

## ANTICIPATED ACQUISITION BY YPO OF FINDEL EDUCATION LIMITED

### Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups<sup>1</sup>

#### Introduction

1. On 30 June 2020, the Competition and Markets Authority (**CMA**), in exercise of its duty under section 33(1) of the Enterprise Act 2002 (the **Act**), referred the anticipated acquisition by Yorkshire Purchasing Organisation (**YPO**)<sup>2</sup> of Findel Education Limited (**Findel**) (the **Merger**), for further investigation and report by a group of CMA panel members (the **Inquiry Group**).
2. In its provisional findings on the reference notified to YPO and Findel (the **Parties**) on 16 October 2020, the CMA, among other things, provisionally concluded that the Merger would result in the creation of a relevant merger situation, and that the creation of that situation may be expected to result in a substantial lessening of competition (**SLC**) in the supply of Educational Resources<sup>3</sup> to Educational Institutions<sup>4</sup> in the UK by Generalist Suppliers.<sup>5</sup>
3. The CMA has provisionally concluded that this SLC may be expected to result in adverse effects, for example in the form of higher prices (which may be in the form of reduced discounts or rebates) and/or reduced quality, range or service than would otherwise be the case absent the Merger.

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<sup>1</sup> CMA Rules of Procedure for Merger, Market and Special Reference Groups (CMA17 March, 2014 corrected November 2015 (**CMA Rules**)).

<sup>2</sup> YPO is a joint committee constituted by 13 'Founder Member' local authorities which control YPO in equal parts. The Council of the City of Wakefield acts as the 'Lead Authority' of YPO. YPO operates under the Local Authority (Goods & Services) Act 1970'. The other 12 Founder Member local authorities are (i) Barnsley Metropolitan Borough Council; (ii) The Borough Council of Bolton; (iii) City of Bradford Metropolitan District Council; (iv) Borough Council of Calderdale; (v) Doncaster Borough Council; (vi) The Council of The Borough Of Kirklees; (vii) Knowsley Metropolitan Borough Council; (viii) North Yorkshire County Council; (ix) Rotherham Borough Council; (x) St Helens Borough Council; (xi) Wigan Borough Council; (xii) Council of The City of York.

<sup>3</sup> As defined in the provisional findings report.

<sup>4</sup> Ibid

<sup>5</sup> Ibid

4. This Notice sets out the actions which the CMA considers it might take for the purpose of remedying, mitigating or preventing the SLC<sup>6</sup> and/or any resulting adverse effects identified in the Provisional Findings Report.<sup>7</sup>
5. The CMA invites comments on possible remedies by 5pm on 30 October.

### **Criteria**

6. In deciding on a remedy, the CMA shall in particular have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it.<sup>8</sup>
7. To this end, the CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will select the least costly and intrusive remedy that it considers to be effective.
8. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.<sup>9</sup>

### **Possible remedies on which views are sought**

9. In merger inquiries, the CMA prefers structural remedies, such as divestiture or prohibition, over behavioural remedies, because:
  - (a) structural remedies are more likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;
  - (b) behavioural remedies are less likely to have an effective impact on the SLC and its resulting adverse effects, and are more likely to create significant costly distortions in market outcomes; and
  - (c) structural remedies rarely require monitoring and enforcement once implemented.<sup>10</sup>
10. At this stage, the CMA's initial view is that prohibition of the Merger is likely to be an effective remedy to the SLC and the adverse effects which may result from it. The CMA's current view is that prohibition would represent a comprehensive solution to all aspects of the SLC it has provisionally found

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<sup>6</sup> Elsewhere in this Notice, references to remedying the SLC are used as shorthand for the statutory reference to remedying, mitigating or preventing the SLC.

<sup>7</sup> See also sections 36(2) and 41 of the Act and rule 12.1 CMA Rules.

<sup>8</sup> Section 36(3) of the Act.

<sup>9</sup> *Merger Remedies: CMA87* (December 2018), paragraph 3.4

<sup>10</sup> *Merger Remedies: CMA87* (December 2018), paragraph 3.46.

(and any resulting adverse effects) and that the risks in terms of its effectiveness are very low. The CMA's initial view is also that prohibition would be a proportionate remedy.

11. The CMA has not, at this stage, been able to identify another structural remedy, including a differently configured or smaller divestiture package, that would be likely to form the basis of an effective remedy.
12. Partial divestiture would require splitting up the Findel (and/or the YPO) business. These separated assets which currently contribute to a single, integrated, competitive proposition would then need to compete effectively under separate ownership. At this stage, it appears unlikely that this would comprehensively remedy the SLC or any resulting adverse effect identified in the Provisional Findings and would be likely to have an unacceptable level of risk in terms of its effectiveness, in particular in relation to composition risks.<sup>11</sup> Accordingly, our initial view is that partial divestiture appears unlikely to represent an effective remedy. However, the CMA will consider any partial divestiture remedies put forward as part of this consultation.
13. As stated above, the CMA has a preference for structural remedies, and the circumstances of this case do not appear to represent one which would generally support adoption of a behavioural remedy.<sup>12</sup> The CMA's initial view is that a behavioural remedy is very unlikely to be an effective remedy to the SLC or any resulting adverse effects identified in the Provisional Findings. However, the CMA will consider any behavioural remedies put forward as part of this consultation.
14. The CMA will consider any other practicable remedies that the Parties, or any interested third parties, may propose that could be effective in addressing the SLC and/or the resulting adverse effects.
15. The CMA will also consider whether a combination of measures is required to achieve a comprehensive solution – for example whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies. The CMA will evaluate the impact of any such combination of measures on the SLC and any resulting adverse effects.

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<sup>11</sup> Composition risks are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market (see also [Merger Remedies: CMA87](#) (13 December 2018), paragraph 5.3).

<sup>12</sup> The circumstances in which behavioural remedies are more likely to be used as the primary source of remedial action are set out in [Merger Remedies: CMA87](#) (December 2018), paragraph 7.2.

## ***Prohibition***

16. Prohibition of the Merger would prevent an SLC from resulting in any relevant market. The CMA's initial view is therefore that prohibition would represent a comprehensive solution to all aspects of the SLC it has provisionally found (and consequently any resulting adverse effects) and that the risks in terms of its effectiveness are very low.

## ***Partial divestiture***

17. In evaluating possible divestitures as a remedy to the SLC it has provisionally found (the **provisional SLC**), the CMA will consider the likelihood of achieving a successful divestiture and the associated risks. In reaching its view, the CMA will have regard to the following critical elements of the design of divestiture remedies:
  - (a) The scope of the divestiture package;
  - (b) Identification of a suitable purchaser; and
  - (c) The effectiveness of the divestiture process.<sup>13</sup>

### *The scope of the divestiture package*

18. To be effective in remedying the provisional SLC, any divestiture package would need to be appropriately configured to be attractive to potential purchasers and to enable the purchaser to operate effectively as an independent competitor.<sup>14</sup>
19. In defining the scope of a divestiture package that will satisfactorily address the provisional SLC, the CMA will normally seek to identify the smallest viable, stand-alone business that can compete successfully on an ongoing basis and that includes all the relevant operations pertinent to the area of competitive overlap.<sup>15</sup>
20. The CMA will generally prefer the divestiture of an existing business, which can compete effectively on a stand-alone basis, to the divestiture of part of a business or a collection of assets. This is because divestiture of a complete

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<sup>13</sup> [Merger Remedies: CMA87](#) (December 2018), paragraph 5.2.

<sup>14</sup> [Merger Remedies: CMA87](#) (December 2018), paragraph 5.3(a).

<sup>15</sup> [Merger Remedies: CMA87](#) (December 2018), paragraph 5.7.

business is less likely to be subject to purchaser and composition risk and can generally be achieved with greater speed.<sup>16</sup>

21. The CMA is not currently aware of any partial divestiture package which would provide a suitable purchaser with sufficient assets and capability to comprehensively remedy the provisional SLC. Accordingly, the CMA's initial view is that partial divestiture is unlikely to represent an effective remedy.
22. The CMA invites views on whether a structural divestiture short of full prohibition would be effective, and if so:
  - (a) what package of assets would need to be divested (for example, customer relationships or brands), and how this would be sufficient to comprehensively remedy the provisional SLC and/or the resulting adverse effects;
  - (b) whether the Parties can divest a mixture of assets from both Parties (sometimes referred to as a 'mix and match' approach), and whether such an approach would result in additional risks to the remedy;<sup>17</sup>
  - (c) whether there are any risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market;
  - (d) whether there are risks that a suitable purchaser is not available or that the merger parties will divest to a weak or otherwise inappropriate purchaser;
  - (e) whether there are risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture; and
  - (f) any other elements that may be required.

#### *Identification of a suitable purchaser*

23. The CMA will wish to be satisfied that a prospective purchaser:

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<sup>16</sup> Purchaser risk refers to the risks that a suitable purchaser is not available or that the merger parties will dispose to a weak or otherwise inappropriate purchaser; composition risk refers to the risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market; *Merger Remedies: CMA87* (December 2018), paragraph 5.3 and 5.12.

<sup>17</sup> The CMA has a preference for avoiding 'mix-and-match' remedies as this may create additional composition risk such that the divestiture package will not function effectively; *Merger Remedies: CMA87* (December 2018), paragraph 5.16.

- (a) is independent of the Parties;
- (b) has the necessary capability to compete;
- (c) is committed to competing in the relevant market; and
- (d) will not create further competition concerns.<sup>18</sup>

24. The CMA invites views on whether there are:

- (a) any specific factors to which the CMA should pay particular regard in assessing purchaser suitability;
- (b) any specific purchasers or types of purchasers which should be ruled out as potentially suitable purchasers; and
- (c) risks that a suitable purchaser is not available or that the Parties will divest to a weak or otherwise inappropriate purchaser.

#### *Effective divestiture process*

25. An effective divestiture process will protect the competitive potential of any divestiture package before disposal and will enable a suitable purchaser to be secured in an acceptable timescale. The process should also allow prospective purchasers to make an appropriately informed acquisition decision.<sup>19</sup> The CMA invites views on the appropriate timescale for achieving a divestiture.
26. The CMA will consider what, if any, procedural safeguards may be required to minimise the risks associated with any divestiture.
27. At this stage, the CMA expects that it would be necessary to require an up-front buyer and that any divestiture is completed before the merger is allowed to complete.
28. The CMA invites views on whether YPO should be required to appoint a monitoring trustee to oversee the divestiture(s) and to ensure that the package to be divested is maintained during the course of the process.
29. The CMA would have the power to mandate an independent divestiture trustee to dispose of any divestiture package if:

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<sup>18</sup> [Merger Remedies: CMA87](#) (December 2018), paragraphs 5.20 and 5.21.

<sup>19</sup> [Merger Remedies: CMA87](#) (December 2018), paragraph 5.33.

- (a) the Parties fail to procure divestiture to a suitable purchaser within the initial divestiture period; or
  - (b) the CMA has reason to expect that the Parties will not procure divestiture to a suitable purchaser within the initial divestiture period.
30. In unusual cases, the CMA may require that a divestiture trustee is appointed at the outset of any divestiture process. The CMA invites views on whether the circumstances of this Merger necessitate such an approach in any divestiture process.

### **Cost of remedies and proportionality**

31. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, of those remedy options that it considers will be effective. The CMA will also seek to ensure that no remedy is disproportionate in relation to the provisional SLC and its adverse effects. If the CMA is choosing between two remedies that it considers would be equally effective, it will choose that which imposes the least cost or that is the least restrictive.<sup>20</sup>
32. The CMA invites views on what costs are likely to arise in implementing any remedy option(s).

### **Relevant customer benefits**

33. In deciding the question of remedies, the CMA may have regard to the effect of any remedial action on any relevant customer benefits in relation to the creation of the relevant merger situation.<sup>21</sup>
34. Relevant customer benefits are limited by the Act to benefits to relevant customers<sup>22</sup> in the form of:
- (a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom ... or
  - (b) greater innovation in relation to such goods or services.'<sup>23</sup>

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<sup>20</sup> [Merger Remedies: CMA87](#) (December 2018), paragraph 3.6.

<sup>21</sup> [Merger Remedies: CMA87](#) (December 2018), paragraphs 3.15 and 3.16.

<sup>22</sup> For these purposes, relevant customers are direct and indirect customers (including future customers) of the merger parties at any point in the chain of production and distribution and are therefore not limited to final consumers. See also section 30(4) of the Act.

<sup>23</sup> Section 30(1)(a) of the Act, see also [Merger Remedies: CMA87](#) (December 2018), paragraph 3.17.

35. The Act provides that a benefit is only a relevant customer benefit if:
- (a) it may be expected to accrue to relevant customers within the UK within a reasonable period as a result of the creation of that situation; and
  - (b) it was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.<sup>24</sup>
36. The CMA welcomes views on the nature of any relevant customer benefits and on the scale and likelihood of such benefits and the extent (if any) to which these are affected by the different remedy options we are considering.

### **Next steps**

37. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the CMA to consider, by 30 October 2020 (see Note (i)).
38. A copy of this notice will be posted on the CMA website.

Stuart McIntosh  
Inquiry Group Chair  
16 October 2020

### *Note*

- (i) This notice of possible actions to remedy, mitigate or prevent the SLC and/or any resulting adverse effects is made having regard to the Provisional Findings announced on 16 October 2020. The Parties have until 6 November 2020 to respond to the Provisional Findings. The CMA's findings may alter in response to comments it receives on its Provisional Findings, in which case the CMA may consider other possible remedies, if appropriate.

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<sup>24</sup> Section 30(3) of the Act, see also [Merger Remedies: CMA87](#) (December 2018), paragraph 3.19.