

Anticipated acquisition by Penguin Random House LLC of Simon & Schuster

Decision on relevant merger situation and substantial lessening of competition

ME/6916/20

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 12 May 2021. Full text of the decision published on 4 June 2021.

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. Penguin Random House LLC (**PRH**) has agreed to acquire from ViacomCBS Inc all of the shares of Simon & Schuster Inc and Simon & Schuster (UK) Limited, which together own all the issued and outstanding equity interests of all companies operating the Simon & Schuster business globally (**S&S** and together with PRH, the **Parties** and with regard to statements about the future, the **Merged Entity**) (the **Merger**).
2. The Competition and Markets Authority (**CMA**) considered whether, as a result of horizontal unilateral effects, the Merger may give rise to a substantial lessening of competition (**SLC**). The Parties both publish and sell trade books in the UK. While PRH is the largest publisher of trade books in the UK with a 20-30% share of supply, the increment from the Merger will be small at approximately [0-5]% across all the segments where the Parties compete. The CMA believes that the Parties do not compete particularly closely with each other and that the Merged Entity will face sufficient remaining constraints post-Merger including from the three largest competing publishers in the UK (Hachette, HarperCollins and Pan Macmillan), as well as from a large number of smaller publishers (several of which are comparable to S&S in size).

3. The CMA therefore believes that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects.
4. The Merger will therefore **not be referred** under section 33(1) of the Enterprise Act 2002 (the **Act**).

ASSESSMENT

Parties and transaction

5. PRH is a book publisher and wholly owned subsidiary of the media company Bertelsmann SE & Co. KGaA (**Bertelsmann**). Bertelsmann's turnover in the financial year ending 31 December 2019 was approximately £15.8 billion worldwide and approximately £1 billion in the UK.¹
6. S&S is currently wholly owned by ViacomCBS Inc.² S&S's turnover in the financial year ending 31 December 2019 was approximately £638 million worldwide and approximately £40 million in the UK.³
7. Pursuant to a share purchase agreement dated 24 November 2020, PRH agreed to acquire S&S from ViacomCBS Inc.⁴
8. PRH and S&S are primarily active in the publication and sale of English language trade books to wholesale and retail customers. Their core markets are English-speaking countries. Both PRH and S&S also offer, to a more limited extent, distribution services to other publishers.⁵

Jurisdiction

9. Each of PRH and S&S is an enterprise. As a result of the Merger, these enterprises will cease to be distinct.

¹ Merger Notice, Table 6.1. The CMA has generally used FY2019 data in this decision as the latest available Nielsen data for a full year was for FY2019. The CMA has cross-checked this data with partial Nielsen data for FY2020.

² [REDACTED].

³ Merger Notice, Table 6.1.

⁴ Merger Notice, paragraph 2.2.

⁵ Merger Notice, paragraphs 12.11-12.13 and 14.7-14.8. Although S&S provides distribution services to third party publishers, it does not own any distribution infrastructure in the UK. [REDACTED]. Therefore, the Merger will not impact the ownership of book distribution infrastructure in the UK. S&S's revenues from the supply of distribution services to third parties are also relatively small ([REDACTED] in 2019), and there are other large publishers that provide distribution services to third parties, such as Macmillan Distribution, HarperCollins UK Distribution and Hachette UK Distribution. No third parties raised concerns about the impact of the Merger in relation to the distribution of trade books in the UK. For these reasons, the CMA does not believe that the Merger gives rise to a realistic prospect of an SLC as a result of the overlap in the supply of distribution services in the UK. This overlap is therefore not considered further in this decision.

10. The Parties both publish and sell trade books in the UK in a range of formats (ie print, eBook and audiobook). The Parties have a combined share of supply of [20-30]% by volume (with an increment of [0-5]%) in the sale of print books in the UK.⁶ The CMA therefore believes that the share of supply test in section 23 of the Act is met.
11. The CMA therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
12. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 22 March 2021 and the statutory 40 working day deadline for a decision is therefore 19 May 2021.

Counterfactual

13. The CMA assesses a merger's impact relative to the situation that would prevail without the merger (ie the counterfactual).⁷ In an anticipated merger the counterfactual may consist of the prevailing conditions of competition, or conditions of competition that involve stronger or weaker competition between the merger firms than under the prevailing conditions of competition.⁸
14. In determining the appropriate counterfactual, the CMA will generally focus only on potential changes to the prevailing conditions of competition where there are reasons to believe that those changes would make a material difference to its competitive assessment.⁹
15. The Parties submitted that the Merger is the result of a competitive bidding process.¹⁰ The Parties submitted that there were several competing bidders for S&S, [REDACTED].¹¹
16. The Parties submitted that absent the Merger, S&S would no longer have continued to operate as an independent competitor, but would instead have been acquired by [REDACTED].¹² The Parties also submitted, however, that adopting the prevailing conditions of competition as the counterfactual would not make a difference to the CMA's competitive assessment.¹³

⁶ Merger Notice, paragraph 5.1, Table 2.2, Table 14.4 and Table 15.4.

⁷ Merger Assessment Guidelines (CMA129), 18 March 2021 (**Merger Assessment Guidelines**), paragraph 3.1.

⁸ Merger Assessment Guidelines, paragraph 3.2.

⁹ Merger Assessment Guidelines, paragraph 3.9.

¹⁰ Merger Notice, paragraph 11.1.

¹¹ See the Parties' response to Question 17(d) of the CMA's Request for Information 1 dated 23 February 2021. The Parties submitted that [REDACTED].

¹² Merger Notice, paragraph 11.2.

¹³ Merger Notice, paragraph 11.3.

17. The CMA considers that a sale of S&S to an alternative bidder would not have resulted in a more competitive counterfactual than the prevailing conditions of competition and would not therefore make a material difference to the CMA's competitive assessment in this case.
18. The CMA therefore assessed the Merger against the prevailing conditions of competition.

Competitive assessment

Background

19. The Parties are both active in the publishing and sale of trade books to retail and wholesale customers in the UK. Publishing involves acquiring rights from authors, editing books and then selling books to customers. The Parties both publish and sell trade books across a broad range of categories (ie fiction, non-fiction, children's books), in a range of formats (ie print, eBook and audiobook) and to a range of customers (eg wholesalers, supermarkets, chain booksellers, internet retailers, independent bookstores, and bargain bookshops).

Horizontal unilateral effects in the publishing sector for trade books

20. As both Parties compete in the publishing and sale of trade books, the CMA assessed whether the Merger may give rise to horizontal unilateral effects.
21. Unilateral effects can arise in a horizontal merger when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or to degrade non-price aspects of its competitive offering (such as quality, range, service and innovation) on its own and without needing to coordinate with its rivals.¹⁴ Horizontal unilateral effects are more likely when the merging parties are close competitors.¹⁵
22. In assessing whether the Merger may give rise to horizontal unilateral effects, the CMA had regard to the following dynamics of competition in the publishing and sale of trade books:
 - (a) There is an upstream and a downstream dimension to competition. Publishers compete upstream to acquire publishing rights from authors and downstream to sell trade books to retail and wholesale customers. These two aspects of competition are linked because being successful in

¹⁴ Merger Assessment Guidelines, paragraph 4.1.

¹⁵ Merger Assessment Guidelines, paragraph 4.8.

downstream sales requires publishers to acquire the rights to good titles and authors.

- (b) Downstream there are different categories of trade books (ie fiction non-fiction, and children's books), and trade books are sold in different formats (ie print, ebook, audiobook) and into different channels (eg independent bookshops, supermarkets, internet retailers). Competitive conditions in these segments may vary, and some competitors are comparatively stronger in some segments than others. For example, there is evidence that Amazon is comparatively stronger in eBooks and audiobooks than print books.¹⁶
- (c) The primary focus of both Parties is the sale of English language trade books, and their core territories are English speaking countries (including the UK, the United States and Canada).¹⁷ A comparison of the Parties' shares of supply in the sale of trade books by value between the UK (PRH [20-30]%, S&S [0-5]%), and the estimates included in the Parties' internal documents for the United States (PRH [20-30]%; S&S [5-10]%) indicates a difference in competitive conditions by country.¹⁸ This is generally consistent with the Parties' internal documents, [REDACTED]. For example, a PRH board presentation shows that [REDACTED].¹⁹ [REDACTED].²⁰

23. The CMA had regard to these dynamics in assessing how closely the Parties compete and the competitive strength of alternatives. In carrying out its assessment, the CMA took account of the following evidence:

- (a) shares of supply for the sale of trade books in the UK calculated on various segmentations (ie by book format, by book category, and by sales channel);
- (b) data on the volume of UK bestsellers sold by the Parties and other publishers;
- (c) third party views on the best alternatives available to customers; and
- (d) the Parties' internal documents.

24. In assessing an anticipated merger, the CMA is required to consider whether it 'may be expected to result in a substantial lessening of competition within

¹⁶ See paragraph 38.

¹⁷ Merger Notice, paragraph 1.1.

¹⁸ S&S document: [REDACTED].

¹⁹ PRH document: [REDACTED].

²⁰ For example, see PRH document: [REDACTED].

any market or markets in the United Kingdom for goods or services'.²¹ The assessment of the relevant market is an analytical tool that forms part of the analysis of the competitive effects of the merger and should not be viewed as a separate exercise.²² In this case, the CMA has assessed competitive dynamics relevant to the Parties' activities in relation to the publishing and sale of trade books to retailers and wholesalers in the UK. In line with the approach set out in the CMA's Merger Assessment Guidelines,²³ the CMA considers that the analysis of the evidence gathered for the purposes of competitive assessment, which assesses the potentially significant constraints on the Parties' behaviour, captures the competitive dynamics more fully than a separate formal analysis of market definition.²⁴ The CMA notes that its assessment of the evidence for the purpose of its consideration of whether the Merger may be expected to result in an SLC does not depend on the precise definition of the relevant market.²⁵

25. The rest of this section considers whether it is or may be the case that the Merger may be expected to result in an SLC in relation to horizontal unilateral effects.

Shares of supply

26. Table 1 below sets out Nielsen estimates of shares of supply for the publishing and sale of trade books in the UK, taking all book formats, book categories and sales channels in aggregate.²⁶ The shares of supply are based on the value of trade books sold at retail level in the UK in 2019.

Table 1: Shares of supply by value (2019)

Publisher	Share of supply (%)
PRH	[20-30]%
Simon & Schuster	[0-5]%
Merged Entity	[20-30]%
Hachette	[10-20]%
HarperCollins	[5-10]%
Pan Macmillan	[5-10]%
Bloomsbury Group	[0-5]%
Bonnier Books UK Publishing Group	[0-5]%

²¹ Section 33(1)(b) of the Act.

²² Merger Assessment Guidelines, paragraph 9.1.

²³ Merger Assessment Guidelines, paragraph 9.2.

²⁴ Merger Assessment Guidelines, paragraph 9.2.

²⁵ Merger Assessment Guidelines, paragraph 9.5.

²⁶ Nielsen is a market data provider in the trade books industry. It collects market share data based on different segments and its categorisation is recognised across the industry. Both the Parties and third parties submitted that they use Nielsen data in the ordinary course of their business and when they are considering competitive conditions.

Publisher	Share of supply (%)
OUP Group	[0-5]%
Scholastic Ltd. Group	[0-5]%
Amazon Publishing Group	[0-5]%
Others	[40-50]%
Total	100

Source: Merger Notice, Table 14.1, based on Nielsen BookScan and Nielsen Books and Consumers data (FY2019).

27. Table 2 below sets out equivalent share of supply estimates for the Parties and the top three competing publishers in Table 1 for different segments of the overall supply of trade books in the UK, ie broken down by book format, by book category, and by sales channel.

Table 2: Shares of supply by value for different segments (2019)

Segment	PRH (%)	S&S	Merged Entity	Hachette	Harper Collins	Pan Macmillan	Others
Print	[20-30]%	[0-5]%	[20-30]%	[10-20]%	[5-10]%	[5-10]%	[40-50]%
eBook	[20-30]%	[0-5]%	[20-30]%	[10-20]%	[5-10]%	[0-5]%	[40-50]%
Audiobook	[20-30]%	[0-5]%	[20-30]%	[10-20]%	[10-20]%	[0-5]%	[40-50]%
Fiction	[30-40]%	[0-5]%	[30-40]%	[10-20]%	[10-20]%	[5-10]%	[10-20]%
Non-fiction	[20-30]%	[0-5]%	[20-30]%	[10-20]%	[5-10]%	[0-5]%	[40-50]%
Children's books	[20-30]%	[0-5]%	[20-30]%	[5-10]%	[10-20]%	[5-10]%	[50-60]%
Chain booksellers	[20-30]%	[0-5]%	[20-30]%	[10-20]%	[5-10]%	[5-10]%	[40-50]%
Mass market retailers	[20-30]%	[0-5]%	[20-30]%	[10-20]%	[10-20]%	[5-10]%	[30-40]%
Internet retailers	[20-30]%	[0-5]%	[20-30]%	[10-20]%	[5-10]%	[0-5]%	[50-60]%
Independent bookstores	[10-20]%	[0-5]%	[10-20]%	[5-10]%	[5-10]%	[0-5]%	[60-70]%
Bargain bookshops	[10-20]%	[0-5]%	[20-30]%	[10-20]%	[5-10]%	[5-10]%	[50-60]%
Other dealers	[10-20]%	[0-5]%	[10-20]%	[5-10]%	[5-10]%	[0-5]%	[60-70]%

Source: Merger Notice, Tables 14.3, 14.5, 14.7, and 14.9; Parties' response to RFI dated 3 March 2021, Tables 1, 3, and 5; and PRH document: s.10-9, slide 31; based on Nielsen BookScan and Nielsen Books and Consumers data (FY2019)

Notes: the segmentations by book category and sales channel are based on print books only; 'mass market retailers' mainly consist of supermarkets; the 'Others' share in eBook includes Amazon publishing with a relatively more significant share of [5-10]%, while the 'Others' share in children's

books includes Scholastic and Usborne, with relatively more significant shares of [5-10]% and [5-10]%, respectively.

28. PRH is currently the largest publisher of trade books in the UK, having shares of supply in the range of 20-30% in most segments. The only segment where PRH's share exceeds 30% is in fiction (where its share is approximately [30-40]%). In all segments, the Merger will result in only a small increment to PRH's share, in the range of [0-5]%, and the Parties' combined shares will generally be below 30%.
29. In addition, three large publishers will remain in the UK post-Merger with a substantially larger share than S&S: Hachette (with a share of 10-20% in most segments), HarperCollins (with a share of 5-15% in most segments), and Pan Macmillan (with a share of 5-10% in most segments).²⁷ There are also several smaller publishers with shares in the range of 1-5% (and therefore comparable to S&S) across multiple segments, such as Bloomsbury, Bonnier, OUP, Scholastic, Amazon, Usborne, and Faber. Finally, a long tail of publishers all with shares of less than 1% each, accounting for a substantial combined share of supply in most segments (30-60%) will remain in the UK post-Merger. This indicates that the Merged Entity will continue to face competition from a wide range of publishers post-Merger.

Data on bestsellers

30. The CMA considered the number of bestsellers published by different publishers as one way to measure publishers' relative competitive strength.
31. Other than being a proxy to measure commercial success, the label 'bestseller' applied to a particular book can be used by retailers as a marketing tool to boost sales of that book and other books written by that author.
32. Historic bestsellers may also become an important part of a publisher's back catalogue. This means that publishers that currently have a small share of supply but are particularly successful in publishing new bestsellers every year may grow their back catalogue and possibly increase their share of supply over time (eg if they publish a disproportionate number of bestsellers to their current share).
33. Bestsellers are also a way to measure publishers' competitive strength in acquiring publishing rights from authors, as the rights to bestselling titles often involve well-known authors and celebrities that command significant

²⁷ The top four suppliers are generally the same across different segments, that is PRH, Hachette, HarperCollins, and Pan Macmillan.

advances. In this context, one competitor submitted that the Merger would allow the Parties to leverage their position in the United States into the UK because rights to English language titles are increasingly acquired on a global basis.

34. The CMA considered the number of top 100 annual UK bestsellers by value and volume published by PRH and S&S between 2017 and 2019.²⁸ The data did not suggest that S&S is a particularly significant competitor in the UK with regard to bestsellers, or that its comparatively stronger position in the United States has helped it to secure rights to bestselling books in the UK. While PRH published a large proportion of bestsellers over that period ([REDACTED] titles each year), S&S published no bestsellers in 2019, and only [REDACTED] bestsellers by value in 2018 and 2017, respectively. These figures are not disproportionately large compared to S&S' shares of supply.²⁹ Several publishers performed better than S&S, including Hachette ([REDACTED] bestselling titles each year), HarperCollins ([REDACTED] titles each year), Pan Macmillan ([REDACTED] titles each year), and Bloomsbury ([REDACTED] titles each year). A number of other smaller publishers also published a comparable number of bestsellers to S&S over the same time frame, including Bonnier, Faber and Scholastic.

Third party views

35. Several third parties expressed concern to the CMA that PRH, as the largest UK publisher, already holds a strong position in the UK, which would be strengthened by the Merger. Some third parties raised concerns that the Merger could result in higher prices, lower service quality or reduced choice for customers. Some also raised concerns that it could lead to reduced advances or worse terms and conditions for authors.
36. However, overall, feedback from the Parties' customers and trade bodies indicates that PRH and S&S are not particularly close competitors. The feedback also indicates that a significant number of other publishers will remain post-Merger to constrain the Merged Entity. In particular:
- (a) In response to a question on which publishers customers would use if PRH were not available, only one customer mentioned S&S, with a large number of alternatives being named, the most common of which were Hachette, Pan Macmillan, HarperCollins and Bloomsbury.³⁰ Similarly, when asked to name the best alternatives to PRH, only two customers considered S&S to be among the best alternatives to PRH, with the

²⁸ See the Parties' response to Question 4 of the CMA's Request for Information 1 dated 23 February 2021.

²⁹ By volume, S&S published [REDACTED] in both 2017 and 2018 and no bestseller in 2019.

³⁰ Other suppliers were Scholastic, Usborne, Bonnier and Faber.

majority of customers considering Pan Macmillan, Hachette and HarperCollins to be better alternatives. Other publishers that were named as better alternatives to PRH than S&S included Bloomsbury, Scholastic, and Faber.

(b) Similarly, while the majority of customers considered that they would switch at least some of their purchases to PRH if S&S were not available, and half of customers considered that PRH was just as good as S&S, customers also mentioned that they would switch purchases to several other publishers (such as Pan Macmillan, Hachette, HarperCollins and Bloomsbury), and that they considered these to be good alternatives to S&S.³¹

37. Likewise, competitors' responses to the CMA's merger investigation show that the Parties are not particularly close competitors, and that a number of other publishers will remain post-Merger to constrain the Merged Entity. In particular, while the majority of competitors considered that S&S would lose sales to PRH in the event that it charged materially higher prices, only a minority considered that PRH would lose material sales to S&S if it did the same. Furthermore, all competitors considered that both PRH and S&S would also lose sales to Hachette, HarperCollins and Pan Macmillan in the event that they were to charge materially higher prices and, with regard to PRH, named other competitors such as Bloomsbury and Bonnier at least as often as S&S.
38. With regard to competition across specific segments, most third parties submitted that most publishers compete effectively across different formats (eBook, audiobook, print), with some mentioning that Amazon is comparatively stronger in eBooks and audiobooks. Similarly, customers and competitors submitted that while some publishers specialise in particular book categories (fiction, non-fiction, children's books), most publishers, especially the larger ones, compete effectively across different book categories. Feedback on competitiveness across different sales channels was mixed, with some third parties submitting that publishers generally compete effectively across different sales channels, and others submitting that larger publishers are relatively stronger in certain channels such as supermarkets. No third parties identified S&S as being particularly strong in any segment.

³¹ Trade bodies ([redacted]) responding to a question on the best alternatives to PRH and S&S also listed Hachette, HarperCollins, Pan Macmillan and Bloomsbury as alternatives to the Parties in the UK. Only one trade body identified PRH as one of the best alternatives to S&S, amongst other publishers.

Internal documents

39. The Parties' internal documents do not suggest that PRH and S&S view each other as particularly close competitors in the UK. In particular, except for documents relating to the Merger, PRH's documents do not focus on S&S in the UK in any significant way. For example, PRH's strategy presentations for its board only refer to S&S alongside other publishers in shares of supply tables and charts built using Nielsen data. This contrasts to PRH's assessment of other publishers (such as [X]), which are assessed in more detail in its UK strategy presentations.
40. On the other hand, the S&S documents the CMA reviewed mostly consisted of market analyses and reviews of S&S' performance compared to the market in general, without referring to specific competitors. For example, in a UK strategy document S&S defines itself as '[X]' and a '[X]', which is consistent with S&S' shares of supply presented above.³²

Conclusion on horizontal unilateral effects

41. On the basis of the evidence above, the CMA considers that, although PRH is the leading publisher in the UK,³³ S&S only has a small share of supply in the publishing and sale of trade books in the UK as well as in all segments considered by the CMA.
42. The available evidence also shows that the Parties do not compete particularly closely and that the Merged Entity will be constrained by three large publishers as well as a number of publishers with comparable or larger shares of supply than S&S. Each of these publishers is likely to exert a greater (or at least comparable) competitive constraint on the Merged Entity as that currently exerted by S&S on PRH.

Decision

43. Consequently, the CMA does not believe that it is or may be the case that the Merger may be expected to result in an SLC within a market or markets in the United Kingdom.
44. The Merger will therefore **not be referred** under section 33(1) of the Act.

³² S&S document: [X].

³³ While the focus of the CMA's assessment is on the change in the competitive constraints on the merger firms arising from the merger, where one merger firm has a strong position in the market, even small increments in market power may give rise to competition concerns. Merger Assessment Guidelines, paragraph 4.12(a).

Naomi Burgoyne
Director, Mergers
Competition and Markets Authority
12 May 2021