

Anticipated acquisition by Kaplan International Holdings Limited of Osborne Books Limited

ME/6576/15

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 9 February 2016. Full text of the decision published on 11 March 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. Kaplan International Holdings Limited (**Kaplan**) has agreed to acquire Osborne Books Limited (**Osborne**) (the **Merger**). Kaplan and Osborne 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 online and printed content for studying the Association of Accountancy Technicians (**AAT**) professional accountancy qualifications (**AAT content**). Kaplan is also present in the supply of AAT teaching courses for students.
4. The evidence gathered by the CMA indicated that course content for other accountancy qualifications was not a substitute for AAT content because the content was specific to the qualification. The CMA also found AAT content suppliers serve customers across the UK and the main parameters of competition do not differ locally. On the basis of this evidence, the CMA concluded that the appropriate frame of reference to assess the effects of the Merger was the supply of AAT content in the UK.

Horizontal effects

5. The CMA found that the Parties are effective competitors in the supply of AAT content, with a combined share of supply of AAT content of greater than [60-70]% in the UK. Post-Merger, there would only be one remaining competitor (BPP) to the Parties. On this basis, the CMA could not rule out that there was a realistic prospect of a substantial lessening of competition (**SLC**) that would enable the Parties to raise prices and/or reduce the quality of its offering post-Merger.

Vertical effects

6. The CMA also assessed whether Kaplan, post-Merger, would have the ability and incentive to foreclose the supply of AAT content to other AAT course providers. Kaplan derives most of its revenue from AAT courses, for which AAT content is an input. The CMA found that Kaplan would not have the ability to divert students from competitors' AAT courses to its own courses by reducing supply of AAT content. This is because Kaplan does not compete closely with government-funded colleges active in the supply of AAT courses. Therefore, limiting the supply of AAT content to such colleges would not benefit Kaplan in terms of increased demand for its courses. In addition, other AAT course providers could switch to BPP's AAT content, further limiting the ability to reduce the supply of AAT content to course providers. Having concluded that Kaplan did not have the ability to foreclose the supply of AAT content it was unnecessary for the CMA to consider its incentives.
7. The CMA therefore concluded that the Merger does not give rise to a realistic prospect of an SLC as a result of vertical effects through the loss of actual competition in the provision of AAT content

Conclusion

8. It was not necessary for the CMA to determine conclusively whether there is a realistic prospect that the Merger will result in an SLC in the supply of AAT content in the UK, because, even assuming that it will, the CMA has in any event decided to exercise its discretion to apply the markets of insufficient importance exception (the **de minimis exception**) to the duty to refer under section 33(2)(a) of the Enterprise Act 2002 (the **Act**).
9. The Merger will therefore **not be referred** under section 33(1) of the Act.

ASSESSMENT

Parties

10. Kaplan is a provider of professional qualification courses in the UK, including a wide range of business, finance and accounting courses, and is also a publisher of exam-based content designed for its own courses and for external use. As part of its business, Kaplan provides courses for the AAT qualification and AAT content, both to students subscribed to its own courses and to external students.
11. In the financial year ended in 31 December 2014, Kaplan Publishing Limited¹ generated revenue of £12 million of which £[X] million was generated from the sales of AAT content in the UK.
12. Osborne is a publisher of business and accounting content in the UK, and is primarily active in the supply of AAT content. In the financial year ended 31 December 2014, Osborne generated revenue of approximately £1.7 million, of which £[X] million was attributable to customers of AAT content located in the UK.

Transaction

13. On 23 October 2015, Kaplan and Osborne's shareholders entered into a Share Sale Agreement relating to the acquisition of all of the issued share capital of Osborne by Kaplan.
14. The completion of the Merger is conditional on CMA's clearance of the Merger in Phase 1.

Jurisdiction

15. The CMA believes that both Kaplan and Osborne are 'enterprises' for the purposes of the Act² and that these enterprises will cease to be distinct as a result of the Merger.
16. The Parties submit that their combined share of supply in the supply of AAT content in the UK is [60–70]%, excluding internal sales, and [60–70]%, including internal sales, with an increment of [10–20]% and [20–30]%,

¹ Kaplan Publishing Limited is a wholly owned subsidiary of Kaplan International Holdings Limited and the company responsible for producing the content for Kaplan's business, finance and accounting courses.

² See section 129 of the Act and paragraph 4.8 of the [Mergers: Guidance on the CMA's jurisdiction and procedure](#).

respectively (see Table 1 below). The CMA therefore considers that the share of supply test in section 23 of the Act is met.

17. 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.
18. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 18 December 2015 and the statutory 40 working day deadline for a decision is therefore 16 February 2016.

Counterfactual

19. 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, the CMA considers that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or that there is a realistic prospect of a counterfactual that is more competitive as between the Parties than these conditions.³
20. In this case, there is no evidence supporting an alternative counterfactual, and neither the Parties nor any third parties have put forward arguments in this respect. Therefore, the CMA considers the prevailing conditions to be the relevant counterfactual.

Background

AAT content

21. The AAT qualification is divided into four levels of advancing difficulty, and every level of the AAT qualification consists of different units.
22. There are three suppliers of AAT content in the UK: the Parties and BPP. These three AAT content suppliers all provide separate AAT content for each

³ [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](#), Annex D).

unit of levels 2 to 4⁴, including, for each level, a tutorials book, workbooks with practice questions and notebooks.

23. The customers of AAT content can be:
- (a) *Course providers* that buy AAT content from one or more publishers depending on their course requirements and feedback from their students, among other things.
 - (b) *Wholesalers/retailers* that purchase AAT content from publishers to sell it directly to students.
 - (c) *Online customers* that purchase AAT content online directly from BPP, Kaplan, Osborne or from a retailer.
24. Students may be provided with AAT content as part of their course fee, or the course provider may recommend purchasing particular AAT content. This content is produced by the course provider itself or from one of the AAT content suppliers.

AAT courses

25. AAT courses are delivered in different ways:
- (a) Classroom courses, in which students are taught by a tutor in a classroom and can be provided by:
 - (i) private entities, such as Kaplan, BPP, First Intuition, in return for the payment of a fee by the students themselves or their employers; or
 - (ii) public colleges, which only offer government-funded courses (eg further education colleges).
- In contrast to students studying an AAT course with a private provider, students in public colleges do not pay for the course themselves (at least in its totality). As a result, public college AAT students tend to be younger than private AAT course students. Private AAT course students normally work full or part time.
- (b) Distance learning or online courses, in which students study individually and are provided by the course supplier with a study plan and other study materials including online resources. Some course providers offer access

⁴ The Parties do not supply AAT content for level 1, which is a short AAT accountancy qualification designed to develop basic business and finance skills such as using mathematics for accounting, creating business documents and performing essential accounting procedures.

to a tutor via email or telephone. A few course providers also offer courses where students use online classrooms in which students are taught simultaneously by a tutor.

Frame of reference

26. 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.⁵
27. The CMA's approach to market definition is generally to begin with the overlapping products of the Parties in the narrowest plausible candidate market and then to consider whether this can be widened primarily on the basis of demand-side considerations. If appropriate, the CMA then considers if supply-side substitution allows several products to be aggregated into a wider market.⁶

Product scope

28. As set out above, the Parties overlap in the supply of different levels of AAT content.

Parties' views

29. Kaplan submitted that the narrowest relevant product frame of reference is the supply of AAT content for the AAT qualification levels 2, 3 and 4.
30. To support this the Parties stated that:
 - (a) From the demand-side, AAT content is not substitutable with other UK professional accountancy content. That is, students will require content that is specifically orientated towards the specific AAT course and exam.

⁵ [Merger Assessment Guidelines](#), paragraph 5.2.2.

⁶ [Merger Assessment Guidelines](#), section 5.2.17

(b) The AAT qualification is one of the junior qualifications and is generally less expensive and considered less rigorous academically than most other accountancy qualifications.

31. General accountancy textbooks are not considered to be substitutable for AAT content. As with other professional accountancy content, general accountancy textbooks are at most complementary.
32. With regard to supply-side factors, Kaplan submitted that suppliers of other (non-AAT) accountancy content would find it relatively easy to start supplying AAT content quickly, particularly in response to a price increase by current providers of AAT content.

CMA analysis

33. The CMA considered whether the frame of reference should be broadened to include both the supply of AAT content and the supply of other accountancy text books.
34. The CMA found that other accountancy text books are not an alternative to AAT content, which is targeted to students of the most junior accountancy level. None of the third parties that responded to the CMA's market testing identified other accountancy content as a substitute to AAT content.
35. With regard to supply-side factors, the CMA has not received any evidence to suggest that suppliers of other accountancy content would have the ability and incentive to commence supplying AAT content quickly in response to a price increase.
36. Separately, the CMA also assessed whether it was appropriate to define the market more narrowly by distinguishing between: (i) the supply of AAT content for each level of the AAT qualification; and/or (ii) customer segments. However, as the conclusion of the CMA's assessment would not differ depending on the exact definition of the product frame of reference, it was not necessary for the CMA to reach a conclusion on these issues.

Conclusion

37. For the reasons mentioned above, the CMA considered the impact of the Merger on the supply of AAT content.

Geographic scope

Parties' views

38. Kaplan submitted that the supply of AAT content is UK wide because all AAT content suppliers offer AAT content to customers located across the UK.

CMA assessment

39. The evidence gathered by the CMA indicated that:
- (a) the price of AAT content is set nationally;
 - (b) all AAT content suppliers have distribution systems with national coverage; and
 - (c) the conditions of competition for the supply of AAT content are similar across the UK.
40. The CMA therefore concluded that the appropriate geographic scope for its assessment was the UK.

Conclusion on frame of reference

41. For the reasons set out above, the CMA has considered the impact of the Merger in the supply of AAT content in the UK.

Competitive assessment

Horizontal unilateral effects

42. 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.⁷ 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 AAT content in the UK.

⁷ [Merger Assessment Guidelines](#), from paragraph 5.4.1.

Shares of supply

43. The Parties' shares of supply for the provision of AAT content in the UK, by revenue, differ depending on whether the CMA includes Kaplan's and BPP's sales of AAT content to students attending their own courses (intra-group sales).

Table 1 – Shares of supply of AAT content in the UK (2014)

	Share (excluding intra-group sales)		Share (including intra-group sales)	
	£m	%	£m	%
Kaplan	[£]	[10–20]	[£]	[30–40]
Osborne	[£]	[50–60]	[£]	[20–30]
Combined share		[60–70]		[60–70]
BPP	[£]	[30–40]	[£]	[30–40]
Total	[2–3]	100	[4.5–5.5]	100

Source: CMA estimates based on the Parties' and third parties' sales information

44. The combined share of supply of the Parties is high in either circumstance (more than [60–70]%) and the increment resulting from the merger is significant even excluding Kaplan's intra-group sales ([10–20]%).

Closeness of competition and constraints from other AAT content suppliers

Parties' submissions

45. Kaplan stated that some independent course providers may consider Kaplan and Osborne's content to be substitutable. However, in Kaplan's view, AAT content supplied by Kaplan and Osborne differs in two main respects:
- Osborne's business model is focused on publishing, not on being a course provider, whereas Kaplan generates the vast majority of its AAT content sales ([80–90]%) from sales of AAT content to its own students (ie intragroup sales). In its view, Kaplan does not compete with Osborne regarding these sales.
 - Kaplan's AAT content is written by Kaplan's lecturers and is designed for use on its own courses, and orientated towards their exams. On the other hand, Osborne's AAT content is written by freelance authors and covers the AAT syllabus comprehensively, not adhering to any specific course provider's teaching structure.

46. Kaplan further states that BPP is its closest competitor in the supply of AAT content because BPP uses the same business model under which it tailors its AAT content to its own courses.
47. Kaplan also submitted that the number of Osborne customers of AAT content that are also Kaplan's customers is [X] (see, however, in paragraph 52, that some customers submitted that they purchase AAT content from both Kaplan and Osborne).

Third party submissions

48. Some third parties submitted that Osborne is particularly strong in AAT content for level 2, whilst Kaplan and BPP predominantly supply AAT content to levels 3 and 4. Furthermore, a third party noted that, whilst Kaplan and BPP have sales forces which proactively contact colleges and other customers, Osborne does not use a sales team. Rather, its materials are recommended for lower AAT levels based on its reputation.
49. However, the majority of customers that responded to the CMA's market testing stated that Kaplan and Osborne compete closely in the supply of AAT content. One third party in particular submitted that Kaplan and Osborne's offers are broadly the same, primarily comprising study manuals and question banks with similar pricing and covering the same content.
50. Most customers stated that they have used the same AAT content supplier for many years and that they would not consider a switch to another AAT content supplier in response to a 5% price increase. However, most customers identified price, along with quality, as being highly relevant in their choice of AAT content supplier. Third party evidence is therefore mixed on whether AAT content customers are price sensitive or not.
51. Furthermore, some customers indicated that they had switched providers before: some between Osborne and BPP; and only one between Kaplan and BPP. This evidence suggests that competition may be closer between BPP and Osborne. However, this evidence is anecdotal, based on a relatively small number of the Parties' customers, and therefore the CMA was unable to place much weight on this.
52. Two customers that responded to the CMA's market testing purchase AAT content from more than one supplier, including Kaplan and Osborne.

Internal documents

53. An internal document from Kaplan that compares the AAT content of each of the Parties - using scores on a scale from 1 to 10 and discussing their strengths and weaknesses - suggests that their AAT content does not differ substantially. [REDACTED].⁸ BPP's AAT content is not assessed in this document. The CMA considers that this is evidence that the Parties compete.
54. Another internal document of Kaplan states that one rationale for the Merger was the '[REDACTED]', which also suggests that Kaplan and Osborne are close competitors and that, after the Merger, Kaplan would not face significant constraints from other AAT content suppliers.⁹
55. Osborne's internal documents include a win-loss analysis, which shows that in 2014 Osborne lost [REDACTED] customers in total, regained [REDACTED] customers and gained [REDACTED] new customers. For a small number of customers, this document indicates where Osborne won or lost its customers: (i) Osborne lost [REDACTED] customers to BPP and [REDACTED] customers to Kaplan; and (ii) Osborne regained [REDACTED] customers from BPP and [REDACTED] customer from Kaplan. The main reasons for switching in both directions are related to quality of content and the overall package (ie customer service and postage costs).¹⁰
56. This win-loss analysis indicates that course providers switch between the three AAT content suppliers. Osborne [REDACTED] and this could indicate that BPP is a closer competitor to Osborne than is Kaplan. However, AAT content from Osborne and Kaplan appears interchangeable to customers and it is difficult to be confident that the constraint from BPP would ensure that the Merger would not lead to a loss of competition. In addition, as discussed above, given the limited number of examples from the win-loss analysis, it was necessary for the CMA to approach this evidence with a certain degree of caution.
57. Finally, another Osborne internal document compared the prices of the three AAT content suppliers. It indicated that the prices charged for the level 2 materials do not differ substantially for most materials. More importantly, the difference between the total price of Kaplan's and Osborne's AAT content (after discounts) for levels 2 and 3 [REDACTED].¹¹ The same applies regarding the total price (after discounts) of the units of all levels together.¹²

⁸ Internal document '[REDACTED]'.

⁹ See '[REDACTED]'.

¹⁰ See Osborne's internal documents: '[REDACTED]' and '[REDACTED]'. This document does not indicate in all cases the AAT supplier to which Osborne lost or from which Osborne won its customers.

¹¹ See Osborne's internal document: '[REDACTED]'.

¹² For level 4, the difference between BPP's and Kaplan's total price (after discount) is [REDACTED].

Conclusion

58. As shown in Table 1 above, post-Merger, Kaplan will be the largest supplier of AAT content to independent customers in the UK with a share of supply of approximately 60 to 70% including and excluding intra-group sales. BPP will be the only other supplier of external AAT content, with a significantly smaller market share, of approximately 30 to 35%. The Merger will therefore reduce the number of AAT content suppliers in the UK from three to two.
59. Furthermore, based on the evidence described above, the Parties compete for the supply of AAT content and the constraints that Kaplan will face post-Merger from BPP do not necessarily appear to be sufficient to prevent it from increasing prices and/or reducing the quality of its services.
60. As a result, the CMA cannot rule out that the Merger will give rise to a realistic prospect of an SLC in the supply of AAT content in the UK. However, for the reasons set out in paragraphs 90 to 109 below regarding the *de minimis* exception, the CMA does not find it necessary to reach a conclusion in this case.

Vertical effects through the loss of actual competition in the provision of AAT content

61. As set out above, Kaplan offers AAT courses and provides its students with its own AAT content, the cost of which is included in the course fee.
62. The CMA therefore assessed whether, post-Merger, Kaplan would have the ability and incentive to foreclose other AAT course providers, either by increasing the prices of its AAT content (partial foreclosure), or by ceasing to supply AAT content to independent customers altogether (complete foreclosure).
63. The CMA's approach to assessing vertical theories of harm is to analyse the following cumulative conditions: (a) the ability of the merged entity to foreclose competitors, (b) the incentive of it to do so, and (c) the overall effect of the strategy on competition.¹³

Ability to foreclose

64. Whether Kaplan will have the ability to foreclose other AAT course providers after the Merger will depend on: (a) the extent to which Kaplan competes with those AAT course providers; (b) how important the AAT content supplied by

¹³ [Merger Assessment Guidelines](#), paragraph 5.6.6.

the Parties is to AAT course providers and whether there are other alternative AAT content suppliers; and (c) how much the price of AAT content represents in terms of the total costs of AAT course providers.

Parties' views

65. Kaplan stated that, post-Merger, it would not have the ability or incentive to foreclose its supply of AAT content to other AAT course providers.
66. In particular, Kaplan told us that its ability to foreclose will be thwarted for a number of reasons, including:
 - (a) AAT content is not an essential input for AAT courses.
 - (b) Its downstream customers could switch supply to the other AAT content publisher, BPP.
 - (c) There are very low barriers to enter into the AAT content market with a number of potential competitors of which some are already providing AAT courses and producing their own AAT content for use in-house.
 - (d) The cost of AAT content represents a small proportion of AAT course providers' overall costs, which include, among other things, premises, staffing and equipment. Therefore, an increase of the independent course providers' costs with AAT content would not significantly impact the profits of those course providers.

Third party submissions

67. All government-funded colleges offering AAT colleges that responded to the CMA market-testing stated that they do not compete with Kaplan in the provision of AAT courses. However, the long distance providers of AAT courses submitted that they compete closely with Kaplan.
68. Some AAT course providers stressed the importance of being able to continue using the AAT content of their current AAT content supplier. One long distance AAT course provider in particular submitted that it is important for its business to continue to have access to Osborne's AAT content, because Osborne is the only AAT content supplier that is not a competitor in the supply of long distance AAT courses. However, some course providers stated that they would switch to BPP in response to a price increase.
69. AAT course providers' responses also show that the business models of course providers vary: whilst some course providers include the price of AAT content in their course fee, others do not, but still request that students

purchase specific AAT content. For the AAT course providers that do not include the price of the AAT content in their course fee, a price increase in the Parties' AAT content post-Merger does not appear to significantly affect their ability to compete with Kaplan in the supply of AAT courses.

CMA analysis

70. Some third parties indicated that the choice of AAT content is important for AAT course providers as it impacts on the attractiveness of their courses. Furthermore, the cost of AAT content seems to represent a non-negligible proportion of the total costs of AAT course providers, especially for long distance course providers.¹⁴ An increase in the cost of AAT content may therefore significantly impact the profits of at least some course providers.
71. However, the CMA considers that post-Merger Kaplan would not have the ability to partially or fully foreclose the supply of AAT content to other course providers for the following reasons:
- (a) The majority of Kaplan's and Osborne's customers are government-funded colleges that do not compete closely with Kaplan in the supply of AAT courses, which diminishes Kaplan's ability to divert sales as a result of a foreclosure strategy.
 - (b) Based on third party responses, the Parties' AAT content is not an essential input for the provision of AAT courses, as course providers can use their own AAT content or switch to BPP.
 - (c) BPP was identified as Kaplan's closest competitor. Therefore, students who did leave any foreclosed course providers could switch to BPP instead of Kaplan. Moreover, it is clear that BPP could not be foreclosed, given that it produces its own AAT course content.
 - (d) Kaplan's share in the supply of AAT courses at national level, by number of new students in 2014,¹⁵ was less than [X] % by reference to all AAT course providers.¹⁶
 - (e) Some AAT course providers produce their own AAT content (eg Premier Training, First Intuition, and Home Learning).

¹⁴ Based on Kaplan's course fees for London-based classroom courses and long distance courses, AAT content only represents [10–20] % of the course fee for classroom courses and around a third of Kaplan's standard long distance courses.

¹⁵ There is no data available on the AAT course market's value. Hence, these estimates are based on data on new registered students in 2014 provided to us by AAT.

¹⁶ Kaplan's share is around [30–40] %, by number of students, by reference to private classroom course providers.

- (f) AAT course providers (including AAT online course providers) would still be able to purchase the Parties' AAT content through wholesalers.
- (g) The Parties' internal documents indicate that Kaplan [X]. The CMA has not received any evidence to indicate that Kaplan has sought to restrict supply of its AAT content to other course providers, despite being active in both AAT content and course provision pre-merger.

Conclusion on ability

- 72. For the reasons set out above, the CMA has found that it would be difficult for Kaplan, post - Merger, to divert students from competitors' AAT course providers to its own courses by foreclosing access to AAT content. In particular, Kaplan does not compete closely with government-funded colleges in the supply of AAT courses - from which Kaplan derives most of its AAT content revenue - and other AAT course providers could switch to BPP.
- 73. The CMA, therefore, believes that the Merger will not change Kaplan's ability to foreclose its competitors in the supply of AAT courses.

Incentive and overall effect of a foreclosure strategy on competition

- 74. Since the CMA has concluded that the Merger will not provide Kaplan with sufficient ability to foreclose, the CMA has not further assessed the impact of the Merger on Kaplan's incentive to foreclose and the effect of a foreclosure strategy on competition.

Conclusion on vertical effects

- 75. For the reasons set out above, the CMA considers that the Merger does not give rise to a realistic prospect of an SLC as a result of vertical effects through the loss of actual competition in the provision of AAT content.

Barriers to entry and expansion

- 76. 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 substantial lessening of competition. In assessing whether entry or expansion might prevent a substantial lessening of competition, the CMA considers whether such entry or expansion would be timely, likely and sufficient.¹⁷

¹⁷ [Merger Assessment Guidelines](#), from paragraph 5.8.1.

77. Entry or expansion of existing firms can mitigate the initial effect of the merger on competition, and in some cases may mean that there is no substantial lessening of competition. In assessing whether entry or expansion might prevent a substantial lessening of competition in the supply of AAT content in the UK, the CMA considers whether such entry or expansion would be timely, likely and sufficient.¹⁸

The Parties' views

78. Kaplan submitted that barriers to entry and expansion in the supply of AAT content in the UK are not significant, because: (i) costs of entry are low (around £250,000 over a 9 month period to achieve a 5% share of supply); (ii) there are no technical or regulatory obstacles to entry (ie AAT does not approve or pre-vet the AAT content); and (iii) there are a large number of authors currently providing or capable of providing AAT content.
79. Kaplan also stated that both independent course providers who already produce their own AAT content and general professional education publishers can easily enter the AAT content market. In fact, as mentioned in paragraph 32, Kaplan submitted that suppliers of other (non-AAT) accountancy content would find it relatively easy to start supplying AAT content quickly, particularly in response to a price increase by current providers of AAT content.

CMA assessment

Likelihood of entry

80. The CMA cannot rule out that, as submitted by the Parties, independent course providers and publishers of other accountancy content might enter the AAT content market in the event of a sustained price rise.
81. However, the evidence gathered by the CMA does not suggest they are planning to do so and the CMA is not aware of any entry in the AAT content market in the past few years.
82. Without evidence of likely entry, the CMA does not need to consider whether entry would be timely and sufficient to mitigate any anticompetitive effects resulting from the Merger.

¹⁸ *Merger Assessment Guidelines*, paragraphs 5.8.1 to 5.8.3.

CMA conclusion

83. For the reasons set out above, the CMA concluded that entry or expansion in the supply of AAT content in the UK would not be timely, likely and sufficient to mitigate the potential anticompetitive effects of the Merger such that the Merger would not give rise to a realistic prospect of an SLC.

Third party views

84. The CMA contacted customers and competitors of the Parties, as well as an industry association. From the eight customers that responded to the CMA's market-testing, two expressed concerns that Osborne's AAT content might not be available to them after the Merger. Another customer was concerned about the loss of the only independent supplier of AAT content to one of its main competitors. The other five customers did not raise concerns and no concerns were raised by [redacted] and the [redacted] that responded to the CMA's questionnaire.
85. Third party comments have been taken into account where appropriate in the competitive assessment above.

Conclusion on substantial lessening of competition

86. Based on the evidence set out above, the CMA believes that the Merger does not give rise to a realistic prospect of an SLC as a result of vertical effects through the loss of actual competition in the provision of AAT content.
87. However, the CMA's investigation cannot rule out that the Merger may result in an SLC as a result of horizontal unilateral effects in the supply of AAT content in the UK. The CMA therefore cannot rule out that the test for reference may be met in this case. However, it has not been necessary for the CMA to reach a conclusion on this point because the CMA has, for the reasons set out below, exercised its discretion to apply the *de minimis* exception to the duty to refer under section 33(2)(a) of the Act.

Exceptions to the duty to refer

88. 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 CMA has considered below whether it is appropriate to apply the *de minimis* exception to the present case.

89. The Parties stated that they were willing to waive their procedural rights to a full investigation, including the receipt of an Issues Letter and an Issues Meeting, in the event that the CMA found that its duty to refer might be met but that it would exercise its discretion not to refer given the market concerned were of insufficient importance. This statement was provided without prejudice to the Parties' views on whether the duty to refer was met.¹⁹ Given that, on the basis of the factors below, the CMA decided to apply this discretion, it did not send an Issues Letter to the Parties and no Issues Meeting was held.

Markets of insufficient importance

90. 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 taking into account factors including the size of the market(s) concerned, the likelihood that harm will arise, the magnitude of competition potentially lost and the duration of such effects.²⁰

'In principle' availability of undertakings in lieu

91. The CMA's general policy, regardless of the size of the affected market, is not to apply the *de minimis* exception where clear-cut undertakings in lieu of a reference (UILs) could, in principle, be offered by the parties to resolve the concerns identified.²¹
92. In order for a UIL to be available in principle it must be:
- (a) sufficiently clear-cut; and
 - (b) not wholly disproportionate in relation to the concerns identified.²²
93. If the competition concerns arising from a merger relate to such an integral part of the transaction that to remedy them via a structural divestment would be tantamount to prohibiting the merger altogether, then clear-cut UILs are not in principle available.²³

¹⁹ This procedural approach is in line with the *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122), December 2010 – see paragraph 2.53. This guidance has been adopted by the CMA (see Annex D to *Mergers: Guidance on the CMA's Jurisdiction and Procedure*).

²⁰ *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance*, chapter 2.

²¹ *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance*, paragraphs 2.2 and 2.18-27.

²² *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance*, paragraphs 2.22-2.27.

²³ *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance*, paragraph 2.25.

94. The CMA's concerns regarding the supply of AAT content in the UK may in principle have been addressed, in a clear cut way, by the divestment of the Osborne's AAT content business.
95. The CMA considers that the divestment of Osborne's AAT content in the UK would be tantamount to prohibiting the Merger as it would amount to divesting almost all the acquired business.
96. Accordingly, the CMA considers that, because any divestment capable of addressing the competition concerns raised by the Merger would be tantamount to prohibition, there are no clear-cut UIL available in principle in this case.
97. On this basis, the CMA therefore proceeded to consider whether to exercise its discretion to apply the *de minimis* exception.

Relevant factors

98. Where the annual value in the UK of the market(s) concerned is, in aggregate, less than £3 million, the CMA will generally not consider a reference justified provided that there is in principle no clear-cut UIL available. Where the annual value in the UK, in aggregate, of the market(s) concerned is between £3 million and £10 million, the CMA will consider the likely level of consumer harm by reference to a number of factors²⁴ when deciding whether or not to apply the *de minimis* exception: the size of the market, the strength of the CMA's concerns, the magnitude of competition that would be lost by the merger, and the likely durability of the merger's impact.²⁵ The CMA will also consider the wider implications of a *de minimis* decision.²⁶ As the value of the market for the supply of AAT content in the UK is higher than £3 million (see paragraph 99 below), each of these factors is considered in turn below.

Market size

99. Based on data provided by the Parties and [X], the CMA estimates that the total size of the market for the supply of AAT content in the UK in the markets for the supply of AAT content in the UK is £[4.5–£5.5] million.²⁷

²⁴ *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance*, paragraph 2.15.

²⁵ *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance*, paragraph 2.28.

²⁶ *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance*, paragraph 2.40-43.

²⁷ The total value of the AAT content market is £[2–3] million without intra-group sales and £[4.5–5.5] million with intra-group sales.

100. Including intra-group sales, the total size of the market concerned exceeds £3 million at approximately £[4.5–£5.5] million.²⁸ However, the Parties only compete closely for the supply of AAT content to AAT students that are not taking the AAT courses provided by Kaplan or BPP. Taking this into account, the value of the market concerned, excluding Kaplan’s and BPP’s internal sales of AAT to their own students, is below £3 million (at £[2–3] million, as shown in Table 1 above).²⁹
101. The evidence available to the CMA does not indicate that the size of the market concerned is expected to increase materially in the foreseeable future.
102. Overall, the CMA therefore considers that the market size is a factor pointing strongly in favour of the application of the *de minimis* exception.

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

103. Based on the evidence assessed in the competitive assessment, the CMA considers that the Merger may have an anti-competitive effect on the supply of AAT content, as the Merger will reduce the number of competitors from three to two in this market.
104. However, the effect of the merger will be mitigated by the competitive constraint that BPP will continue to exert on Kaplan post-Merger, and by the fact that a number of course providers already use their own course content students attending these courses will not be affected by the Merger.
105. Overall, the CMA does not consider that the likelihood of the SLC arising and the magnitude of competition lost as a result of the Merger is a factor pointing against the application of the *de minimis* exception.

Durability

106. The likelihood of new entry and expansion is not sufficient to offset the SLC that may arise from the Merger in the market concerned. However, a number of course providers already supply their own AAT content to students and it is therefore foreseeable in the longer term that these providers may offer their

²⁸ Where the annual value in the UK of the market(s) concerned is, in aggregate, less than £3 million a reference will generally not be justified. See paragraph 2.15 of the [Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance](#).

²⁹ See footnote 13 of the [Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance](#), which explains that the market concerned may be a subset of the relevant market as defined for the purpose of the competition assessment, where it is clear that customer detriment will be experienced by only a proportion of the relevant market.

material to third parties on a commercial basis in the event of a sustained price rise.

Replicability

107. The CMA will also take account of the wider implications of its decisions, and will be less likely to exercise its discretion, and therefore more likely to refer, where a Merger is potentially replicable across a number of similar markets in a particular sector.³⁰
108. The Merger does not appear to be one of a potentially large number of similar mergers that could be replicated across the sector. The supply of AAT content is a niche, well defined market offering study materials specific to a foundation level accountancy qualification. In any future transactions in this sector the CMA would, in any event, examine to what extent the competitive conditions are comparable to those it has assessed for the purposes of this decision.
109. The CMA thus considers, on the basis of the evidence available to it, that the Merger is not likely to be replicable in similar markets across the sector.

Conclusion on the application of the de minimis exception

110. Taking all the above factors into consideration, and having particular regard to the size of the market concerned, the CMA considers that the market concerned in this case is not of sufficient importance to justify the making of a reference. As such, the CMA considers that it is appropriate for it to exercise its discretion not to make a reference.

Decision

111. Consequently, the CMA has not had to conclude on whether it believes that it is or may be the case that the Merger has resulted, or may be expected to result, in a substantial lessening of competition 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 would be of insufficient importance to justify the making of a reference.

³⁰ [Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance](#), paragraphs 2.40-2.43.

112. The Merger will therefore **not be referred** under section 33 of the Act.

Jonathan Parker
Director of Mergers
Competition and Markets Authority
9 February 2016