

Anticipated acquisition by Turnitin LLC of Ouriginal Group AB

Decision on relevant merger situation and substantial lessening of competition

ME-6931-21

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 26 July 2021. Full text of the decision published on 24 August 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. Turnitin LLC (**Turnitin**) has agreed to acquire Ouriginal Group AB (**Ouriginal**) (the **Merger**). Turnitin and Ouriginal are together referred to as the **Parties**, and for statements referring to the future, the **Merged Entity**.
2. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that each of Turnitin and Ouriginal is an enterprise; that these enterprises will cease to be distinct as a result of the Merger; and that the share of supply test is met. Accordingly, arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
3. The Parties overlap in the supply of anti-plagiarism software (**APS**), which they supply primarily to higher education (**HE**) customers and, to a lesser extent, secondary education (**SE**) customers, in the United Kingdom (**UK**).
4. In relation to the supply of APS to HE customers in the UK, the CMA found that the Parties are currently close competitors, with a very high combined share of supply (albeit with a very small increment due to Ouriginal's limited presence in the UK), and very few alternative suppliers. The CMA also found that, absent the Merger, Ouriginal may have introduced a [X] to its APS product, which is considered an important feature by HE customers in the UK.

However, the CMA considers that it is uncertain whether this would have materially strengthened Ouriginal's position in the supply of APS to HE customers in the UK.

5. With respect to entry and expansion, the CMA found that barriers to entry in the supply of APS to HE customers are high. However, the CMA also considers that well-resourced players that are already active in the broader non-instructional educational software sector may be well-positioned to enter or expand. The CMA also found that one third party in particular ([§]) is likely to expand its existing APS offering in the UK to HE customers, although the extent of such expansion is currently uncertain.
6. Based on the findings described above, the CMA cannot rule out that it is or may be the case the Merger may give rise to a realistic prospect of a substantial lessening of competition (**SLC**) as a result of horizontal unilateral effects in relation to the supply of APS to HE customers in the UK.
7. However, taking into account the size of the market concerned, the likelihood and magnitude of customer harm resulting from the Merger, and the fact that there are no clear-cut undertakings in lieu (**UILs**) in principle available, the CMA has decided to exercise its discretion to apply the markets of insufficient importance (the *de minimis*) exception to the duty to refer (under section 33(2)(a) of the Enterprise Act 2002 (the **Act**)). The CMA did not have to conclude whether the Merger gives rise to a realistic prospect of a SLC in the market concerned because, even if the duty to refer were met, then it would in any event exercise its discretion to apply the *de minimis* exception.
8. The Merger will therefore **not be referred** under section 33(1) of the Act.

ASSESSMENT

Parties

9. Turnitin¹ is a multinational provider of software solutions within the educational software sector, which include APS, grammar checking, digital grading, automated essay scoring, digital assessment creation and delivery and online exam proctoring. The worldwide turnover of Turnitin² in 2020 was

¹ Turnitin is an indirect subsidiary of A/NPC Holdings LLC, which is jointly owned by Advance Communications Company LLC (an indirect subsidiary of Advance Publications, Inc.) and Newhouse Cable Holdings LLC (a direct subsidiary of Newhouse Broadcasting Corporation). Newhouse Broadcasting Corporation and Advance Publications, Inc. (together, the **A/N Group**) are [§]. See the final Merger Notice submitted to the CMA by Turnitin on 2 June 2021 (the **Merger Notice**), paragraph 12.

² Excluding the A/N Group. The worldwide turnover of the A/N Group (including Turnitin in 2020 was £[§] billion, of which approximately £[§] million was generated in the UK (Merger Notice, Table 2).

approximately £[X] million, of which approximately £[X] million was generated in the UK.³

10. Ouriginal is an APS provider headquartered in Sweden, and is the result of the previous merger of two APS companies, Urkund and PlagScan. The worldwide turnover of Ouriginal in 2020 was £[X] million, of which only a very small proportion, approximately £[X], was generated in the UK.⁴

Transaction

11. The Merger is anticipated and is governed by a share purchase agreement entered into on 1 March 2021 and amended on 22 March 2021 (the **SPA**) under which Turnitin would acquire 100% of the shares of Ouriginal. The value of the anticipated transaction is approximately £[X] million.⁵
12. The Merger is also the subject of review by the competition authorities in [X], Australia and [X].

Procedure

13. The Merger was considered at a Case Review Meeting.⁶

Jurisdiction

14. Each of Turnitin and Ouriginal is an enterprise. As a result of the Merger, these enterprises will cease to be distinct.
15. The Parties submitted that the share of supply test is met on the basis that their combined share of the supply of APS in the UK exceeds 25%.⁷ As described in paragraphs 41 to 43 below, the CMA's investigation confirmed that Turnitin's share of the supply of APS to HE customers in the UK exceeds 25% and Ouriginal also supplies APS to HE customers in the UK. Therefore, the CMA believes the share of supply test in section 23 of the Act is met.
16. 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.

³ Merger Notice, Table 2.

⁴ Merger Notice, Table 2.

⁵ Merger Notice, paragraph 25.

⁶ As the Parties waived their rights to an Issues Meeting and Issues Letter (as described in further detail below), the CMA followed an abridged procedure.

⁷ Merger Notice, paragraph 82.

17. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 3 June 2021 and the statutory 40 working day deadline for a decision is therefore 29 July 2021.

Counterfactual

18. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (i.e. the counterfactual).⁸ 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.⁹
19. The Parties submitted that, absent the Merger, the sellers of Ouriginal would have been likely to undertake an initial public offering (**IPO**) or listing of shares in Ouriginal, [X].¹⁰ The Parties also submitted that, in the unlikely event that an IPO did not take place, absent the Merger, there was a real likelihood that Ouriginal would be a weaker competitor in the APS segment in the UK. The Parties submitted that Ouriginal had no plans to expand in the UK [X] and referred to the entry of other players such as Microsoft and Google.¹¹
20. The CMA considers that the possible IPO of Ouriginal would not itself constitute a significant change affecting competition between the Parties. The CMA also considers that the evidence submitted by the Parties is insufficient to demonstrate that, absent the Merger (and absent an IPO), Ouriginal would be a weaker competitor in the UK.
21. Therefore, the CMA believes prevailing conditions of competition to be the relevant counterfactual.

Frame of reference

Product scope

22. Non-instructional educational software is used to assist teaching, learning and research activities, and includes offerings such as APS, learning management systems (**LMS**), student information systems, grammar checking products, and exam proctoring solutions.

⁸ [Merger Assessment Guidelines \(CMA129\)](#), 18 March 2021, paragraph 3.1.

⁹ [Merger Assessment Guidelines](#), paragraph 3.2.

¹⁰ Merger Notice, paragraphs 264-265 and 271-272.

¹¹ Merger Notice, paragraphs 267-269.

23. Within non-instructional educational software, the Parties overlap in the supply of APS, a type of software that uses text mining technology (as well as, in some cases, other functionalities) to detect plagiarism in written materials.
24. The Parties submitted that the appropriate product frame of reference is the supply of non-instructional educational software without further segmentation according to specific end use (such as APS). In the Parties' view: (i) the different products within this sector serve the same basic function; (ii) the customers of the different products are the same; and (iii) there is a high degree of supply-side substitution in the non-instructional educational software space.¹² The Parties also submitted that there is no clear distinction between the APS products preferred by different types of customers, and that APS suppliers generally do not license their products exclusively to one type of customer.¹³
25. The CMA considered: (i) whether the frame of reference should include APS and other non-instructional educational software products; and (ii) whether the supply of APS should be further segmented by customer type.

APS and other non-instructional educational software products

26. Responses from third parties to the CMA's merger investigation indicated that customers consider there to be fundamental differences in functionality and end use between non-instructional educational software products, and therefore that APS is not substitutable with other products. Evidence from third parties also indicated that providers of other non-instructional educational software products did not see themselves as competing with the Parties' APS offerings.¹⁴
27. In addition, internal documents submitted by the Parties indicate that the Parties predominantly focus on the APS segment when assessing the level of constraint imposed by other players.¹⁵
28. The evidence received in this case does not support the Parties' submission that the frame of reference should include all non-instructional educational software. The CMA has therefore considered the impact of the Merger in the supply of APS specifically.

¹² Merger Notice, paragraphs 299-301.

¹³ Merger Notice, paragraph 294.

¹⁴ For instance, email of [REDACTED] dated 1 June 2021.

¹⁵ [REDACTED].

Customer segmentation

29. The CMA considered whether the supply of APS should be further segmented by customer type, in particular between HE¹⁶ and SE¹⁷ customers.
30. Internal documents submitted by the Parties indicate that there might be differences in preferences between HE and SE customers (for example, sales and marketing documents are tailored to these different customer segments).¹⁸ Several internal documents submitted by the Parties also indicate that the Parties distinguish between HE customers and SE customers,¹⁹ with certain documents containing separate UK share of supply estimates for the two customer groups.²⁰ Internal documents also indicate that a third party ([REDACTED])'s current APS offering is focused on the SE segment,²¹ [REDACTED].²²
31. In addition, third parties told the CMA that HE customers have specific requirements for their APS products. In particular, they require providers to have a database of historical student submissions against which to compare for plagiarism.²³
32. Taking into account the evidence described above, the CMA has assessed the impact of the Merger on the supply of APS to HE customers separately to that of SE customers.

Conclusion on product scope

33. For the reasons set out above, the CMA has considered the impact of the Merger in the supply of APS to HE customers.²⁴

¹⁶ This refers to a university or college (or other institution) offering education at an advanced level (beyond the secondary education level). To the extent they offer such advanced level courses, the CMA includes in 'HE' further education (FE) institutions, a term sometimes used to describe institutions (e.g. vocational colleges) that students attend after secondary education, but that are not HE universities or colleges for advanced learning.

¹⁷ This refers to a school or college (or other institution) offering secondary education. The Parties also refer to this segment as 'K-12', which is a US terminology used to cover primary and secondary schools.

¹⁸ [REDACTED].

¹⁹ For instance, [REDACTED].

²⁰ For instance, [REDACTED].

²¹ For instance, [REDACTED].

²² [REDACTED].

²³ [REDACTED] email of 18 May 2021.

²⁴ The CMA's decision does not focus on the supply of APS to SE customers in the UK. No competition concerns arise in this segment. In particular, the CMA found that the Parties' combined shares in this segment are low, that Google is an existing significant constraint, barriers to entry are lower than in the HE segment, and no SE customers contacted expressed concerns.

Geographic scope

34. The Parties submit that the relevant geographic market is at least Europe-wide, on the basis that: (i) most academic research around the world is published in English (meaning that UK customers can use APS providers that are based in Europe); and (ii) the Parties' APS products are identical across Europe and are largely language agnostic.²⁵
35. The CMA received evidence from the Parties and third parties which showed that UK customers have distinct requirements for their APS products. Specifically, UK customers value additional features within their APS products, such as commenting and feedback functionality.²⁶ The Parties also submitted that there was lower demand for these features in other European countries (e.g. in Ouriginal's core territories of the Nordics).²⁷ In addition, the Parties' internal documents indicate that the Parties often consider conditions of competition on a national basis rather than on a European wide basis.²⁸

Conclusion on geographic scope

36. For the reasons set out above, the CMA therefore considers that the appropriate geographic frame of reference for the supply of APS to HE customers is UK-wide.

Conclusion on frame of reference

37. For the reasons set out above, the CMA has considered the impact of the Merger in the supply of APS to HE customers in the UK.

Competitive assessment

Horizontal unilateral effects

38. 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.²⁹ Horizontal unilateral

²⁵ Merger Notice, paragraphs 314-322.

²⁶ Merger Notice, paragraph 477, as confirmed by the note of the call with [X], paragraphs 4 and 8.

²⁷ Merger Notice, paragraphs 482-485, [X].

²⁸ For instance, [X].

²⁹ [Merger Assessment Guidelines](#), paragraph 4.1.

effects are more likely when the merging parties are close competitors.³⁰ In addition, where one merger firm has a strong position in the market, even small increments in market power may give rise to competition concerns.³¹

39. Unilateral effects may also arise from the elimination of potential or dynamic competition. Potential competition is relevant to the potential for a merger to substantially lessen competition where, absent the merger, entry, or expansion by either or both merger firms may have resulted in new or increased competition between them.³²
40. In order to assess the likelihood of the Merger resulting in horizontal unilateral effects in the supply of APS to HE customers in the UK, the CMA considered:
- (a) shares of supply.
 - (b) current closeness of competition between the Parties.
 - (c) future closeness of competition between the Parties; and
 - (d) competitive constraints from alternative suppliers.

Shares of supply

41. The Parties submitted that their combined share in the supply of APS to HE customers in the UK in 2020 was [60-70]%, with Ouriginal representing only a [0-5]% increment.³³
42. The CMA believes that this understates the Parties' combined share in 2020, (although it does consider that Ouriginal's share is very small), for the following reasons:
- (a) a number of third parties ([REDACTED]) listed as competitors by the Parties indicated that they do not consider themselves to compete with the Parties' APS products. In addition, several third parties stated that they do not attribute revenue specifically to the APS features in their products ([REDACTED]) or that they earned no revenue in 2020 from the sales of APS to HE customers in the UK ([REDACTED]).
 - (b) internal documents of both Parties indicate that Turnitin's UK share in the supply of APS to HE customers could be as high as [90-100]% based on

³⁰ [Merger Assessment Guidelines](#), paragraph 4.8.

³¹ [Merger Assessment Guidelines](#), paragraph 4.12(a).

³² [Merger Assessment Guidelines](#), paragraph 5.1.

³³ Merger Notice, Table 21.

number of institutions licensed (with Ouriginal still representing a very small increment);³⁴ and

- (c) these estimates are consistent with responses provided by several third parties, which indicated that Turnitin's share of supply to HE customers is very high, with several indicating that Turnitin has a near monopoly position in the UK.³⁵

43. Based on the evidence described above, the CMA considers that the Parties' combined share of supply of APS to HE customers in the UK is very high (likely above 90%), where Turnitin is by far the largest provider and Ouriginal's incremental share is very small.

Current closeness of competition between the Parties

Parties' submissions

44. The Parties submitted that they are not particularly close competitors in the UK and only occasionally encounter each other as competitors. The Parties also submitted that, while Ouriginal offers a 'pure play' APS product, Turnitin's main APS product (Feedback Studio) is differentiated due to its feedback and grading component.³⁶ The Parties also submitted that, while Ouriginal previously considered the UK to be a target country in 2018, winning customers in the UK [REDACTED].³⁷

Internal documents

45. Internal documents of Ouriginal indicated that Ouriginal views Turnitin to be its closest competitor both in the UK³⁸ and globally.³⁹ Internal documents of Turnitin confirmed that Turnitin perceives Ouriginal's brands as a threat both in the Europe, Middle East and Africa (**EMEA**) regions and globally, with certain documents noting that Ouriginal is Turnitin's biggest competitor in the EMEA.⁴⁰ However, the CMA did not find any internal documents of Turnitin

³⁴ Turnitin internal document [REDACTED] estimated that (based on number of institutions licensed) Turnitin had a UK market share of [REDACTED]% for HE customers, and [REDACTED]% for FE customers. An Ouriginal internal document dated May 2019, [REDACTED], page 4, estimated that Turnitin had a [REDACTED]% market share with respect to HE customers (with Ouriginal representing a [REDACTED]% increment), based on number of customers. The document provided separate numbers for FE customers, where it estimated that Turnitin had a [REDACTED]% market share (with Ouriginal representing an [REDACTED]% increment).

³⁵ Note of the call with [REDACTED], paragraph 25; note of the call with [REDACTED], paragraph 25; letter of 17 June 2021 [REDACTED]; [REDACTED] email of 17 June 2021; [REDACTED] email of 17 June 2021.

³⁶ Merger Notice, paragraph 398(a).

³⁷ Merger Notice, paragraph 95.

³⁸ [REDACTED].

³⁹ For instance, [REDACTED].

⁴⁰ [REDACTED].

that contained UK-specific references to the competitive threat posed by Ouriginal.

46. Ouriginal submitted several documents showing the outcomes of tenders for HE customers. These documents indicate that, for these UK tenders, Ouriginal and Turnitin were the only bidders.⁴¹ They also indicate that one of the reasons that Ouriginal lost UK tenders to Turnitin was its lack of [REDACTED].⁴²

Third party views

47. The vast majority of Ouriginal's HE customers named Turnitin as the strongest alternative APS supplier in the UK, with one customer stating that there were no other viable alternatives. Feedback from Turnitin's HE customers however was more mixed. One customer ranked Ouriginal as Turnitin's closest alternative but stated that Ouriginal's lack of feedback and grading functionality meant that it would not meet the customer's requirements. Another customer indicated that Turnitin currently provides an APS offering that other providers cannot match. However, [REDACTED] a significant number of UK HE institutions [REDACTED] raised concerns about the 'monopoly position' of the Merged Entity post-Merger.

Conclusion on current closeness of competition

48. Based on the evidence above, the CMA considers that Turnitin is Ouriginal's main competitive constraint in the UK. The CMA considers that the constraint currently posed by Ouriginal on Turnitin in the UK is much lower, largely because of Turnitin's strong position and Ouriginal's lack of specific functionality, which is valued by HE customers within the APS offering.

Future closeness of competition between the Parties

Parties' submissions

49. The Parties submitted that Ouriginal previously considered the possibility of [REDACTED], following advice from UK customers that this was important. However, Ouriginal ultimately decided not to pursue this, due in part to [REDACTED].⁴³
50. The Parties submitted that Ouriginal instead plans to add a [REDACTED], which would be far less sophisticated than Turnitin's [REDACTED].⁴⁴ The Parties submitted that

⁴¹ Merger Notice, paragraph 477; [REDACTED].

⁴² For instance, [REDACTED].

⁴³ Merger Notice, paragraph 471-472.

⁴⁴ Merger Notice, paragraphs 464-467.

Ouriginal is not in a position to estimate the impact of [REDACTED] on Ouriginal's position in the supply of APS in the UK.⁴⁵

51. The Parties also submitted that, since 2018, Ouriginal has been [REDACTED] the number of full-time employees (**FTE**) assigned to the UK.⁴⁶

Internal documents

52. Ouriginal's internal documents indicate that its plans to develop a [REDACTED] are targeted at competing with Turnitin specifically, and are part of a wider strategy aimed at the UK.⁴⁷ Internal documents also indicate that Ouriginal considers that a 'basic need' product could be sufficient to 'replace competition' for most customers.⁴⁸
53. With respect to Ouriginal's UK strategy more generally, internal documents confirm that the overall number of employees assigned to the UK has [REDACTED] since 2019, and there is currently [REDACTED].⁴⁹ Internal documents also confirm that in January 2021 [REDACTED].⁵⁰

Third party views

54. As described above, tender outcome documents submitted by the Parties and responses from customers to the CMA's merger investigation confirmed that HE UK customers value an APS feedback function.⁵¹
55. In addition, [REDACTED] a significant number of UK HE institutions confirmed that Ouriginal has new features in development, the release of which is welcomed and would enable Ouriginal to offer significant competition to Turnitin. [REDACTED] raised concerns that the Merged Entity would not adopt these enhancements or that they would be offered only at an additional price.

Conclusion on future closeness of competition

56. Based on the evidence described above, the CMA considers that there is a realistic prospect that, absent the Merger, Ouriginal would have introduced a [REDACTED] to its APS product. However, the CMA considers that, even with the introduction of this function, it is uncertain whether Ouriginal would have

⁴⁵ Merger Notice, paragraph 261.

⁴⁶ Merger Notice, paragraphs 94, 96-97, 244-245 and 267.

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ Merger Notice, Table 14 (including the Attachments to the Merger Notice listed in Table 14).

⁵⁰ Merger Notice, paragraphs 246-248 (including the Attachments to the Merger Notice listed in these paragraphs).

⁵¹ Merger Notice paragraph 477; [REDACTED].

materially strengthened its position in the supply of APS to HE customers in the UK. In particular, the CMA notes Ouriginal's historical lack of success in the UK, as well as the evidence indicating that Ouriginal [X] its UK presence and had no plans to [X].

Competitive constraints from alternative suppliers

Parties' submissions

57. The Parties submitted that, post-Merger, there are a number of players in the UK that are larger than Ouriginal and that will continue to constrain the Merged Entity, including Grammarly, Blackboard, Noplag and Compilatio, as well as the APS products recently launched by Google and Microsoft.⁵²

Internal documents

58. Internal documents submitted by Turnitin indicate that Turnitin consistently monitors the competitive offerings of [X] and [X], as well as [X] and certain other competitors, at the global level (but not at the UK level specifically).⁵³ However, several internal documents indicated that the actual impact of [X] and [X] in the supply of APS (generally) has yet to materialise,⁵⁴ and that [X] competitive constraint may be currently limited to the SE space.⁵⁵ Similarly, certain internal documents of Turnitin position [X] product as a complement to its grammar checker rather than a true competitor, and also note that [X] APS product is only compatible with [X] own LMS.⁵⁶

Third party views

59. Several HE customers indicated that there were no viable alternatives to the Parties (and in particular, to Turnitin), and several raised concerns about a lack of choice post-Merger. In particular, [X] a significant number of HE institutions indicated that competition in the APS market was already limited, as it was very difficult to build up a database of prior submissions that could rival those of Turnitin. HE customers that did list other competitors identified Blackboard and Grammarly most frequently as the main alternative suppliers (but ranked them as weaker competitors compared to the Parties).
60. A number of third parties ([X]) listed by the Parties as competitors responded that they do not consider themselves to compete with the Parties' APS

⁵² Merger Notice, paragraph 370.

⁵³ For instance, [X].

⁵⁴ For instance, [X].

⁵⁵ For instance, [X].

⁵⁶ [X].

products. Some third parties listed Grammarly and Blackboard as competitors to the Parties' APS products, with some also listing other smaller players. Only one third party listed Google as a competitor in the supply of APS.⁵⁷

61. One competitor ([REDACTED]) confirmed that it has an APS product ([REDACTED]), but that its strategic focus is on [REDACTED]. Another competitor confirmed that it has had [REDACTED], and that the HE segment is of interest but still a new area ([REDACTED]).⁵⁸ The same third party also confirmed that it already offers feedback and grading functionality (which, as described above, are valued by HE customers in the UK).⁵⁹

Conclusion on alternative constraints

62. Based on the evidence set out above, the CMA considers that there are very limited alternative suppliers of APS to HE customers that currently constrain the Parties. As regards future competitive constraints, as described below in relation to barriers to entry and expansion, the evidence gathered indicates that, while certain third parties may enter or expand in the APS HE segment in the UK in the foreseeable future, the extent of such entry and/or expansion is uncertain.

Conclusion on horizontal unilateral effects

63. For the reasons set out above, the CMA considers that the Parties are currently close competitors, with very few alternative suppliers. The CMA found that Turnitin has a very high share of supply and that the Merger would lead to a very small increment due to Ouriginal's limited presence in the UK. The CMA also found that, absent the Merger, Ouriginal may have introduced [REDACTED] to its APS product, in response to feedback from UK HE customers that this was important. However, the CMA considers that it is uncertain whether this additional [REDACTED] (which would have been less sophisticated than Turnitin's [REDACTED]) would have materially strengthened Ouriginal's position in the supply of APS to HE customers in the UK.
64. Accordingly, the CMA cannot rule out that the Merger may give rise to significant competition concerns as a result of horizontal unilateral effects in relation to the supply of APS to HE customers in the UK.

⁵⁷ Note of the call with [REDACTED], from paragraph 24.

⁵⁸ Note of the call with [REDACTED], paragraphs 23-25.

⁵⁹ Note of the call with [REDACTED], paragraph 22.

Barriers to entry and expansion

65. 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.⁶⁰

Parties' submissions

66. The Parties submitted that there are no significant barriers to entry and expansion in the UK APS market.⁶¹ The Parties submitted that they see a significant competitive threat from new entrants, in particular Google and Microsoft, who are international in scope, well-known and well-funded players in the non-instructional educational software market, with a history of expansion in the markets they enter.⁶²

Internal documents and third party views

67. Internal documents of the Parties indicate that barriers to entry in the supply of APS to HE customers are high.⁶³ In particular, the CMA found the need for a high-scale content database and related technology to be a barrier. Numerous internal documents refer to Turnitin's content databases and web-crawler functionality as its key differentiators against existing players and potential entrants.⁶⁴ Several HE customers indicated that Turnitin's large internal database of prior submissions is a significant barrier to entry for other potential APS providers.⁶⁵ Several third parties active in the educational technology space also indicated that developing a product offering sufficiently similar to that of Turnitin would be challenging, in particular given the challenge in accumulating the required databases.⁶⁶ However, one third party indicated that entering the APS market would not be difficult for well-resourced players already active in the educational technology space, or for some technology start-up companies.⁶⁷

⁶⁰ *Merger Assessment Guidelines*, paragraphs 8.28-8.31.

⁶¹ Merger Notice, paragraph 526.

⁶² Merger Notice, paragraph 273.

⁶³ For instance[REDACTED].

⁶⁴ For instance, [REDACTED].

⁶⁵ Note of the call with [REDACTED], paragraph 25 and note of the call with [REDACTED], paragraph 14.

⁶⁶ Note of the call with [REDACTED], paragraph 36 and note of the call with [REDACTED], paragraph 25.

⁶⁷ Note of the call with [REDACTED], paragraphs 36 and 37.

68. Internal documents indicate that Turnitin monitors the threat of the entry/expansion by [REDACTED] and [REDACTED] in the APS space.⁶⁸ However, feedback from third parties regarding future entry and/or expansion plans was mixed:
- (a) two third parties listed by the Parties as competitors ([REDACTED]) indicated that they have no current plans to enter the UK market with a standalone APS solution in the next two years. However, one of these third parties ([REDACTED]) indicated that it has certain attributes that might give it an advantage if it were to do so;
 - (b) another third party indicated that it plans to target HE customers in the supply of APS in the UK [REDACTED];⁶⁹
 - (c) another third party ([REDACTED]) indicated it is receiving increasing interest from UK APS customers and plans to further target UK customers.

CMA view

69. Based on the evidence set out above, the CMA considers that barriers to entry in the supply of APS to HE customers in the UK are high, as a result of the HE customers' preference for providers to have access to a material database of prior student submissions. However, the CMA considers that well-resourced players that are already active in the non-instructional educational software sector may be well-positioned to enter and/or expand. In particular, the CMA considers that one third party ([REDACTED]), a well-resourced player with a strong presence in the broader educational technology sector, [REDACTED], is likely to expand its current APS offering in the UK to HE customers. The extent of such expansion is, however, currently uncertain.

Third party views

70. The CMA contacted customers and competitors of the Parties, whose feedback has been taken into account where appropriate in the competitive assessment above.

Conclusion on substantial lessening of competition

71. Based on the evidence set out above, the CMA cannot rule out that it is or may be the case that the Merger may be expected to result in an SLC as a

⁶⁸ For instance, [REDACTED].

⁶⁹ [REDACTED]

result of horizontal unilateral effects in relation to the supply of APS to HE customers in the UK.

72. However, it has not been necessary for the CMA to reach a definitive conclusion on this point because the CMA has, for the reasons set out below, exercised its discretion to apply the exception to refer under section 33(2)(a) of the Act.

Exceptions to the duty to refer

73. Where the CMA's duty to refer is engaged, the CMA may, pursuant to section 33(2)(a) of the Act, decide not to refer the merger under investigation for a Phase 2 investigation on the basis that the market(s) concerned is/are not of sufficient importance to justify the making of a reference (the ***de minimis* exception**). The CMA has considered below whether it is appropriate to apply the *de minimis* exception to the present case.⁷⁰

Markets of insufficient importance

74. In considering whether to apply the *de minimis* exception, the CMA will consider, in broad terms, whether the costs involved in a reference would be disproportionate to the size of the market(s) concerned, taking into account also the likelihood that harm will arise, the magnitude of competition potentially lost and the duration of such effects.⁷¹

'In principle' availability of UILs

75. The CMA's general policy, regardless of the size of the affected market, is not to apply the *de minimis* exception where clear-cut UILs could, in principle, be offered by the parties to resolve the concerns identified.⁷²
76. In most cases, a clear-cut UIL will involve a structural divestment. The CMA will not consider that UILs are in principle available where: (i) the CMA's competition concerns relate to such an integral part of a transaction that to remedy them via a structural divestment would be tantamount to prohibiting the merger altogether;⁷³ or (ii) the minimum structural divestment that would

⁷⁰ The Parties waived their procedural rights to a full investigation, including the receipt of an Issues Letter and an Issues Meeting, in the event that the CMA decided to exercise its discretion not to refer on the basis that the market concerned was of insufficient importance. This waiver was provided without prejudice to the Parties' views on whether the duty to refer was met. In the light of the CMA's decision to apply the discretion not to refer (set out below), it did not send an Issues Letter to the Parties and no Issues Meeting was held.

⁷¹ [Mergers: Exceptions to the duty to refer](#) (CMA64), 13 December 2018.

⁷² [Mergers: Exceptions to the duty to refer](#), paragraph 28.

⁷³ [Mergers: Exceptions to the duty to refer](#), paragraph 32.

be required to ensure the remedy was effective would be wholly disproportionate in relation to the concerns identified.⁷⁴

77. The Parties made submissions regarding a possible remedy package, comprising a divestment of certain Ouriginal UK assets and an interim licence of Ouriginal's intellectual property (the **Proposed Commitments**). However, the CMA considers that the omission of key assets from the divestiture package contemplated in the Proposed Commitments [X] gives rise to considerable composition and purchaser risks, and would necessitate a wide range of behavioural undertakings with separate design and enforcement risks. Accordingly, the CMA does not consider the Proposed Commitments to constitute clear-cut UILs that are in principle available.
78. The CMA also considered a broader structural remedy (comprising a full divestiture of Ouriginal's UK business, or a divestiture of Turnitin's UK APS business). The Parties submitted that the divestment of Ouriginal's UK business would be tantamount to prohibiting the Merger altogether. The CMA considers that Ouriginal's UK business is not clearly and effectively separable from the remainder of Ouriginal. The CMA therefore considers that a divestiture package would likely need to comprise Ouriginal's entire global business, which would relate to such an integral part of the Merger that it would be tantamount to prohibition, and would also be wholly disproportionate to the concerns identified. The CMA considers that the same conclusions would apply to a divestiture of Turnitin's UK APS business (having regard in particular to the fact that the supply of APS is Turnitin's primary business).
79. Accordingly, the CMA does not consider that 'in principle' clear-cut UILs are available in this case.

Relevant factors

80. The CMA will consider the likely level of consumer harm by reference to a number of factors when deciding whether or not to apply the *de minimis* exception including: (i) the size of the market; (ii) the strength of the CMA's concerns that harm will occur as a result of the merger; (iii) the magnitude of competition that would be lost by the merger; (iv) and the likely durability of the merger's impact.⁷⁵ The CMA will also consider the wider implications of a *de minimis* decision.⁷⁶ Each is considered in turn below.

⁷⁴ [Mergers: Exceptions to the duty to refer](#), paragraph 33.

⁷⁵ [Mergers: Exceptions to the duty to refer](#), paragraph 35.

⁷⁶ [Mergers: Exceptions to the duty to refer](#), paragraphs 47-51.

Market size

81. Where the annual value in the UK, in aggregate, of the market(s) concerned is between £5 million and £15 million, the CMA will consider whether the expected customer harm resulting from the merger is materially greater than the average public cost of a phase 2 reference.⁷⁷ By contrast, where the annual value in the UK of the market(s) concerned is, in aggregate, less than £5 million, the CMA will generally not consider a reference justified unless a clear-cut UIL is in principle available.⁷⁸
82. The Parties estimated a market size of £7.5 million for the supply of APS in the UK to HE customers.⁷⁹ The CMA considers that this estimate likely overstates competitors' presence in the HE segment, and that the market size is more likely to be in the range of £6 million to £7 million, which is towards the bottom of the £5 million to £15 million range.⁸⁰

Strength of the CMA's concerns and magnitude of competition lost

83. In accordance with its guidance, the CMA has considered the strength of its belief regarding the likelihood of an SLC and the magnitude of competition lost by the Merger.⁸¹
84. In this case, the Parties' combined shares of supply are very high, the number of alternative suppliers is limited, and several HE customers have raised concerns about the lack of choice post-Merger. However, the CMA notes that Ouriginal has a very small presence in the UK, and has experienced limited growth in the UK in recent years, with an overall reduction in UK sales staff since 2019. In addition, as described above, while, absent the Merger, Ouriginal may have introduced a [✂] to its APS product, it is uncertain whether this would have materially strengthened Ouriginal's position in the supply of APS to HE customers in the UK.

Durability of any SLC

85. The CMA assesses the likely durability of the merger effect as part of its assessment of the suitability of the application of the *de minimis* exception.

⁷⁷ [Mergers: Exceptions to the duty to refer](#), paragraph 10.

⁷⁸ [Mergers: Exceptions to the duty to refer](#), paragraph 9.

⁷⁹ Merger Notice, Table 21.

⁸⁰ CMA analysis based on Parties' submissions. The CMA has included all of Turnitin's revenue from Feedback Studio in calculating Turnitin's revenues from the supply of APS to HE customers in the UK.

⁸¹ [Mergers: Exceptions to the duty to refer](#), paragraphs 38-44.

86. In this case, as described above, the available evidence indicates that, while barriers to entry are high, well-resourced players already active in the wider non-instructional educational software space may be well positioned to enter. In particular, one third party ([REDACTED]) is likely to expand its APS offering in the UK to HE customers, although the extent of such expansion is currently uncertain.

Wider implications of a 'de minimis' decision

87. The CMA is less likely to apply the *de minimis* exception where it believes that the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question.⁸²
88. In this case, the CMA notes that Turnitin has made several acquisitions in the APS space, as well as the wider non-instructional educational technology space, in recent years.⁸³ However, this pattern of acquisitions appears to be at the global level rather than focused on the UK specifically. The CMA has seen no evidence that this merger is one of a potentially large number of similar mergers that could be replicated across the supply of APS to HE customers in the UK.
89. In considering the wider implications of a particular decision whether to exercise the *de minimis* discretion, the CMA may also have regard to the economic rationale behind an individual transaction.⁸⁴
90. The evidence available to the CMA indicates that Turnitin's primary rationale for the Merger is to increase its presence in the Nordics and German-speaking (**DACH**) regions, where Ouriginal is primarily active.⁸⁵ The Parties also submitted that the Merger is a response to the increased competitive threat from Google and Microsoft, which is reflected in the internal documents of Turnitin.⁸⁶ The CMA has not seen evidence indicating that the Merger is motivated by the acquisition or increase of market power in UK markets.

Conclusion on the application of the *de minimis* exception

91. Taking all the above factors into consideration, the CMA believes that the market concerned in this case is not of sufficient importance to justify the

⁸² [Mergers: Exceptions to the duty to refer](#), paragraph 48.

⁸³ In particular, in 2020, Turnitin acquired Unicheck (an APS company), ExamSoft (a software-based assessment platform), ProctorExam (an online proctoring company) and certain IP rights from iSchoolConnect. Merger Notice, paragraphs 70 to 77.

⁸⁴ [Mergers: Exceptions to the duty to refer](#), paragraph 51.

⁸⁵ For instance, [REDACTED].

⁸⁶ Merger Notice, paragraph 34 [REDACTED].

making of a reference. As such, the CMA believes that it is appropriate for it to exercise its discretion to apply the *de minimis* exception.

Decision

92. Consequently, the CMA has not had to conclude on whether 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 as, pursuant to section 33(2)(a) of the Act, the CMA believes that the market concerned is not of sufficient importance to justify the making of a reference.
93. The Merger will therefore **not be referred** under section 33 of the Act.

Joel Bamford
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Competition and Markets Authority
26 July 2021