

HUNTER DOUGLAS / 247 HOME FURNISHINGS LIMITED

Response to Remedies Notice

1. Introduction and Summary

- 1.1 Hunter Douglas' response to the Remedies Notice is prepared on the basis of the CMA's provisional conclusion that the 2019 Transaction has resulted, or may be expected to result, in a substantial lessening of competition ("SLC") in the online retail supply of made-to-measure blinds in the United Kingdom. For the avoidance of doubt, and as will be set out in the Parties' response to the Provisional Findings, the Parties do not agree that there are grounds for such a finding. The submissions contained in this response should therefore not be considered as an acceptance of the finding of an SLC in the Provisional Findings and are prepared solely on the basis that an SLC finding is upheld in the CMA's final decision.
- 1.2 As far as Hunter Douglas is aware, the situation in which the CMA finds itself is unprecedented. Never before has the CMA been required to consider a remedy which puts the acquiring party back in a position in which it continues to hold over 25% of the target¹. Yet that is precisely what is required in this case, given the CMA's finding that it is the change in the nature of control from material influence (under the counterfactual) to a controlling interest that gives rise to an SLC.
- 1.3 The CMA has provisionally concluded that Hunter Douglas acquired material influence over the activities of 247 as a result of the 2013 Transaction and then acquired control as a result of the 2019 Transaction. Further, the CMA has provisionally concluded that the relevant counterfactual (i.e. the structure of the market in the absence of the 2019 Transaction) is a situation in which Hunter Douglas holds 49% of the ordinary shares of 247.
- 1.4 There is no basis for imposing a remedy that goes beyond the re-establishment of that market structure (i.e. Hunter Douglas continuing to hold at least 49% of the ordinary shares in 247). In other words, the aim of the remedy is not to create a situation in which 247 operates in a wholly independent manner to Hunter Douglas, but rather solely to ensure that Hunter Douglas' de jure control over 247 is removed (i.e. it holds no more than its pre-existing position).

¹ The Parties are aware of the CMA's report and acceptance of undertakings in the *AkzoNobel/Metlac Holdings* case where AkzoNobel was required not to acquire shares over and above the 49% which it already owned. However, in that case, the CMA was considering an anticipated transaction which it was able to prohibit through the undertaking finally agreed. It was not required to unpick a completed transaction, as is the case here. In any event, the CMA did not impose any additional restrictions against the interests already held.

- 1.5 It is therefore clear that, of the two divestiture remedies proposed in the Remedies Notice, only that which requires a divestment of 51% of the ordinary share capital of 247 would be linked to the SLC that has been provisionally found and could be proportionate. To go beyond that approach would be *ultra vires* (the CMA has no power to do anything other than address the SLC that it has found associated with the 2019 Transaction) and disproportionate to the SLC identified in the Provisional Conclusions.
- 1.6 In addition, Hunter Douglas considers that the CMA is wrong to conclude that in the relevant counterfactual Hunter Douglas would no longer enjoy the rights acquired in the 2013 Transaction, for reasons that the Parties will explain in their response to the Provisional Findings. The re-establishment of the expected structure in the absence of the 2019 Transaction under the most likely counterfactual does not therefore require the removal of those rights.

2. The Provisional Findings and Remedies Notice

- 2.1 In its Provisional Findings, the CMA provisionally concludes that the 2019 Transaction has resulted in the creation of a relevant merger situation, and that the creation of that situation has resulted, or may be expected to result, in a SLC in the online retail supply of made-to-measure blinds in the UK. Having identified an SLC, it is for the CMA to decide whether, and if so what, action should be taken for the purpose of remedying, mitigating or preventing the SLC identified in the Provisional Findings².
- 2.2 The CMA has therefore issued a Notice of possible remedies (“the Remedies Notice”) under Rule 12 of the CMA’s rules of procedure for merger, market and special reference groups.
- 2.3 Before commenting on the individual matters set out in the Remedies Notice, it is important to consider the objective that any remedy must achieve. Any remedy must be as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it³. The remedy cannot be for any other purpose: it must solely relate to the merger situation for which an SLC is found⁴. It must also be the least costly and intrusive remedy that the CMA considers to be effective and cannot be disproportionate in relation to the SLC in question⁵.

² Section 35(3) Enterprise Act 2002

³ Section 35(4) Enterprise Act 2002

⁴ Sections 35(3) and 41(2) Enterprise Act 2002, pursuant to which the CMA’s duty is to take such action as it considers to be reasonable and practicable to remedy, mitigate or prevent the SLC concerned.

⁵ *Merger Remedies*, CMA 87, paragraph 3.4

- 2.4 Importantly, in order to be effective, a remedy should seek to re-establish the structure of the market expected in the absence of the merger⁶. In effect, the proposed remedy of the CMA should seek to return the structure of the market to the position set out in the counterfactual.
- 2.5 Further, in order for a remedy to be reasonable and proportionate, it must be the least costly remedy of those that will be effective. If the CMA is choosing between two remedies, both of which are sufficient to address the SLC identified, it must select the remedy that imposes the least cost or that is least restrictive⁷.
- 2.6 These principles are of particular importance when faced with the unusual situation where the Provisional Findings acknowledge that the relevant counterfactual is a position in which Hunter Douglas holds rights which, incidentally, it has provisionally found confer material influence over the activities of 247.

3. Possible Remedies

- 3.1 In the Remedies Notice, the CMA identifies two potential structural remedies to address the SLC identified in the Provisional Findings:
- (a) A divestiture by Hunter Douglas of 100% of the ordinary share capital of 247; or
 - (b) A divestiture by Hunter Douglas of 51% of the ordinary share capital of 247.
- 3.2 In Hunter Douglas's view, the second of these options is the only course of action lawfully open to the CMA. The Provisional Findings provisionally conclude that, in the absence of the 2019 Transaction, the expected structure of the market was one in which Hunter Douglas held 49% of the ordinary share capital of 247⁸. As the CMA's Merger Remedies Guidance sets out, a remedy which re-establishes the structure of the market expected in the absence of the 2019 Transaction should be expected to address the adverse effects at source⁹. The re-establishment of the structure of the market does not require a complete divestment by Hunter Douglas of its interest in 247 and the imposition of such a measure would, therefore, clearly be *ultra vires* by exceeding the SLC associated with the 2019 Transaction and disproportionate to address the SLC identified by the CMA.

⁶ *Merger Remedies*, CMA 87, paragraph 3.5(a)

⁷ *Merger Remedies*, CMA 87, paragraph 3.6

⁸ Paragraph 6.35 of the Provisional Findings where the CMA concludes that the only plausible counterfactual is one in which Hunter Douglas own 49% of the ordinary share capital of 247.

⁹ *Merger Remedies*, CMA 87, paragraph 3.5(a)

4. Divestiture

4.1 The Remedies Notice sets out a number of elements of a potential divestiture which need to be considered in turn.

Scope of the divestiture package

4.2 As set out above, a divestment of 51% of the ordinary share capital of 247 will clearly be effective in addressing the SLC identified by the CMA. No additional measures are required in this respect. Any further restrictions would exceed the scope of the SLC provisionally found by the 2019 Transaction and would both impose unnecessary costs and be disproportionate.

4.3 Furthermore, the Remedies Notice considers whether Hunter Douglas should be entitled to certain additional rights in 247 even if required to divest itself of 51% of the ordinary share capital of 247¹⁰. Prior to the 2019 Transaction (which is the only transaction over which the CMA has jurisdiction, and in respect of which the CMA has provisionally found an SLC), in addition to 49% of the voting rights in 247, Hunter Douglas held certain other rights (as set out in the Annex to the Remedies Notice) and the CMA has provisionally found that a combination of those rights and certain other factors were sufficient to show that Hunter Douglas acquired material influence as a result of the 2013 Transaction¹¹ (although such conclusion is irrelevant to the issue of remedies as the CMA can only seek to restore the status quo ante).

4.4 The additional rights fall into three categories:

- (a) typical minority investor protection rights;
- (b) rights which have no nexus with the United Kingdom; and
- (c) rights specific to the context in which the 2019 Transaction arose.

4.5 Rights 1, 2, 3, 4, and 6 in the Annex are typical investor protection rights so as to prevent any major changes to the business of 247 without the approval of its minority investor¹². Hunter Douglas notes, however, that the CMA has failed to include in the Annex the right set out in

¹⁰ Remedies Notice, paragraph 20(e)

¹¹ Provisional Findings, paragraph 5.29

¹² The right to appoint a director, although not untypical, is not always required for investor protection. Further, the right to approve the annual budget may instead be a right to approve exceptional capital expenditure and acquisitions of real property for the purposes of protection of the value of a minority shareholder's investment (although Hunter Douglas would expect this right to be relevant only very rarely given the low capital intensity of online M2M blinds retailers).

clause 5(2)(o) of the Stakeholders Agreement¹³ in respect of related party transactions. Such a right is, however, a standard investor protection right so as to prevent a majority shareholder from being able to reduce the value of a minority investor's investment to its own benefit. Hunter Douglas would expect to benefit from such a right in the event that it is required to divest 51% of the ordinary shares of 247.

- 4.6 The right relating to geographic expansion (Right 5 in the Annex) is a right with no nexus to the United Kingdom. The right relating to the payment of dividends in excess of 35% of profit (Right 9) was a right associated with this since Hunter Douglas was keen to ensure that sufficient funds were available to support international expansion.
- 4.7 The remaining rights set out in the Annex (Rights 7, 8 and 10) are rights which were specific to the structure of the 2013 and 2019 Transactions. Those rights principally served to protect Hunter Douglas's position at the point when the options were exercised. In practice, Hunter Douglas never exercised any of these rights.
- 4.8 As set out above, the aim of a remedy should be to re-establish the structure of the market which would be expected in the absence of the merger, i.e. the counterfactual identified in the competitive assessment. In the Provisional Findings, the CMA considers that the relevant counterfactual is one in which Hunter Douglas holds 49% of the ordinary shares of 247 but does not benefit from the rights set out in the Annex to the Remedies Notice.
- 4.9 However, the Parties consider that this conclusion has been reached on the basis of an incorrect assessment of the nature of the rights acquired by Hunter Douglas in 2013 and the legal rights and obligations created by the suite of documents entered into by Hunter Douglas and the Founding Shareholders at the time. In fact, when assessed properly, the most likely counterfactual is one in which Hunter Douglas own 49% of the ordinary shares of 247 and continues to benefit from all of the additional rights set out in the Annex to the Remedies Notice.¹⁴
- 4.10 Any remedy must return Hunter Douglas to the position it would have been in under the counterfactual (i.e holding 49% of the ordinary shares of 247 and benefiting from the rights acquired in consequence of the 2013 Transaction over which the CMA does not have jurisdiction)¹⁵. Such a remedy is effective in addressing the SLC identified as a result solely of

¹³ Dated 30 April 2013.

¹⁴ Further detail will be provided in the Parties' Response to the Provisional Findings.

¹⁵ Hunter Douglas considers that it should, as a matter of law, be entitled to those rights in the context of any remedy to address the SLC identified. However, as set out above, certain of the rights which were

the 2019 Transaction and goes no further than that which is necessary to address the CMA's SLC finding associated with the 2019 Transaction.

Identification of a suitable purchaser

- 4.11 Whilst the Parties strongly disagree with the CMA's finding of an SLC in the Provisional Findings, Hunter Douglas has considered whether there would be a potential buyer for any divestiture package. In Hunter Douglas' view, it should not be difficult to find a suitable purchaser or purchasers¹⁶ meeting the criteria set out in paragraph 19 of the Remedies Notice. 247 is a profitable business with growth potential, notwithstanding that its market share has fallen in recent years.
- 4.12 The same is true whether or not Hunter Douglas holds the rights set out in the Annex to the Remedies Notice. Those rights do not significantly go beyond rights which would typically be granted to a minority investor for the protection of its investment. Such rights should not, therefore dissuade a potential purchaser or purchasers from acquiring 51% of the ordinary shares of 247. Indeed, many private equity and conglomerate businesses have partial stakes in their portfolio companies.
- 4.13 However, as noted above, the present situation is without precedent to the knowledge of the Parties in that a divestment meeting the criteria set out at paragraphs 7-9 of the Remedies Notice (i.e. the least costly and intrusive remedy that offers a comprehensive solution that is reasonable and practicable to remedy the SLC and that is not disproportionate to the SLC found) does not require the complete removal of Hunter Douglas' rights in 247¹⁷. Specifically, it is clear even from the counterfactual identified by the CMA that, in the CMA's view, Hunter Douglas would have material influence over 247. The CMA must take this into account when assessing and applying proportionate criteria as regards the independence of any purchasers.

Effective Divestiture Process

- 4.14 Hunter Douglas considers that in the context of the global Covid-19 pandemic, a timescale of at least 9 months is appropriate in order to allow for the divestment to take place. Such a period will allow Hunter Douglas to identify a suitable buyer, engage in appropriate negotiations with

put in place at the time of the 2013 Transaction may no longer be relevant in the absence of the put and call options.

¹⁶ Hunter Douglas notes that the pre-existing situation prior to the 2019 Transaction was that two investors held the remaining 51%. Under the CMA's analysis, provided that Hunter Douglas divests itself of 51% of the ordinary shares whether to a single investor or to more than one investor, the SLC identified in the Provisional Findings will have been addressed.

¹⁷ See also paragraph 25, Remedies Notice.

that buyer, obtain CMA approvals and put in place necessary documentation. Hunter Douglas will endeavour to identify a buyer and complete a sale process as quickly as possible, however, given the current, unprecedented situation resulting from the Covid-19 pandemic, it may take more time than usual to do so and a modest extension from the CMA's usual practice of 6 months is therefore appropriate. Hunter Douglas notes that a longer period of time than six months was agreed by the CMA in connection with the CMA's prohibition decision in *JD Sports/Footasylum*.

- 4.15 There is no risk to the 247 business during this period since (a) the measures put in place under the IEO¹⁸ will continue to ensure that 247 is run in a profitable manner and (b) there is no asset risk since Hunter Douglas has no incentive to run down a business in which it will continue to hold a significant minority stake.
- 4.16 Given that there is no risk to the 247 business, there is no risk to the competitive capability of the divestiture package. The competitive capability of the divestiture package could only deteriorate if 247 itself deteriorated. Since there is no possibility of this arising due to the effect of the IEO and Hunter Douglas' incentives, there can be no risk to the divestiture package.
- 4.17 Hunter Douglas does not consider it necessary or proportionate to mandate a divestiture trustee to oversee the divestment process. There is no reason to believe that Hunter Douglas will not be able to identify a suitable purchaser and that it will not proceed with a divestment. Mandating a divestiture trustee in those circumstances would incur an unnecessary cost and would be disproportionate.

5. Conclusion

- 5.1 The Provisional Findings have identified an SLC in respect of the 2019 Transaction only. The Parties strongly disagree with that finding and consider there to be no prospect of identifying an SLC arising as a result in any increase in Hunter Douglas' level of control under the counterfactual to a controlling interest as a result of the 2019 Transaction. The Parties' views on the SLC finding will be set out in its response to the Provisional Findings.
- 5.2 However, to the extent that the CMA maintains its position in its final report, the only proportionate way in which to remedy the SLC identified is to return Hunter Douglas to the position it would have been in absent the transaction. Such a position is the only likely counterfactual. This approach means that the CMA can go no further than requiring Hunter Douglas to divest itself of 51% of the ordinary share capital of 247. It cannot prevent Hunter Douglas from maintaining the rights previously held in 247 to protect its investment and any

¹⁸ Initial Enforcement Order made by the CMA on 21 November 2019.

additional measures would be disproportionate as the CMA notes in its Mergers Remedies Guidance (CMA 87) and, in any event, *ultra vires*.