

Anticipated acquisition by McGraw-Hill Education, Inc. of Cengage Learning Holdings II, Inc.

Decision to refer

ME/6849/19

The CMA's decision to refer under section 33(1) of the Enterprise Act 2002 given on 24 March 2020. Full text of the decision published on 30 March 2020.

Introduction

1. On 1 May 2019, McGraw-Hill Education, Inc. (**MHE**) and Cengage Learning Holdings II, Inc. (**Cengage**) (together the **Merged Entity**) entered into an agreement under which MHE and Cengage will merge and the current controllers of MHE, investment funds managed by affiliates of Apollo Management, L.P. (**Apollo**), will acquire approximately 50% of the votes in the Merged Entity (the **Merger**). Apollo will also have the ability to exercise veto rights over decisions of the Merged Entity's board of directors. Apollo, MHE and Cengage are together referred to as the **Parties**.
2. On 10 March 2020, the Competition and Markets Authority (**CMA**) decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger consists of arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that this may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**)¹ as a result of horizontal unilateral effects in relation to the supply of HE titles for 51 courses in the UK (the **SLC Courses**).² Terms defined in the SLC Decision have the same meaning in this decision on reference unless otherwise specified.
3. On the date of the SLC Decision, the CMA gave notice pursuant to section 34ZA(1)(b) of the Act to the Parties of the SLC Decision. However, in order to allow the Parties the opportunity to offer undertakings to the CMA for the

¹ See [case page](#)

² See Annex 2 to the SLC Decision.

purposes of section 73(2) of the Act, the CMA did not refer the Merger for a Phase 2 investigation pursuant to section 33(3)(b) on the date of the SLC Decision.

4. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings for the purposes of section 73(2) of the Act, it must do so before the end of the five working day period specified in section 73A(1)(a) of the Act. The SLC Decision stated that the CMA would refer the Merger for a Phase 2 investigation pursuant to section 33(1), and in accordance with section 34ZA(2) of the Act, if no undertakings for the purposes of section 73(2) of the Act were offered to the CMA by the end of this period (ie by 17 March 2020); if the Parties indicated before this deadline that they did not wish to offer such undertakings; or if the undertakings offered were not accepted.
6. On 17 March 2020, the Parties offered the CMA the following undertakings (the **Proposed Undertakings**): divestment to one or more upfront buyers of specified titles and associated title-specific digital materials³ from the Parties in 50 of the 51 SLC Courses.⁴ For 42 of the SLC Courses, the Proposed Undertakings cover the full geographic scope of the specified titles. For eight of the SLC Courses the Proposed Undertakings cover a more limited geographic scope (eg UK or Europe, Middle East and Africa (**EMEA**)).⁵
7. The Proposed Undertakings include specified relevant titles, relevant title-specific ancillary materials, and all tangible and intangible assets associated with such titles, including author contracts and customer lists for each of the SLC Courses.⁶
8. The Parties explained that the Proposed Undertakings seek to address the CMA's concerns while avoiding 'some of the most disproportionate global impacts' of selling all of one Party's titles in each SLC Course. The Proposed Undertakings comprise the following features:
 - (a) For 42 of the SLC Courses, the Parties offered a global divestiture of specified titles:

³ Digital materials are eBooks and associated digital learning tools, namely instructor/student companion websites and non-interactive media assets (eg videos and other static media) and test and question banks associated with the divested titles.

⁴ Remedies Form, paragraph 1.2. The Parties did not submit undertakings for the course 'Mathematics: All Other'. As part of the Remedies Form, the Parties submitted the revenue of Cengage had been erroneously allocated to this course and should have been allocated to two other courses in which the CMA found no SLC. The Parties therefore submitted that there was no overlap between the Parties in 'Mathematics: All Other'.

⁵ The Parties also provided written and oral supplementary submissions on the 19, 20 and 22 March.

⁶ Remedies Form, paragraph 1.3.

- (i) In 22 of the SLC Courses, the Parties offered either to sell all Cengage or all MHE titles in each of the 22 courses (the **Complete Global Divestitures**).
 - (ii) In 20 of the SLC Courses, the Parties offered to sell a set of titles which amount (in terms of aggregate revenue) to the majority of - and in some instances more than - the share of supply of the Party that had the lower share in the SLC Course (Cengage or MHE as the case may be). In approximately half of the SLC Courses falling within this category, the set of titles offered are not those of the Party with the lower share of supply. Therefore, they do not involve the divestment of the actual increment arising from the Merger⁷ and the divesting Party would continue to retain titles in the course. In a limited number of SLC Courses falling within this category, the Proposed Undertakings include an offer of a mix-and-match divestment of both Parties' titles⁸ (the **Targeted Global Divestitures**).
- (b) For eight of the SLC Courses, the Parties proposed a divestment of their rights in a more limited geographic area (the **Regional Divestitures**). For these SLC Courses, the global rights to certain textbooks would be geographically split into two regions: the UK (and up to the EMEA region if requested by the chosen purchaser) and the rest of the world. Post-divestiture, the potential purchaser would acquire a regional right (either UK or EMEA) to a textbook, with the Merged Entity retaining the rights to the same textbook outside the specified region. The Parties also offered to provide the purchaser with a right to benefit from new editions created by the Merged Entity for the US market.

Assessment of the Proposed Undertakings

9. As noted at paragraph 2 above, in the SLC Decision, the CMA concluded that it is or may be the case that the Merger may be expected to result in an SLC as a result of horizontal unilateral effects in relation to the supply of HE titles for 51 courses in the UK.
10. Section 73(2) of the Act states that the CMA may, instead of making a reference and for the purpose or remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which, in

⁷ I.e., in many cases, where Cengage had a lower share of supply than MHE, a set of MHE titles was offered or vice versa.

⁸ In 'Accounting: Managerial: Introductory: Undergraduate', the Parties offered a set of titles from both Parties (ie a mix-and-match remedy). In 'Accounting: Cost Accounting And Control: Introductory' and 'Psychology: Introductory', the Parties offered to divest a number of Cengage titles amounting to the majority of the share of supply of MHE and an additional Regional Divestiture of the MHE titles.

relation to anticipated mergers, may be expected to result from it, accept undertakings in lieu of a reference (**UILs**) to take such action as it considers appropriate.

11. In accordance with section 73(3) of the Act, when deciding whether to accept UILs, the CMA shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it.
12. In order to accept UILs, the CMA must be confident that all of the potential competition concerns that have been identified in its investigation would be resolved by means of the UILs without the need for further investigation. UILs are therefore appropriate only where the remedies proposed to address any competition concerns raised by the merger are clear-cut and capable of ready implementation.⁹ Further:
 - (a) In relation to the substantive competition assessment, the clear-cut requirement 'means that there must not be material doubts about the overall effectiveness of the remedy'; and
 - (b) In practical terms, the clear-cut requirement means that 'UILs of such complexity that their implementation is not feasible within the constraints of the Phase 1 timetable are unlikely to be accepted.'¹⁰
13. As a general rule, the CMA considers that at Phase 1, it is appropriate for it to seek to remedy or prevent competition concerns rather than simply mitigate concerns.¹¹
14. Further, the CMA considers that at Phase 1 it is generally unlikely to consider that behavioural UILs will be sufficiently clear cut to address the identified competition concerns.¹²
15. In the present case, for the reasons set out below, the CMA has material doubts that the Proposed Undertakings would effectively remedy the competition concerns identified in the SLC Decision. While the CMA considers that the Complete Global Divestitures may effectively remedy the competition concerns identified in respect of the SLC Courses to which they relate, after careful consideration of the Targeted Global Divestitures and the Regional Divestitures, the CMA does not believe that these two elements of the

⁹ [CMA Remedies Guidance](#), paragraph 3.27.

¹⁰ [CMA Remedies Guidance](#), paragraph 3.28.

¹¹ [CMA Remedies Guidance](#), paragraph 3.31.

¹² [CMA Remedies Guidance](#), paragraph 3.32.

Proposed Undertakings offer a comprehensive and clear-cut solution in respect of the SLC Courses to which they relate.

Targeted Global Divestitures

16. The CMA considers that the Targeted Global Divestitures do not offer a clear-cut solution to the competition concerns identified in the SLC Decision for the following reasons.
17. First, the Targeted Global Divestitures entail a divestment of titles which, in the majority of cases do not, in terms of shares of supply, transfer the full increment brought about by the Merger to the proposed purchaser.
18. Second, the Parties offer a divestiture that, in a number of instances, amounts to a figure *equivalent* to the increment in terms of aggregate revenue. In doing so, the Parties have selected their preferred titles to divest and their preferred titles with which to compete in the UK (including retaining titles from both Parties) from the Parties' combined portfolio. The Parties have made limited submissions regarding the competitive strength of the titles covered by the Targeted Global Divestitures and the titles which the Parties would retain. The Parties have not demonstrated to the CMA's satisfaction that a significant composition risk would not arise in this case as a result of this selection.¹³
19. The CMA has therefore been unable to confirm that the Targeted Global Divestitures would restore competition to the level that would have prevailed absent the Merger in the relevant SLC Courses.
20. Third, in a limited number of courses the Targeted Global Divestitures include an offer of a 'mix-and-match' divestment of the Parties' titles within an SLC Course. In accordance with the CMA's guidance, to avoid additional composition risk, it will normally be preferable for all of the assets to be provided by one of the merger parties, unless it can be demonstrated to the CMA's satisfaction that there is no significant increase in risk from a mix-and-match alternative.¹⁴ The Parties have not demonstrated to the CMA's satisfaction that such a significant risk would not arise in this case.
21. The CMA therefore considers that there is a significant risk that the Targeted Global Divestitures would not fully address the competition concerns identified in the SLC Decision without the need for further investigation and the CMA has material doubts about the effectiveness of this remedy.

¹³ [CMA Remedies Guidance](#), paragraph 5.3(a).

¹⁴ [CMA Remedies Guidance](#), paragraph 5.16.

Regional Divestitures

22. The CMA considers that the Regional Divestitures do not offer a clear-cut solution to the competition concerns identified in the SLC Decision for the following reasons.
23. First, the CMA has concerns that these regional rights may not incentivise the potential purchaser to compete effectively, including financing and developing new editions of a title, to the same extent as a global right would. The CMA considers that the investment necessary for a new edition will not be recouped globally, but on a narrower basis, and that this may dampen the incentive of a purchaser to compete in the future.
24. Second, it is uncertain whether authors would accept having two separate relationships in relation to the same text, ie one with the Merged Entity globally and another with the potential purchaser in the UK. Even if authors would in principle agree to this arrangement, it is not clear to the CMA how effectively that relationship would operate in practice. The CMA has concerns that the Merged Entity may retain a primary relationship with the author, which could hamper the potential purchaser's ability to negotiate different or additional modifications in order to compete in the UK. The CMA notes that the Parties offered to provide the purchaser with a right to benefit in the UK from new editions created by the Merged Entity for the US market. However, since these modifications are outside of the potential purchaser's control, the CMA considers that this may not be sufficient to enable the potential purchaser to compete effectively in the UK. The CMA also has doubts as to how this right would be enforced and/or monitored by the potential purchaser, noting that the Proposed Undertaking in respect of the right to benefit from the Merged Entity's modifications is behavioural in nature.¹⁵
25. Third, the CMA has concerns as to whether a potential purchaser (with regional rights) would be appropriately protected from imports of the Merged Entity's global title or from (potential) UK customers accessing digital titles globally. Whilst the potential purchaser may benefit from some copyright or contractual protection, the CMA considers that it may not be feasible for a potential purchaser to monitor all potential import channels.¹⁶ The CMA further considers that it is also unclear whether it would be commercially and economically viable for the purchaser to enforce its regional rights. Therefore

¹⁵ [CMA Remedies Guidance](#), paragraph 7.4(d).

¹⁶ Indeed, the CMA notes that, during the Phase 1 investigation, the Parties were unable to identify the extent to which their distributors were selling titles to customers located in other countries.

the CMA has concerns as to the risks of ineffective monitoring and enforcement.

26. The CMA therefore considers that there is a significant risk that the Regional Divestitures would not restore competition to the level that would have prevailed absent the Merger and would not fully address the competition concerns identified in the SLC Decision without the need for further investigation.

Decision

27. For the reasons set out above, after examination of the Proposed Undertakings, the CMA does not believe that it would achieve as comprehensive a solution as is reasonable and practicable to the SLC identified in the SLC Decision and the adverse effects resulting from that SLC.
28. Accordingly, the CMA has decided not to exercise its discretion under section 73(2) of the Act to accept undertakings in lieu of reference.
29. Therefore, pursuant to sections 33(1) and 34ZA(2) of the Act, the CMA has decided to refer the Merger to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 to conduct a Phase 2 investigation.

Joel Bamford
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Competition and Markets Authority
24 March 2020