

# Anticipated acquisition by Pearson Professional Assessments Limited of the computer-based testing business of learndirect Limited

**ME/6562/15**

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 2 December 2015. Full text of the decision published on 7 January 2016.

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

## SUMMARY

1. Pearson Professional Assessments Limited,<sup>1</sup> through its UK operating entity Pearson VUE (**Pearson VUE**), has agreed to acquire the computer-based testing business of learndirect Limited<sup>2</sup> (**learndirect**) (the **Merger**). Pearson VUE and learndirect are together referred to as the **Parties**.
2. The Competition and Markets Authority (**CMA**) considers that the Parties' enterprises will cease to be distinct as a result of the Merger, that the share of supply test is met and that 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 end-to-end post-school (16+) invigilated computer-based testing (**CBT**) services to organisations that issue certifications and/or accreditations in the United Kingdom (**UK**). The CMA estimates that in 2014/2015, Pearson VUE had a share of supply of [70–80]% and learndirect had a share of supply of [10–20]% in the UK, giving the Parties a combined share of [90–100]% post-Merger.

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<sup>1</sup> Pearson Professional Assessments Limited is a wholly-owned subsidiary of Pearson plc, a global company that creates, manages and sells educational products and related services.

<sup>2</sup> Learndirect Limited is a wholly-owned subsidiary of Pimco (Holdings) Limited, which in turn is owned by the private equity investor Lloyds Development Capital (**LDC**), which is wholly-owned by the Lloyds Banking Group (**LBG**).

4. The rationale for the Merger is to enable Pearson VUE to continue to service the CBT contract in relation to the driving theory test in the UK (the **DVSA Contract**). Pearson VUE has serviced the DVSA Contract since 2004, but in 2012, the contract was awarded to learndirect by the UK government as part of a single supplier framework agreement for CBT services following a tender process (the **CBT Framework**). Learndirect is due to begin servicing the DVSA Contract in September 2016, whereas if the Merger goes ahead, learndirect would exit the market and cease to supply end-to-end post-school (16+) invigilated CBT services.
5. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie, the counterfactual) and, in this case, the CMA concluded that the most competitive realistic counterfactual against which to assess the competitive effects of the Merger, was one in which learndirect continues to service the CBT Framework, including the DVSA Contract as of September 2016, and for the Parties to compete against each other for the supply of end-to-end post-school (16+) invigilated CBT services in the UK.
6. The CMA assessed whether, as a result of horizontal unilateral effects, the Merger may lead to an increase in prices and/or a reduction in the quality of end-to-end post-school (16+) invigilated CBT services in the UK.
7. In its competitive assessment, the CMA considered the effects of the Merger on the supply of the DVSA Contract separately, owing to its large size (by value and test volume) and high service requirements, including the need for a national network of test centres.
8. Given that the DVSA Contract is not due to be re-tendered until [✂] (at the earliest) and that in previous tenders for the DVSA Contract the incumbent supplier did not win, the CMA recognises that there is some uncertainty regarding the effects of the Merger on the supply of the DVSA Contract. However, the evidence gathered by the CMA indicates that the Parties were the only two suppliers that met the technical requirements for the supply of the DVSA Contract in the 2012 tender process. [✂].
9. Taking this into account, the CMA assessed the level of competition in the remainder of the market for the supply of end-to-end post-school (16+) invigilated CBT services and the extent to which the Parties are close competitors under the relevant counterfactual. The CMA found that the acquisition involves the merger of the two largest suppliers of end-to-end post-school (16+) invigilated CBT services in the UK, based on current shares of supply. Whilst the CMA recognises that other suppliers of invigilated CBT services will provide some competitive constraint for certain segments of the

market, such as English language testing, the competitive constraint imposed by the Parties' competitors will remain limited.

10. Based on the evidence available to the CMA, including third party responses, the CMA found that there is a realistic prospect that the Merger would result in a substantial lessening of competition (**SLC**) in the supply of end-to-end post-school (16+) invigilated CBT services in the UK which may lead to price rises and/or a reduction in service quality provided to examining bodies/customers, and which could be passed on to candidates.
11. The Parties have until 9 December 2015 to offer undertakings in lieu of a reference (**UILs**) to the CMA in order to remedy the identified SLC. If such UILs are offered, the CMA will consider whether to accept these under section 73 of the Enterprise Act 2002 (**the Act**). If no such UILs are offered, then the CMA will refer the Merger to phase 2 pursuant to sections 33(1) and 34ZA(2) of the Act.

## ASSESSMENT

### Parties

12. Pearson VUE is active in the supply of end-to-end post-school (16+) invigilated CBT services in the UK and internationally, including the supply of software, a test centre network and computers, and test development services to organisations that issue certifications and/or accreditations. The turnover of Pearson VUE in the financial year ending 31 December 2014 was approximately £58.3 million in the UK.
13. Learndirect is also active in the supply of end-to-end post-school (16+) invigilated CBT services to organisations that issue certifications and/or accreditations in the UK, and currently supplies these services by aggregating the different elements required using its own capabilities and those of other third parties. Learndirect generated a turnover of approximately [X] in the financial year ending 31 July 2015.<sup>3</sup>

### Background

14. Since 2004, Pearson VUE has serviced the DVSA Contract with the Department for Transport and the Driving Standards Agency, now the Driver and Vehicle Standards Agency (**DVSA**), for the provision of the driving theory test throughout the UK. The DVSA Contract is the largest on-demand CBT

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<sup>3</sup> For clarification, this refers to the CBT business of learndirect limited only.

contract in the UK, measured both by value and volume of tests. It is a contractual requirement under Pearson VUE's existing agreement with the DVSA that it is able to deliver the DVSA Contract in invigilated test centres across England, Scotland, Wales and Northern Ireland.

15. Following a tender process in 2012, run by the Cabinet Office and the DVSA under the Public Contracts Regulations 2006 (as amended) (**PCR 2006**), learndirect was awarded the CBT Framework, the UK government's single supplier framework agreement for CBT services, which learndirect entered into in October 2013. The DVSA Contract, which has a value of [REDACTED] per year, was entered into as part of the CBT Framework and will run for a duration of eight years from March 2016.<sup>4</sup> In addition, learndirect has been awarded the following contracts under the CBT Framework since October 2013:
  - (a) a contract for the Life in the UK test with the Home Office/UK Border Agency, which has a value of [REDACTED] per year;
  - (b) a contract with the Department for Education/Standards and Testing Agency for the provision of literacy and numeracy tests for trainee teachers, which has a value of [REDACTED] per year; and
  - (c) a contract with the Construction Industry Training Board for a non-invigilated online test, which has a value of [REDACTED] per year.
16. In addition, learndirect also has a contract with the Civil Aviation Authority for [REDACTED], which has a value of [REDACTED] per year, and a concession agreement with the Security Industry Authority ([REDACTED]).

## Transaction

17. The Merger involves the acquisition by Pearson VUE of contracts and certain other assets comprising the CBT business of learndirect.
18. The Parties submitted that the rationale for the Merger is to allow Pearson VUE to continue to service the DVSA Contract, which was awarded to learndirect as part of the CBT Framework. Pearson VUE has been servicing the DVSA Contract since 2004 and will continue to do so until September 2016. In addition to the transfer of the DVSA Contract, the Merger will include the transfer of the other contracts set out in paragraphs 15 and 16 above.

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<sup>4</sup> The start date of the DVSA Contract was delayed for two years as a result of a confidential settlement of proceedings brought by Pearson VUE under Part 9 of the PCR 2006 against the Cabinet Office and Department for Transport in relation to the decision to award the CBT Framework to learndirect.

19. The Merger is conditional on CMA clearance in phase 1 and on obtaining consents from all learndirect's customers to the novation of the customer contracts that Pearson VUE is acquiring.

## **Jurisdiction**

20. As a result of the proposed Merger, Pearson VUE will acquire sole control of the CBT business of learndirect and these two businesses will cease to be distinct. The nature of the business is such that the key assets enabling the service to be provided are contracts. The target includes contracts currently being serviced and generating revenue, as well as contracts already awarded, which will generate revenue in the future. These services will continue to be delivered without interruption in the event of the Merger. Goodwill attaches to the contracts. In addition, candidate data, test materials, domain names and goodwill associated with the above will also transfer to Pearson VUE. Pearson VUE is thus acquiring the activities of a business, and the target is therefore an enterprise.
21. The CMA estimates that Pearson VUE provides [70–80]% of the total supply of end-to-end post-school (16+) invigilated CBT services in the UK, which would increase by [10–20]% with the acquisition of learndirect resulting in a combined share of [90–100]% in the UK. Accordingly, the share of supply test under section 23 of the Act is met.
22. 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.
23. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 8 October 2015, an issues meeting was held with the Parties on 10 November 2015 and the statutory 40 working day deadline for a decision is 2 December 2015.

## **Counterfactual**

24. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie, the counterfactual). For anticipated mergers, the CMA generally adopts the prevailing conditions of competition as the counterfactual against which to assess the impact of the merger. However, the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it considers that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is

a realistic prospect of a counterfactual that is more competitive than prevailing conditions as between the merging parties.<sup>5</sup>

25. Pearson VUE submitted that the purpose and effect of the Merger is for Pearson VUE to retain and continue servicing the DVSA Contract. In its view, the effect of the Merger would be to preserve the status quo as at the date of the Merger vis-à-vis the DVSA Contract (ie, Pearson VUE would continue to provide this test from September 2016). Therefore, Pearson VUE submitted that the appropriate counterfactual is to compare: (i) the situation as at the date of the Merger where Pearson VUE is providing the DVSA Contract, but not the other contracts which form part of the Merger, and (ii) the situation post-Merger where Pearson VUE is providing the DVSA Contract and the other CBT contracts that form part of the Merger (ie, as set out in paragraphs 15 and 16 above).
26. The CMA does not agree with Pearson VUE's submission in relation to the counterfactual. The CMA considers that the most competitive realistic counterfactual consists of learndirect servicing the CBT Framework, including the DVSA Contract as of September 2016, and competing against Pearson VUE for the supply of end-to-end post-school (16+) invigilated CBT services in the UK. This is based on the following considerations:
  - (a) learndirect will service the DVSA Contract;
  - (b) learndirect will compete for other CBT contracts; and
  - (c) Pearson VUE will remain a strong competitor.

### ***Learndirect will service the DVSA Contract***

27. Currently, learndirect operates 63 test centres in the UK. To service the DVSA Contract, learndirect will have to increase the number of its operated test centres to 244.
28. Learndirect's internal documents showed that a capital investment of approximately [REDACTED] would be required to ensure that learndirect has the infrastructure in place to service the DVSA Contract. In August 2015, [REDACTED] of capital expenditure had already been invested [REDACTED].<sup>6</sup> In October 2015,

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<sup>5</sup> [Merger Assessment Guidelines](#) (OFT1254/CC2), September 2010, from paragraph 4.3.5. The [Merger Assessment Guidelines](#) have been adopted by the CMA (see [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), January 2014, Annex D).

<sup>6</sup> [REDACTED].

learndirect told the CMA that it had already invested [REDACTED], with the remaining investment to be made over the next 12 months (absent the Merger).<sup>7</sup>

29. Learndirect's internal documents indicated that it expected to deliver the DVSA Contract. In particular, [REDACTED] learndirect still expected to service the DVSA Contract on time and to start generating profits [REDACTED].
30. In response to the CMA's issues paper, learndirect submitted that [REDACTED], learndirect has also told the CMA that there was a realistic prospect that learndirect would [REDACTED] service the DVSA Contract.<sup>8</sup> The CMA also noted that learndirect's potential liability for failure to service the DVSA Contract was [REDACTED].<sup>9</sup>
31. Therefore, on the basis of the evidence available to it, the CMA believes that the relevant counterfactual in this case is one in which learndirect will continue servicing the CBT Framework, including the DVSA Contract as of September 2016.<sup>10</sup>

### ***Learndirect will compete for other CBT contracts***

32. Learndirect told the CMA that the capital investment required for the DVSA Contract would also assist learndirect to service other CBT contracts, as it would improve learndirect's national coverage of test centres, hardware and other infrastructure, and hence its capabilities and reputation. This would allow learndirect to bid more competitively for other CBT contracts in government and non-government tender processes in the near future, for example for contracts with [REDACTED].<sup>11</sup>
33. [REDACTED].
34. [REDACTED]. Having concluded that, absent the Merger, learndirect would service the DVSA Contract, [REDACTED], the CMA concluded that it was realistic that learndirect would continue to compete for other CBT contracts as part of its ongoing CBT business.

### ***Pearson VUE will remain a strong competitor***

35. Currently, Pearson VUE operates [REDACTED] test centres in the UK. Pearson VUE submitted that, absent the Merger, [REDACTED].

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<sup>7</sup> Call with learndirect and the case team on 6 October 2015.

<sup>8</sup> Issues meeting, 10 November 2015.

<sup>9</sup> [REDACTED].

<sup>10</sup> [REDACTED].

<sup>11</sup> Pearson VUE submission of 6 October 2015, [REDACTED].

36. In addition to the DVSA Contract, Pearson VUE currently also services a contract with the Construction Industry Training Board for invigilated CBT services (**CITB Contract**). [REDACTED].
37. In response to the CMA's issues paper, Pearson VUE submitted in relation to the CITB Contract that [REDACTED].<sup>12</sup>
38. [REDACTED], Pearson VUE will remain a supplier of end-to-end post-school (16+) invigilated CBT services. As such, the CMA concluded that Pearson VUE's capability and experience would enable it to continue to bid competitively for end-to-end post-school (16+) invigilated CBT service contracts without the DVSA Contract and the CITB Contract.

### ***Conclusion on the preferred counterfactual***

39. The CMA believes that the most competitive realistic counterfactual is for learndirect to service the CBT Framework, including the DVSA Contract as of September 2016, and going forwards compete with Pearson VUE for the supply of end-to-end post-school (16+) invigilated CBT services in the UK. As part of this counterfactual, the CMA believes that it is realistic that Pearson VUE will remain a strong competitor for the provision of CBT services in the UK despite having lost the DVSA Contract.

### **Frame of reference**

40. The CMA considers that market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as it is recognised that there can be constraints on merger parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. The CMA will take these factors into account in its competitive assessment.<sup>13</sup>
41. The Parties overlap in the supply of end-to-end post-school (16+) invigilated CBT services in the UK. The CMA has taken this as its starting point for assessing the appropriate frame of reference and considered whether this should be narrowed further or widened on the basis of demand- and supply-side substitutability factors.

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<sup>12</sup> Pearson VUE internal document, [REDACTED].

<sup>13</sup> [Merger Assessment Guidelines](#), paragraph 5.2.2.

## ***Product scope***

### *CBT vs paper-based testing*

42. Pearson VUE submitted that invigilated CBT and invigilated paper-based testing (**PBT**) form part of the same market. It submitted that all types and formats of tests can be provided either through CBT or PBT.
43. Evidence gathered by the CMA during its investigation indicated that CBT is more suited for 'on-demand testing', as these tests can be taken at a time of the customer's choosing. Pearson VUE also submitted that the risk of a leak of a test's content is lower for CBT than for PBT.
44. Almost all CBT customers told the CMA that they would not consider PBT as an alternative to CBT and that they would not switch from CBT to PBT in the event that the price for CBT increased by 5%.<sup>14</sup> One customer told the CMA that PBT offers a significantly greater risk of fraud and illegal copying. Another customer noted that CBT enables animation and graphics, allowing for a more 'real-world' presentation. It was also noted that CBT provides more flexibility, in particular for candidates with special needs.
45. The Parties' competitors told the CMA that it would not be easy for a provider of PBT to switch to CBT, mainly due to the technology and infrastructure associated with providing CBT services.
46. Therefore, based on the evidence received, the CMA concluded that the product frame of reference should not be widened to include PBT.

### *Invigilated vs non-invigilated testing*

47. The Parties primarily overlap in the supply of invigilated testing as Pearson VUE submitted that it had little involvement in non-invigilated testing. Pearson VUE submitted that invigilated and non-invigilated testing are not part of the same market, as invigilated testing is used for high-stakes testing (eg, for awarding an educational or professional qualification measured against objective standards), whilst non-invigilated testing is used for low-stakes testing (eg, where the aim is to verify that a candidate has undertaken training or attended a course).
48. In response to the CMA's market testing, a large majority of the Parties' customers told the CMA that they require invigilated testing.

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<sup>14</sup> Ten of 11 customers who responded to this question.

49. Therefore, on the basis of the information available to it, the CMA considers that the product frame of reference should not be widened to include non-invigilated CBT.

*School (-16) vs post-school (16+)*

50. Pearson VUE submitted that the testing of students at school, up to age 16, is used primarily to validate learning and is typically organised and delivered via awarding bodies who manage large-scale PBT events at fixed times in the year. In addition, school testing (and the testing of children) has specific characteristics, notably requirements to safeguard minors that distinguish it from post-school testing.
51. Given that the Parties are not active in school testing, the CMA focused its competitive assessment on the supply of post school (16+) testing and did not consider it appropriate to widen the product frame of reference to include CBT for school (-16).

*End-to-end services vs constituent elements of the supply chain*

52. Pearson VUE submitted that there are potentially separate product markets for the constituent elements of invigilated CBT services, namely a technology market for the provision of software solutions, a market for test development services and a market for the provision of test centres. It also submitted that there are specialist providers for all these services and that customers do not necessarily require an end-to-end service, but sometimes tender for different elements of the supply chain as they may have 'in-house capabilities'. Pearson VUE further submitted that learndirect is an aggregator of the necessary elements to provide invigilated CBT services, although it also has one contract for the supply of test centres only.
53. In response to the CMA's market testing, the majority of the Parties' customers told the CMA that they require end-to-end services and the majority of these customers also procure all services from one provider.<sup>15</sup> The main advantage and reason for doing so appears to be because of the integration speed and resilience of this procurement measure. However, some customers told the CMA that they would consider self-supplying in response to a price increase, but that they would still have to source constituent elements from third party providers.<sup>16</sup>

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<sup>15</sup> Ten of 13 customers who require end-to-end services, source all services from one supplier.

<sup>16</sup> Three of ten customers self-supply a constituent element (eg, manual marking of essays or question banks).

54. Whilst the CMA has received evidence that some customers go out to tender for constituent elements for their CBT requirements (the Parties referred to [X] and the Royal College of Paediatrics and Child Health (**RCPCH Contract**),<sup>17</sup> a large majority of customers require end-to-end services. Indeed, larger customers told the CMA that they have not yet tested sourcing constituent elements from different suppliers, as an end-to-end service allows for better integration, speed, resilience and reliability.
55. In addition, learndirect told the CMA that although it was an aggregator of constituent elements for invigilated CBT services, it was responsible for delivering an end-to-end service to its customers [X].<sup>18</sup>
56. For the reasons set out above, and as the Parties overlap in the supply of end-to-end invigilated CBT services, the CMA focused its competitive assessment on end-to-end services.

#### *Segmentation by type of contract or customer*

57. Pearson VUE submitted that whilst individual customer's requirements vary considerably, it does not perceive there to be significant differentiation in the market by category of customer and that a customer's requirements for invigilated testing will be driven by the type of testing that it wishes to undertake rather than the sector in which it operates. However, Pearson VUE also submitted that the DVSA Contract has certain features and requirements that set it apart from all other contracts in the UK.
58. The CMA notes that the DVSA Contract has certain features, in terms of length, coverage, and complexity that sets it apart from other CBT contracts. The CMA has considered the implications of these characteristics as part of its competitive assessment.

#### *Geographic scope*

59. Pearson VUE submitted that both Pearson VUE and its competitor Prometric are global businesses that provide services to certain customers who have global or supra-national testing requirements, but that most awarding bodies and educational institutions provide nationally recognised qualifications and accreditations, and that therefore demand for CBT services was nationally driven. On this basis, Pearson VUE submitted that the market should be UK-wide and the Parties confirmed that they provide services on a national basis.

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<sup>17</sup> RCPCH uses its own booking software.

<sup>18</sup> Call with learndirect and the case team on 6 October 2015.

60. The CMA's investigation confirmed a UK-wide market.

### ***Conclusion on frame of reference***

61. For the reasons set out above, the CMA assessed the impact of the Merger in the supply of end-to-end post-school (16+) invigilated CBT services in the UK.

## **Competitive assessment**

### ***Horizontal unilateral effects***

62. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or degrade quality on its own and without needing to coordinate with its rivals.<sup>19</sup> Horizontal unilateral effects are more likely when the merger parties are close competitors. The CMA assessed whether it is or may be the case that the Merger may be expected to result in an SLC in relation to unilateral horizontal effects in the supply of end-to-end post-school (16+) invigilated CBT services in the UK.

63. The CMA believes that as a result of horizontal unilateral effects, an SLC may manifest itself in the form of:

- (a) increased prices for invigilated CBT services for customers and end-consumers; and
- (b) a reduction in the quality of invigilated CBT services.

### ***Shares of supply***

64. Shares of supply are generally a useful tool to start to assess market power. However, in the market for end-to-end post-school (16+) invigilated CBT services, these shares are less conclusive as services are highly differentiated. Some suppliers that specialise in particular segments of the market have large shares of supply but exert no meaningful constraint beyond the niche in which they are active. Given these market characteristics, the CMA has undertaken an assessment of the competitive constraints imposed by other suppliers identified as competitors by the Parties and has set out the results of this assessment out below.

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<sup>19</sup> [Merger Assessment Guidelines](#), from paragraph 5.4.1.

**Table 1: Parties' and their competitors' shares of supply for end-to-end invigilated CBT services for 2014/2015**

<i>Provider</i>	<i>CMA estimate</i>
Pearson VUE	[70–80]%
learndirect	[10–20]%
<b>Combined</b>	<b>[90–100]%</b>
BTL	[0–5]%
Calibrand	[0–5]%
Cambridge English	[0–5]*
Enlight	[0–5]%
Kryterion	[0–5]%
Prometric	[0–5]%
Questionmark	[0–5]%
RM Results	[0–5]%
The British Council	[0–5]%
Trinity	[0–5]*

Source: CMA estimates from market testing.

\* the CMA notes that these shares are likely to increase to [20–30]% each in 2016, reducing the Parties' combined share to [50–60]% as well as other providers' shares.

65. The CMA found that the Parties' combined share of supply would decrease to [50–60]% in 2016 when the Home Office's Standard English Language Test (**SELT**) will transfer from its current PBT format to CBT. This will increase the total revenue in the market which will be attributed to two consortium providers of the SELT, Cambridge English and Trinity, giving each of them a [20–30%] share of supply. However, for the reasons set out in the CMA's assessment of competitive constraints, Cambridge English and Trinity are unlikely to impose any significant competitive constraint on the Parties' activities in the wider supply of end-to-end post-school (16+) invigilated CBT services in the UK.

### *DVSA Contract*

66. The DVSA Contract requires a highly specified service in terms of volume of tests and national coverage compared to other CBT contracts. In 2014/2015, over two million tests were delivered from [redacted] test centres operated by Pearson VUE, with an increase in volumes forecasted for 2016/2017. Given these highly specified requirements, and the large size of the DVSA Contract by volume of tests and value, the CMA has assessed competition for this contract separately.

67. The UK government awarded the CBT Framework, including the DVSA Contract, to learndirect in October 2013. [redacted].<sup>20</sup> However, evidence gathered

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<sup>20</sup> Learndirect internal document, [redacted] and Pearson VUE internal document, [redacted].

by the CMA indicated that there were only [X] bidders, including the Parties, and that only the Parties were considered to have the necessary technical capabilities to service the DVSA Contract.

68. In response to the CMA's market testing, customers raised concerns that there were no alternative providers to the Parties who had the same technical capabilities and who operated a similar number of test centres thereby facilitating a network with national coverage. [X].
69. At the earliest, the DVSA Contract will be re-tendered in [X] and in this respect, Pearson VUE submitted that third party comments expressing concerns about competition in [X] years' time should be given little credence, in particular, as the DVSA Contract has changed hands each time it has been re-tendered, and by March 2016 two new significant CBT suppliers (Cambridge English and Trinity College) will have entered the market.<sup>21</sup>
70. Although the CMA recognises that the effects of the Merger on the supply of the DVSA Contract are uncertain, primarily, as the date for the next tender is far in the future and the incumbent supplier did not win in previous tenders, the CMA nonetheless considers that the evidence demonstrates that the Parties were the only two credible suppliers for the DVSA Contract and that, given the greater complexity involved in delivering the DVSA Contract, this indicated that they were the leading suppliers of end-to-end post-school (16+) invigilated CBT services in the UK.
71. The CMA also believes that the high revenue stream for the DVSA Contract, supports the successful bidder to cover its fixed costs for test centres and/or research and development through this contract and hence, price other contracts at a lower marginal cost. Therefore, the CMA believes that learndirect would be a strong competitor in the counterfactual as a result of servicing the DVSA Contract.
72. Taking into account this closeness of competition between the Parties for the supply of the DVSA Contract, and the clear strength of the Parties' offerings, the CMA assessed the level of competition in the remainder of the market for the supply of end-to-end post-school (16+) invigilated CBT services under the relevant counterfactual (ie, where learndirect is servicing the CBT Framework, including the DVSA Contract, and competing with Pearson VUE and other competitors in the market).

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<sup>21</sup> Pearson VUE submitted that Prometric won the tender in March 2003, Pearson VUE won the contract in November 2003 and has been administering it since September 2004. Learndirect won the contract as part of the CBT Framework in 2013.

*The supply of end-to-end post-school (16+) CBT services excluding the DVSA Contract*

73. Pearson VUE is currently the leading supplier of end-to-end post-school (16+) invigilated CBT services in the UK. It currently holds the DVSA Contract, the CITB Contract and around [redacted] other CBT service contracts with a value of approximately £[redacted] million out of a current total market size of £75 million. Pearson VUE's market position is set to change in September 2016 after losing the DVSA Contract to learndirect. Taking this development into account as part of its counterfactual, the CMA has assessed the level of competition for the supply of end-to-end post-school (16+) invigilated CBT services that exists beyond the Parties.
74. Pearson VUE submitted that before 2012, learndirect only had one invigilated CBT contract (the contract for the Life in the UK test with the Home Office/UK Border Agency) and it had not bid against Pearson VUE for any other invigilated CBT contracts before winning the CBT Framework. Following the award of the CBT Framework, learndirect bid against Pearson VUE in [redacted], which learndirect won. The Parties submitted that this evidence indicated that the Parties were not close competitors in the remainder of the market.
75. The CMA gathered evidence which indicated that learndirect had competed for other CBT contracts, [redacted] and is highly likely to bid for more CBT service contracts once it commences servicing the DVSA Contract in September 2016.

*Third party views*

76. In response to the CMA's market testing, three customers raised concerns about the Merger, one customer stating that there is a '...risk of significant price rises going forward given the very limited alternatives in terms of alternative CBT provision available to us and the difficulties this would present us with in trying to find an alternative means of delivering'. Another customer told the CMA that it was very concerned and thought that only Pearson VUE and learndirect could meet its needs.
77. However, a number of customers were not concerned by the proposed Merger. The CMA considers that this may have been as a result of learndirect not yet having expanded and taken over the DVSA Contract. Therefore, these customer views may not reflect learndirect's prospective market position as a result of winning the CBT Framework and after having made significant capital investments for the DVSA Contract.

78. The majority of learndirect's suppliers that the CMA contacted told the CMA that they were concerned about the Merger as it would increase barriers to entry, create a duopoly (with Prometric) and discourage innovation.
79. Nearly all competitors raised concerns about the Merger, noting that it would reduce competition to effectively one provider in the market, without the likelihood of any new entrants due to high barriers to entry. Some competitors also referred to the Parties' strong position for the supply of government contracts in their responses.
80. The CMA recognises that competitor responses should be interpreted with caution as part of its market testing and, therefore, it sought to test the strength of other third party suppliers in the market.

#### *Competitive constraints*

81. Pearson VUE submitted a list of the Parties' competitors and told the CMA that it faces competition from Prometric and BTL, as well as Questionmark, Calibrand and RM Results.
82. As part of its market testing, the CMA contacted the Parties' competitors to assess their competitive strength in the market. The relevant evidence and the CMA's views are set out below.
  - *Prometric*
83. The CMA estimated Prometric's share of supply for invigilated CBT services in the UK to be [0–5]%. Pearson VUE submitted that Prometric was previously the provider of the DVSA Contract and has been providing CBT services in the UK for many years. Prometric is currently servicing the driving theory test in the Republic of Ireland and is one of the largest CBT providers globally, servicing the CBT contract for the European Personnel Section Office, which Pearson VUE submitted is the largest CBT contract in the EU (outside the UK). Pearson VUE further submitted that Prometric and BTL have recently announced a partnership in which Prometric will use BTL's test engine.<sup>22</sup>
84. Pearson VUE submitted that [✂].
85. Based on the above, Pearson VUE submitted that Prometric clearly has a reputation and experience for both government and non-government

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<sup>22</sup> The press release can be accessed by following this link: [BTL announces partnership with Prometric, 23 September 2015](#).

customers in the provision of end-to-end invigilated CBT and a significantly stronger track record than learndirect.

86. The CMA believes that Prometric is a credible supplier of CBT services, providing end-to-end services in the UK, with a share of supply of approximately [0–5]%. However, based on the number of contracts that Prometric has lost to the Parties, the annual value of the contracts that Prometric currently services (which is low compared to the Parties' contracts) and customer responses, the CMA considers that Prometric would not sufficiently constrain Pearson VUE post-Merger, as Prometric tends to service mostly small contracts in the UK. In response to the CMA's market testing, one customer told the CMA that Prometric performed significantly less well on delivery and integration and another customer told the CMA that Prometric may be able to compete with the Parties, but that it is a weak competitor, falling short of the required network in the last tender.

- *BTL*

87. BTL's share of supply for invigilated CBT services in the UK is [0–5]%. Pearson VUE submitted that BTL provides an end-to-end assessment platform called 'Surpass' and has won the RCPCH Contract.
88. From its market testing, the CMA understands that BTL's platform 'Surpass' is BTL's software platform, which is a test engine (ie not an end-to-end CBT service as explained in paragraphs 52 to 56 above).
89. The CMA found that BTL only services one end-to-end contract, namely the RCPCH Contract, which includes BTL providing the booking and the test centres. The annual value of this contract is far below the value of the CBT contracts serviced by the Parties. Further, BTL does not consider itself to provide end-to-end services, but is rather a provider of a software platform, which does not include the provision of a booking system or test centres.
90. Whilst the CMA considers that BTL's alliance with Prometric may enhance Prometric's offering, the CMA does not consider that BTL could provide a material competitive constraint on the merged entity.

- *Cambridge English*

91. Pearson VUE submitted that Cambridge English has the second largest share in the market, primarily based on its contract with the Home Office for the provision of the SELT.

92. From its market testing, the CMA understands that the SELT is currently paper-based and will only move to CBT in March 2016 and that Cambridge English is currently developing a CBT solution for this test. However, Cambridge English's ability to service SELT in CBT format has not yet been tested. In addition, whilst the annual value of this test may be high (and therefore resulting in a significant share of supply for Cambridge English), the volume of tests is highly uncertain and the best estimate is that it would be relatively low compared to other large CBT contracts.

93. In addition, the CMA considers that Cambridge English has had an exclusive focus on English language testing, [REDACTED] and would have limited intention to bid for other CBT contracts against the merged entity. Therefore, the CMA believes that Cambridge English would not exert a significant competitive constraint on Pearson VUE other than for English language tests and whilst its shares of supply will increase once the SELT changes from PBT to CBT (as set out at paragraph 65 above), it would be a weak competitor to the merged entity in the wider market.

- *Trinity College London*

94. Further to the CMA's market testing, the CMA has learned that the SELT is provided by two suppliers, Cambridge English (as discussed above) and Trinity College London. The CMA's assessment of Cambridge English also applies to Trinity College London.

- *British Council*

95. The British Council's share of supply for invigilated CBT services in the UK is [0–5]%.

96. From its market testing, the CMA understands that the British Council's share of supply in the UK is significantly smaller than estimated by Pearson VUE, in particular, as the British Council's main contract is still paper-based. In addition, the CMA also notes that the British Council contracted with BTL in order to service another CBT contract. Whilst the CMA believes that the British Council may bid for more CBT contracts going forward, it has not received sufficient evidence to suggest that the British Council will constrain or compete strongly with the merged entity.

- *Questionmark*

97. Pearson VUE submitted that [REDACTED].

98. From its market testing, the CMA understands that this contract is the only contract for end-to-end invigilated CBT services that Questionmark currently services in the UK, although Questionmark's software is sometimes used by an aggregator of end-to-end services or by customers who also self-supply.
- *Calibrand*
99. Pearson VUE submitted that [§]. However, Calibrand does not supply end-to-end services and therefore the CMA does not consider that it would be a material competitive constraint on the merged entity.
- *RM Results*
100. Pearson VUE submitted that RM Results' share of supply was relatively high and that it is the third largest provider of invigilated CBT services. As a result of the CMA's market testing, the CMA has learned that RM Results only provides e-marking, but does not supply end-to-end CBT services. The CMA does not consider RM Results to constitute a constraint on the Parties for the supply of end-to-end CBT services.
- *Providers with a smaller market share*
101. Pearson VUE also submitted a list of providers with a market share below 1%. The CMA has market tested their capability and strength in the market and concluded that they would not constitute a competitive constraint on the merged entity.

### ***Conclusion on horizontal unilateral effects***

102. The evidence gathered by the CMA during its investigation indicates that when bidding for the CBT Framework, including the DVSA Contract, the Parties were each other's closest competitors. For other end-to-end post-school (16+) invigilated CBT service contracts, the CMA believes that Prometric is the only other credible competitor. The CMA recognises that Cambridge English and Trinity College will provide some competitive constraint for English language testing, and that the British Council will continue to compete for CBT contracts, however, the competitive constraint imposed by these parties will remain limited.
103. The rationale for the Merger is to enable Pearson VUE to retain the DVSA Contract, and if the Merger were to go ahead, Pearson VUE's closest competitor for the DVSA Contract would exit the market. Post-Merger, Pearson VUE would face only limited competitive constraints and the CMA believes that it would have a substantial advantage over other providers in the

market when bidding for contracts owing to its significant national network of test centres and the reduction in its marginal costs as a result of servicing the DVSA Contract. In contrast, under the relevant counterfactual, the Parties would be the two largest providers of CBT services and learndirect would continue to compete and compete strongly with Pearson VUE for end-to-end post-school (16+) invigilated CBT service contracts.

104. Accordingly, the CMA has found that there is a realistic prospect that the Merger would result in an SLC in the supply of end-to-end post-school (16+) invigilated CBT services in the UK, in form of price rises and/or a reduction in service quality provided to examining bodies/customers, which could be passed on to candidates.

### ***Barriers to entry and expansion***

105. 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, such entry or expansion must be timely, likely and sufficient.<sup>23</sup>
106. Pearson VUE submitted that barriers to entry are low and that in order to provide invigilated testing services, one would need to develop or acquire some or all of the following component elements of invigilated testing:
- (a) test development services (and psychometric services);
  - (b) a booking, scheduling and payment system;
  - (c) a test delivery solution (potentially PBT or CBT but in practice a new entrant is likely to need to be able to offer a CBT solution);
  - (d) a test centre network (hardware and invigilation); and
  - (e) marking and results reporting capability.
107. Further, Pearson VUE submitted that there are no legal or regulatory barriers to developing or acquiring these capabilities, although significant investment would be needed, especially to obtain a network of wholly-owned test centres.
108. In response to the CMA's investigation, third parties told the CMA that there are considerable barriers to entry in the UK, mainly due to the required investment in the infrastructure, in particular for test centres, and for the

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<sup>23</sup> [Merger Assessment Guidelines](#), from paragraph 5.8.1.

software required to deliver tests. This is also consistent with what learndirect told the CMA ([redacted]).<sup>24</sup>

109. The CMA did not receive any evidence that a third party was intending to enter or expand in the market on a timely, likely and sufficient basis to mitigate the SLC arising as a result of the Merger.
110. For the reasons set out above, the CMA considers that barriers to entry and expansion are relatively high for end-to-end services and would not prevent a realistic prospect of an SLC as a result of the Merger.

### **Third party views**

111. The CMA contacted 23 customers of which 16 responded, 17 competitors of the Parties' competitors of which ten responded, and four suppliers, of which three responded. A few customers raised concerns regarding the Merger and the large majority of the Parties' competitors and the learndirect's suppliers raised concerns. Third party comments have been taken into account where appropriate in the competitive assessment above.

### **Decision**

112. Consequently, the CMA believes 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 UK.
113. The CMA therefore considers that it is under a duty to make a reference under section 33(1) of the Act. However, the duty to refer is not exercised pursuant to section 33(3)(b) whilst the CMA is considering whether to accept undertakings under section 73 of the Act in lieu of a reference. Pursuant to section 73A(1) of the Act, the Parties have until 9 December 2015 to offer an undertaking to the CMA that might be accepted by the CMA under section 73(2) of the Act. If the Parties do not offer an undertaking by this date, if the Parties indicate before this date that they do not wish to offer an undertaking, or if pursuant to section 73A(2) of the Act the CMA decides by 16 December 2015 that there are no reasonable grounds for believing that it might accept the undertaking offered by the Parties, or a modified version of it, then the CMA will refer the Merger for a phase 2 investigation pursuant to sections 33(1) and 34ZA(2) of the Act.

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<sup>24</sup> Issues meeting, 10 November 2015.

**Sheldon Mills**  
**Senior Director of Mergers**  
**Competition and Markets Authority**  
**2 December 2015**