taken in the *CareTech/Cambian*, which did not segment children's homes for children and young people with SEND. However, it is not necessary for the CMA to conclude on this point as no competition concerns arise on any plausible basis.
- *Segmentation of children's homes for children and young people with SEMH*
40. The Parties submitted that, reflective of the approach in *CareTech/Cambian*, children's homes for children and young people with SEMH may be further segmented on the basis of services offered to children who:
- (a) have suffered from sexual trauma (eg through sexual exploitation or abuse), who are typically admitted to specialist children's homes with children who have suffered similar life events;
 - (b) exhibit harmful sexualised behaviour (ie children who are at risk of sexually exploiting/abusing others), who are typically admitted to separate children's homes (and kept away from children who have suffered sexual trauma and do not exhibit harmful sexualised behaviour);
 - (c) are deaf and also affected by SEMH conditions, who are typically admitted to homes with staff specifically trained in British Sign Language to help them receive the appropriate care; and
 - (d) have general SEMH conditions (ie a range of emotional, behavioural, developmental and attachment problems), who can generally be housed together.
41. The Parties submitted that these segmentations are appropriate, as children displaying the first three types of SEMH conditions have special requirements and are generally placed in specific types of homes designed to meet their needs. From a supply-side perspective, this specialisation can also present

challenges for suppliers in switching between SEMH homes. The CMA notes that the Parties only overlap with respect to the fourth category, namely “general” SEMH conditions.

42. The evidence the CMA has received does not indicate any need to deviate from the approach taken in *CareTech/Cambian*. However, it is not necessary for the CMA to conclude on this point as no competition concerns arise on any plausible basis.

- *All children’s homes*

43. The CMA considers that SEND and SEMH homes are not substitutable from a demand-side perspective as the children in these homes will have different needs and it is not generally appropriate to house them together.

44. While the boundaries of the relevant product market are generally determined by reference to demand-side substitution alone, the CMA may widen the scope of the market where there is evidence of supply-side substitution. The CMA therefore considered whether providers switch between different types of children’s homes.

45. The Parties submitted that segmentations between SEND and SEMH conditions are appropriate. This also reflects the recent findings in *CareTech/Cambian*, where the CMA considered that it was not appropriate to use a single product frame of reference for all children’s homes, and that segmentations should be applied based on each category of children’s home – ie homes for children with SEND and homes for children with SEMH conditions.

46. The CMA also received evidence from a third party that different services are offered in residential children’s homes to children with SEMH and children with SEND . The CMA understands that Ofsted distinguishes between SEMH and children’s homes for children with SEND as these different needs necessitate different types of care and services.

47. Based on this evidence, the CMA believes that it is not appropriate to assess the Merger using a single product frame of reference for all children’s homes.

Specialist schools

48. Specialised education services are provided to children and young adults with additional learning needs. The Parties overlap in the provision of specialist schools.

49. In complex and challenging cases, and at the initiation of either a child's parents or their current school, an LA may place a child on an Education, Health and Care Plan ("EHCP"). Each EHCP will set out the child's or young person's SEN and their health and social care needs, and set personalised outcomes across education, health and social care. It will also specify the specialist education provision required by the child. This will be detailed and specific – for example, it would normally set out the type, hours and frequency of support and level of expertise. In setting the EHCP, LAs are obliged to ensure that it provides for the child or young person to be educated in a non-specialist school or institution, unless that is incompatible with either the wishes of the child's parents or the young person, or the provision of efficient education for others.
50. In *CareTech/Cambian*, the CMA segmented services for specialist schools as follows:
- (a) specialist schools for pupils with SEND, which can be further segmented between schools for pupils with:
 - (i) ASD (ie low-functioning autism) and LD;
 - (ii) AS (ie high-functioning autism);
 - (b) specialist schools for pupils with SEMH, which can be further segmented between schools for pupils:
 - (i) who have suffered sexual trauma (ie children who have been sexually abused or exploited);
 - (ii) who exhibit harmful sexualised behaviour (ie children who are at risk of sexually abusing or exploiting others);
 - (iii) who are deaf and have an SEMH condition; and
 - (iv) with general SEMH conditions (ie with a range of emotional, behavioural, developmental and attachment problems).
51. The Parties agree with the above segmentations, due to a lack of demand-side substitutability between each of the different segmentations. Furthermore, from a supply-side perspective, providers are limited in their ability to switch or readily open a new facility with a different specialism. Teachers and support staff specialise in providing education services to children with a particular condition, and if a school sought to switch, existing pupils would need to be placed in other schools before admitting pupils with a different condition. The CMA notes that the Parties overlap only with respect

to specialist schools for children with ASD and LD, and general SEMH conditions.

52. The CMA has received evidence that LAs consider the type of specialist care provided as an important factor when selecting a specialist school in which to place children with SEMH or SEND. One third party stressed the importance of children being placed in schools that matched their care needs.
53. Overall, the evidence the CMA has received does not indicate any need to deviate from the approach taken in *CareTech/Cambian*.

Foster care placement services

54. The CMA previously identified a frame of reference for foster care placement services in *Core Assets Group/PICS* and also *NFA/Acorn*.⁸ In these cases, the CMA concluded that it was appropriate to assess the merger based on the overall supply of foster care placement services, rather than focusing on any particular category of service. The Parties' view is that the CMA should adopt the same approach taken in previous decisions.
55. The evidence the CMA has received does not indicate any need to deviate from the approach taken in these cases. Therefore, the CMA has assessed the Merger in the overall supply of foster care placement services.

Conclusion on product scope

56. For the reasons set out above, and on a cautious basis, the CMA has considered the impact of the Merger on the following services in which the Parties overlap⁹:
 - (a) children's homes for children and young people with SEND;
 - (b) children's homes for children and young people with general SEMH conditions;
 - (c) specialist schools for children with SEND (ASD and LD);
 - (d) specialist schools for children with general SEMH conditions; and

⁸ *Core Assets Group Limited/Partnership in Children's Services Limited and National Fostering Agency/Acorn Care*.

⁹ The Parties do not overlap in the provision of specialist schools for children with AS and the SEMH conditions of sexual trauma, harmful sexualised behaviour and deafness. The CMA therefore did not have to reach a conclusion on the appropriate frame of reference for these services, and they are not discussed further in this decision.

(e) foster care placement services.

57. However, notwithstanding these proposed segmentations, the CMA considers that the exact scope of the relevant product frames of reference may ultimately be left open as, for the reasons discussed below, no competition concerns arise on any plausible basis.

Geographic scope

Children's homes and specialist schools: national vs local

58. In order to determine the appropriate geographic frame of reference, the CMA considered whether competition between children's homes and between specialist schools takes place nationally and/or locally.

59. The evidence that the CMA received indicates that demand for children's homes and specialist schools has a strong local dimension as:

(a) LAs aim to find placements which best meet the needs of each child as close to their original community as possible and, in many cases, within the LA itself or within 20 miles of the LA;

(b) competitors vary between regions in the UK and the market is fragmented, with even large multi-regional providers tending to have a stronger presence in some regions than others;

(c) procurement for a significant proportion of placements takes place on a spot basis, with terms in part negotiated bilaterally between the LA and the independent providers. As such, the terms may vary in response to local competitive conditions; and

(d) even where LAs do seek to procure services via framework agreements in advance of individual placement decisions, these agreements are local or regional rather than national, with prices and other terms varying between different areas.¹⁰

60. As highlighted in *CareTech/Cambian*, this evidence suggests that suppliers compete most closely with each other at a local level.

61. However, the CMA also received evidence indicating that some factors relating to the provision of these services are determined on a wider than local basis.

¹⁰ In addition, placements made through framework agreements can still involve some bilateral negotiation between the LA and the independent provider in relation to fees for additional services.

62. The Parties submitted that pricing/capacity decisions for NFA's schools are made [X]. OFG's fees are generally more [X] than is the case for NFA, with a [X].
63. Based on this evidence, the CMA has considered both national and local competition in the supply of children's homes and specialist schools. The CMA believes that competition currently takes place primarily at a local level, but does not exclude that the dynamics of competition could change in the future (eg in the event of continued consolidation).

Local competition for children's homes and specialist schools

The role of framework agreements

64. As noted above, LAs commission services from independent providers through framework agreements or through individual negotiations on a spot basis.
65. Framework agreements set out the terms (such as the services offered and the price) under which independent providers will provide the relevant service in the specified period. The terms of the framework can specify a variation if the child or young person requires additional services. Most LAs have a number of framework providers.
66. The CMA has not distinguished between framework and off-framework procurement for children's home or specialist school services for the purposes of determining the relevant geographic scope. While the terms of framework agreements may represent a competitive constraint on participating suppliers, the geographic scope could be wider than the area covered by a framework because LAs often place children in children's homes and specialist schools outside of this area. The geographic scope may also be narrower in cases where, for example, strong local suppliers have a disproportionate influence on the terms of the framework due to LAs' preference for placing children close to their local community, or where there is scope for further negotiation of framework terms at the placement stage.
67. Based on these considerations, and consistent with its approach in *CareTech/Cambian*, the CMA considered different catchment areas to capture the set of suppliers that LAs consider when making a placement decision, whether on-framework or off-framework.

Catchment areas

68. Catchment areas are a pragmatic approximation for a candidate market.¹¹ In cases involving local markets, the CMA typically uses catchment areas which capture 80% of a site's sales or customers. However, the CMA may adjust its starting point where there is evidence that this is appropriate.¹²
69. Consistent with its Guidelines, and in line with the approach in *CareTech/Cambian*, the CMA assessed the Merger on the basis of the Parties' average 80% catchment area for each of their children's homes and specialist schools.
70. However, the CMA also received evidence from third parties that the geographic frame of reference for children's homes and specialist schools may be considerably narrower than the 80% catchment area. LAs told the CMA that, provided it is in the best interests of the child, they generally seek to place a child as close to the child's community as possible. Therefore, when comparing alternative service options, LAs start by looking locally. LAs said that most long-distance placements are simply due to capacity constraints in a local area.¹³ Competitors also confirmed that, when they consider what gaps exist in the market, they do so locally.
71. The CMA received evidence that a catchment area of approximately 20 miles may be a more appropriate catchment area as it is a relevant consideration for LAs when making placements to a children's home or specialist school. Third parties said that placing children close to their community is a target which LAs strive to achieve, and independent reports confirmed that a significant proportion of children are placed within 20 miles of their local community.¹⁴ In each product frame of reference where the Parties overlap, the average 80% catchment areas were wider than 20 miles.
72. Third party views and internal documents from the Parties suggest that an appropriate catchment area for both children's homes and specialist school may occasionally be wider than 20 miles. Therefore, on a conservative basis, the CMA also assessed the impact of the Merger on the basis of a 50-mile catchment area around each children's home and specialist school.

¹¹ See The CMA's Merger Assessment Guidelines, at paragraph 5.2.25

¹² See the CMA's Retail mergers commentary, dated 10 April 2017, at paragraphs 2.20 and 2.21. In line with the approach outlined in the CMA's Retail mergers commentary, the CMA has used average catchment areas, where the CMA has averaged 80% catchment areas separately for each party across all of the schools and homes that fall within a particular product frame of reference.

¹³ In some rare cases, LAs will deliberately place children far from their community (eg children who have suffered sexual trauma or are at risk of gang violence).

¹⁴ Sir Martin Narey's 2016 report on Residential Care in England found that up to 63% of children were placed within 20 miles from home or within their LA. The Department of Education's report on Children looked after in England (including adoption), year ending 31 March 2018 shows that, as of 31 March 2018, 51% of all looked-after children in secure units, children's homes or semi-independent accommodation were living within 20 miles of their home.

73. The CMA believes that these three catchment areas enabled it to conduct a broad assessment of competition in the supply of the relevant services. Where appropriate, the CMA considered evidence of competitive constraints from outside these catchment areas in its competitive assessment.
74. Given that the CMA has not found concerns on any plausible basis in any local areas on the basis of 20-mile, 50-mile or average 80% catchment areas, the CMA has not found it necessary to conclude on the appropriate geographic frame of reference.

Foster care placement services

75. In *Core Assets Groups/PICS*, the CMA considered the merger on the basis of geographic frames of reference at both the framework level and at the LA level.¹⁵
76. On a cautious basis, the CMA has assessed the effects of the Merger at both the framework and LA level. However, the CMA does not consider it necessary to conclude on the relevant geographic frame of reference for these services as the Merger does not give rise to competition concerns on any plausible basis.

Conclusion on geographic scope

77. For the reasons set out above, on a cautious basis the CMA has considered the impact of the Merger in the following geographic frames of reference: (i) on a national basis; (ii) 20-mile catchment areas, (iii) 50-mile catchment areas, and (iv) 80% catchment areas.
78. However, it was not necessary for the CMA to reach a conclusion on the geographic frame of reference, since, as set out below, no competition concerns arise on any plausible basis.

Conclusion on frame of reference

79. For the reasons set out above, the CMA has considered the impact of the Merger on a national basis and within (i) 20-mile catchment areas, (ii) 50-mile

¹⁵ In *CareTech/Cambian*, the CMA did not conclude on the appropriate geographic frame of reference in foster care placement services as the Parties' combined shares of supply were (i) less than 5% at a national level; (ii) less than 10% at any framework level; and (iii) less than 30% at any LA level.

catchment areas, and (iii) 80% catchment areas in the following product frames of reference where the Parties overlap:

- (a) children's homes for children and young people with SEND;
- (b) children's homes for children and young people with general SEMH conditions;
- (c) specialist schools for children with SEND (ASD and LD); and
- (d) specialist schools for children with general SEMH conditions.

80. In addition, the CMA has assessed the impact of the Merger on fostering services on a national basis and at both the framework agreement and local authority level in the areas where the Parties currently overlap.

Competitive assessment

Horizontal unilateral effects

81. 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 to degrade quality on its own and without needing to coordinate with its rivals.¹⁶ Horizontal unilateral effects are more likely when the merging 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 horizontal unilateral effects in relation to the frames of reference identified above at paragraphs 79 and 80.

National horizontal unilateral effects

82. As noted above, the CMA's view is that demand for children's homes, specialist schools and fostering placements is local and many of the parameters of competition vary locally. However, as some parameters of competition may be flexed nationally, the CMA has considered whether the Merger may result in a SLC as a result of a loss of competition at the national level.

83. The CMA notes that the provision of children's homes, specialist schools and fostering services is fragmented and the Parties face competition from a

¹⁶ [Merger Assessment Guidelines](#), from paragraph 5.4.1.

number of national and regional players, as well as many local competitors who are able to compete with larger regional and national operators.

National horizontal unilateral effects in the provision of specialist schools

84. The CMA found that the combined national shares of supply for specialist schools for children with general SEMH and SEND conditions were below a level that was likely to raise concern. The national shares of supply for each product frame of reference are:¹⁷
- (a) SEND conditions: [5-10]% for NFA and [5-10]% for OFG, resulting in a combined share of [10-20]%; and
 - (b) General SEMH conditions: [10-20]% for NFA and [0-5]% for OFG, resulting in a combined share of [10-20]%.
85. In addition to the low shares of supply, the CMA has noted significant differences in the Parties' offerings which indicate that the Parties are not close competitors in respect of specialist schools at the national level. Evidence for this includes:
- (a) OFG has higher average prices than NFA for [X].
 - (b) Internal documents from the Parties rarely mention each other as competitors and where they do it is generally at a local level along with other local competitors.
 - (c) OFG and NFA's business models differ. OFG appears to place greater emphasis on a combined school and home offering, whereas many of NFA's schools primarily focus on day students.
86. For the reasons set out above, the CMA has found that the Merger does not give rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects at the national level in the supply of specialist schools for children with SEND or general SEMH conditions.

National horizontal unilateral effects in the provision of children's homes

87. The Parties submitted that their combined share of supply in the provision of children's homes at a national level is very low, with a combined share of supply grouping SEND and general SEMH together at [5-10]% with, an

¹⁷ Source: Parties' analysis of data provided in the Department for Education's Edubase dataset.

increment of [0-5]%.¹⁸ Separately, the CMA has calculated national shares of supply for SEND and general SEMH separately, and in both instances the Parties' combined share of supply does not exceed 10%.¹⁹

88. Given the very low shares of supply, the CMA has found that the Merger does not give rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects at the national level in the supply of children's homes for children with SEND or general SEMH conditions.

National horizontal unilateral effects in the provision of fostering services

89. The Parties overlap in fostering services. NFA is one of the UK's largest fostering services agencies. However, OFG only has a very small local fostering agency and operates primarily in the West Midlands.
90. The combined share of supply of the Parties at a national basis is [20-30]%. However, the increment resulting from OFG's very limited fostering offering is only [0-5]%. On this basis, the CMA has found that the Merger does not give rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects at the national level in the supply of fostering services.

Local horizontal unilateral effects

91. As discussed above, the CMA believes that competition currently takes place primarily at a local level.
92. The CMA considered whether the Merger would allow the merged entity to profitably raise prices or degrade quality in any specific local area or areas.
93. The CMA has considered local horizontal unilateral effects in the following product frames of reference:
- (a) The provision of specialist schools for children with:
 - (i) General SEMH conditions; and
 - (ii) SEND conditions;
 - (b) The provision of children's homes for children with:

¹⁸ Source: Parties' analysis using Ofsted's register of children's homes. The shares of supply calculations do not include competitor homes in Wales or Scotland, and therefore will overstate Parties' share of supply.

¹⁹ Source: CMA calculations using Ofsted's register of children's homes.

- (i) General SEMH conditions; and
 - (ii) SEND conditions;
- (c) Fostering services.

Shares of supply filter

94. The CMA regularly uses filters to screen out overlap areas where there is no realistic prospect of competition concerns. This allows the CMA to focus on the remaining overlap areas, in which a more detailed local analysis may be required.²⁰ In the present case, the CMA used a filter based on the Parties' combined share of supply in each frame of reference.²¹
95. When deciding the appropriate level of the filter for children's homes and specialist schools, the CMA has adopted a cautious approach in light of the following factors: (i) in some areas, competitors may be unable to compete for placements because they are already operating at full capacity; and (ii) providers registered as offering general SEMH services sometimes offer differentiated services (eg by specialism, age, gender, or acuity).
96. In accordance with its approach in *CareTech/Cambian*, the CMA identified overlap areas for a more detailed assessment on the basis of a 30% share of supply filter. In addition, and on a cautious basis, the CMA also considered one overlap in the West Midlands where the Parties' share of supply in specialist schools was very close to 30% on a 20-mile basis and an additional school owned by OFG was located very close to the 20-mile boundary.
97. There were no local areas in which the Merger would result in the Parties' combined share of supply exceeding (or even approaching) the 30% filter in either children's homes or fostering services. As such, the CMA did not further investigate local horizontal unilateral effects in children's homes or fostering services.²²

²⁰ *Retail Mergers Commentary*, from paragraph 3.1.

²¹ The CMA used shares of capacity as the best-available measure of market shares.

²² The CMA notes that the Parties' combined share in the provision of fostering services exceeded 30% in relation to the Peterborough LA on the basis of 2018 data. However, the Parties' combined share of [50-60]% resulted from an increment of a single OFG placement which has since been terminated. OFG therefore no longer has any presence in Peterborough as of 2019. Accordingly, the CMA did not consider it necessary to consider this overlap in more detail.

West Midlands overlap in specialist schools for children with general SEMH conditions

98. The CMA identified two specialist schools of the Parties which overlap with each other in the West Midlands area and have shares of supply close to 30% on a 20-mile basis.²³ These schools are:
- (a) Hilcrest Shifnal School (operated by OFG); and
 - (b) The Wenlock School (operated by NFA).
99. Additionally, the Parties operate two other schools located in the West Midlands. These schools are:
- (a) NFA's Longdon Hall School, which is within 20 miles of The Wenlock School and is located slightly over 20 miles away from OFG's Hilcrest Shifnal School and Hilcrest Glebedale School.
 - (b) OFG's Hilcrest Glebedale School, which is located to the north of the other three sites and is just over 20 miles away from Longdon Hall School and Hilcrest Shifnal School.
100. The Parties submitted that the Merger would not result in an SLC in this local area because:
- (a) Hilcrest Shifnal School teaches children with higher acuity needs than The Wenlock School or Longdon Hall School. This is illustrated by (i) their differentiated offerings, with Hilcrest Shifnal catering for both children placed in OFG homes and day students while The Wenlock School and Longdon Hall School cater only for day students; and (ii) the higher prices charged by Hilcrest Shifnal School. This difference in focus on children with different acuity needs is further illustrated by the large difference in the 80% catchment areas of Hilcrest Shifnal, which is in excess of 90 miles, and The Wenlock School, which is less than 10 miles.
 - (b) There are a large number of alternative competitors who will continue to constrain the merged entity, many of which are geographically closer to the Parties' schools than the Parties' schools are to each other.
 - (c) There are a number of LA-owned schools in the area that constrain the Parties' schools.

²³ The Parties' share of supply was not close to 30% on a 50-mile or average 80% catchment basis.

101. The evidence available to the CMA indicates that the Parties do not compete closely in this local area.
102. In particular, the Parties' internal documents support the view that the Parties are not close competitors and are competitively constrained by alternative providers:
 - (a) An NFA business report for The Wenlock School cited [redacted] schools as competitors, none of which were OFG sites.²⁴
 - (b) An NFA business report for the Longdon Hall School cited [redacted] schools as competitors, none of which were OFG sites.²⁵
 - (c) An OFG internal document listed competitors to Hilcrest Shifnal School. [redacted], it also includes [redacted] other competing schools in the area, suggesting a significant number of alternative competitive constraints.²⁶
103. The CMA also contacted LA customers in the West Midlands area which send a substantial number of students to the Parties' schools. None of these LAs raised concerns about the Merger.
104. Overall, the evidence suggests that the Parties' schools do not compete closely in the relevant catchment areas and there are a number of alternative providers available to LAs seeking specialist schools for children with general SEMH conditions.
105. On the basis of this evidence, the CMA has found that the Merger does not give rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects in the supply of specialist schools for children with general SEMH conditions in the 20-mile catchment areas around Hilcrest Shifnal School and The Wenlock School in the West Midlands.

Conclusion on horizontal unilateral effects

106. For the reasons set out above, the CMA believes that the Parties have low shares of supply in every plausible frame of reference, are not particularly close competitors in all of the areas in which they overlap, and are constrained by a number of competitors in each of these areas. Accordingly, the CMA found that the Merger does not give rise to a realistic prospect of an

²⁴ Annex 3A.37 to the Final Merger Notice.

²⁵ Annex 3A.43 to the Final Merger Notice.

²⁶ Annex RF11.33.14B to the Parties' response to the CMA's Section 109 Notice dated 4 September 2019.

SLC as a result of horizontal unilateral effects in any plausible frame of reference.

Conglomerate effects

107. Conglomerate effects may arise in mergers of firms that are active in the supply of goods or services that do not form part of the same markets but which are nevertheless related in some way, either because their products are complements (so that a fall in the price of one good increases the customer's demand for another) or because there are economies of scale in purchasing them (so that customers buy them together).²⁷
108. Conglomerate mergers may be benign or even efficiency-enhancing. However, in certain circumstances, a conglomerate merger may result in the merged entity foreclosing rivals, including through a tying or bundling strategy.
109. In the present case, the CMA has considered whether the merged entity could use its position in specialist schools, homes or fostering in order to foreclose providers of another service by bundling services at a local level. The CMA considered the following theories of harm:
 - (a) Bundling children's homes and specialist schools in order to foreclose competing providers of specialist schools or children's homes.
 - (b) Bundling fostering and specialist school services in order to foreclose competing providers of specialist schools.
110. The CMA considered both of these theories of harm at the local level given that demand for services arise at a local level and any bundling strategy would relate to individual children who LAs have a responsibility to place locally where possible.
111. The CMA's approach to assessing conglomerate theories of harm is to analyse (a) the ability of the merged entity to foreclose competitors, (b) the incentive of it to do so, and (c) the overall effect of the strategy on competition.²⁸ These are discussed below.

²⁷ [Merger Assessment Guidelines](#), paragraph 5.6.2.

²⁸ [Merger Assessment Guidelines](#), paragraph 5.6.6.

Bundling children's homes and specialist schools in order to foreclose competing providers of specialist schools or children's homes

112. The Parties submitted that although specialist schools and children's homes are related there is no prospect of an SLC resulting from conglomerate effects for the following reasons:
- (a) The products are not complements in an economic sense as a fall in price of one does not increase demand for another.
 - (b) For a substantial proportion of education placements, no residential care is required.
 - (c) Placements are often made at different times with residential care decisions generally being made prior to schooling decisions. Even when placements are made at the same time, they are procured separately by the LAs.
 - (d) Whilst offering integrated care can confer benefits on the children and young people using the services, and LAs as procurers, it is not a prerequisite for market success or for posing a strong competitive constraint on integrated providers. The Parties argue that NFA itself demonstrates this, as it has a national presence but does not bundle services or integrate the provision of its residential, fostering or education services.
113. The CMA considers that internal documents from both Parties indicate that they do bundle their services for specialist schools and children's homes. Furthermore, bundling was seen [X].
114. In addition, a number of LAs told the CMA that bundling specialist schools and children's homes was possible provided that there is close geographic proximity between a specialist school and a children's home that provide services for the same types of children.

Ability

115. In order to assess whether the merged entity would have the ability to foreclose competitors the CMA sought to identify local areas where the Parties' current offerings may provide the ability for the Parties to foreclose competitors.
116. The CMA first identified a number of local areas where one of the Parties had a share of supply in either SEND or general SEMH children's homes or specialist schools that may be sufficient to give rise to the possibility of

foreclosing competitors. The CMA considered that this may be the case where the share of supply was above 40% on a 20-mile, 50-mile or 80% catchment basis.

117. The CMA identified several areas where the Parties had shares exceeding this threshold. However, in each of these areas, there were no homes or schools of the same specialism owned by the other Party in the local area. The lack of schools or homes of the other Party in these areas indicates that the merged entity would lack the ability to bundle an OFG school with an NFA home or *vice versa* in the identified areas.

Incentive and Effect

118. Given the CMA's conclusion that the Parties would not have the ability to foreclose any specialist schools or children's homes competitors in any areas, the CMA did not need to assess the Parties' incentive to do so, or the possible effects of any such strategy.

Conclusion

119. For the reasons set out above, the CMA believes that the Parties do not have the ability to foreclose competing providers of specialist schools or children's homes in any local areas by adopting this strategy. Accordingly, the CMA found that the Merger does not give rise to a realistic prospect of an SLC as a result of conglomerate effects in relation to the bundling of specialist schools with children's homes.

Bundling fostering and specialist school services in order to foreclose competing providers of specialist schools

120. The CMA considered whether the merged entity may be able to use its market position in fostering services in order to foreclose specialist school competitors through a bundling strategy.

Ability

121. The CMA found no evidence from the Parties or third parties that indicated that there was a significant level of bundling of specialist schools with fostering services. In particular, LAs did not raise concerns as regards this possible bundling strategy. Moreover, the lack of evidence of such a strategy being pursued in areas where NFA has a sizeable market presence in fostering services and currently operates a specialist school indicates that the bundling of such services is not a feasible business strategy. Therefore, the

CMA does not believe that NFA would have the ability to foreclose competitors using bundling strategy.

Incentive and Effect

122. Given the CMA's conclusion that the Parties would not have the ability to foreclose any specialist schools competitors, the CMA did not need to assess the Parties' incentives to do so, or the effects of any such strategy.

Conclusion

123. For the reasons set out above, the CMA believes that the Parties do not have the ability to foreclose competing providers of specialist schools by adopting this strategy. Accordingly, the CMA found that the Merger does not give rise to a realistic prospect of an SLC as a result of conglomerate effects in relation to the bundling of specialist schools with fostering services.

Conclusion on conglomerate effects

124. For the reasons set out above, the CMA believes that the merged entity would lack the ability to foreclose competing providers of specialist schools or children's homes. Accordingly, the CMA found that the Merger does not give rise to a realistic prospect of an SLC as a result of conglomerate effects on any plausible basis.

Barriers to entry and expansion

125. 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.²⁹
126. However, the CMA has not had to conclude on barriers to entry or expansion as the Merger does not give rise to competition concerns on any plausible basis.

Countervailing buyer power

127. The Parties submitted that their LA customers have significant countervailing buyer power. However, the CMA has not had to conclude on countervailing

²⁹ [Merger Assessment Guidelines](#), from paragraph 5.8.1.

buyer power as the Merger does not give rise to competition concerns on any plausible basis.

Third party views

128. The CMA contacted customers and competitors of the Parties, governmental departments and associations active in the sectors concerned. Concerns raised by third parties are as follows:
- (a) a limited number of customers raised concerns regarding the lessening of LAs' negotiating power when looking to place children in independent providers' facilities.
 - (b) Other customers also stressed the potential increase in costs and issues related to quality reduction they may face should the Merger proceed.
 - (c) One competitor indicated that the Merger could result in students of specialist schools not being placed in the best education and care facilities, as OFG would receive most referrals from NFA, irrespective of their needs.
129. Third parties also raised more general concerns related to the sectors in which the Parties operate, although these are not necessarily Merger-specific.
- (a) One respondent highlighted a general tendency toward concentration, whilst several customers stressed a lack of capacity in the fostering market and an increasing number of looked after children.
 - (b) A trade association affirmed that the scarcity of available places in child residential education facilities could lead to the creation of unregistered care homes.
130. Third party comments have been taken into account where appropriate in the competitive assessment above.

Decision

131. Consequently, the CMA does not believe 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.
132. The Merger will therefore **not be referred** under section 22(1) of the Act.

Richard Romney
Director, Mergers
Competition and Markets Authority
11 December 2019