

Acquisition by Dye & Durham (UK) Limited of TM Group (UK) Limited

Decision to refer

ME/6963/21

The CMA's decision to refer under section 22 of the Enterprise Act 2002 given on 23 December 2021. Full text of the decision published on 1 March 2022.

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.

INTRODUCTION

1. On 8 July 2021, Dye & Durham Limited (**D&D**), through its subsidiary Dye & Durham (UK) Limited, acquired TM Group (UK) Limited (**TMG**) (the **Merger**).
2. On 9 December 2021, the Competition and Markets Authority (**CMA**) decided under section 22(1) of the Act that it is or may be the case that the Merger constitutes a relevant merger situation that has resulted or may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom as a result of horizontal unilateral effects in relation to the supply of property search reports as part of single 'search packs' (**Property Search Report Bundles**) in England and Wales (**E&W**) (the **SLC Decision**).¹ Terms defined in the SLC Decision have the same meaning in this decision unless otherwise specified.
3. On the date of the SLC Decision, the CMA gave notice pursuant to section 34ZA(1)(b) of the Act to D&D of the SLC Decision. However, in order to allow D&D the opportunity to offer undertakings in lieu of reference to the CMA for the purposes of section 73(2) of the Act (**UILs**), the CMA did not refer the Merger for an in-depth investigation pursuant to section 22(3)(b) on the date of the SLC Decision. On 9 December 2021 the CMA extended the statutory four-month period mentioned in section 24(1) of the Act by notice pursuant to section 25(4) of the Act.

¹ See [Dye & Durham \(UK\) Limited / TM Group \(UK\) Limited merger inquiry - GOV.UK \(www.gov.uk\)](https://www.gov.uk).

- Pursuant to section 73A(1) of the Act, if a party wishes to offer UILs, it must do so before the end of the five working day period specified in section 73A(1)(a) of the Act. The SLC Decision stated that the CMA would refer the Merger for an in-depth investigation pursuant to section 22(1) of the Act (and in accordance with section 34ZA(2) of the Act) if: (1) no UILs were offered to the CMA by the end of this period (ie by 16 December 2021); (2) D&D indicated before this deadline that it did not wish to offer UILs; or (3) the UILs offered were not accepted.

THE PROPOSED UNDERTAKING

- On 16 December 2021, D&D offered the CMA a proposed undertaking that would involve the divestment, to a [X] buyer,² of part of [X] its pre-Merger businesses active in the supply of Property Search Report Bundles in E&W as a single divestiture package, namely [X] (the **Proposed Undertaking**).³
- The Proposed Undertaking would not represent a full divestment of D&D's pre-Merger businesses active in the supply of Property Search Report Bundles in E&W. Specifically, the Proposed Undertaking would not include [X].

[X] business

- The Proposed Undertaking would include [X] property search business trading under the name [X] and involve the divestment of the technology platform on which the business operates; approximately [X] staff including [X]; a long-term lease of offices [X]; and IP rights and branding.⁴ The Proposed Undertaking would also include all [X] property search activities of [X] and of [X].⁵ Further, the Proposed Undertaking would include around [X] existing [X] business retail customers.⁶ The part of the [X] business encompassed by the Proposed Undertaking is referred to as the **Divestiture [X] Business**.

² D&D submitted that it has held ["] discussions with ["] who have ["] expressed interest in the divestiture package ["]. D&D submission to the CMA on proposed undertakings in lieu of 15 December 2021 (the **Proposed Undertaking Offer**), paragraph 4.1.

³ Proposed Undertaking Offer, paragraph 1.1.

⁴ Proposed Undertaking Offer, paragraph 2.2.

⁵ Proposed Undertaking Offer, paragraph 2.2. D&D explained that ["], a supplier of Property Search Report Bundles in E&W, which was ["] into the ["] business following D&D's acquisition of ["] (Response by D&D to the section 109 notice issued by the CMA on 27 September 2021, paragraph 3.1). D&D also explained that ["], it acquired property search business ["] which were being operated ["] and were to be ["] into the ["] business ["] (Response to the Enquiry Letter, note 1 to the table at paragraph 11.8).

⁶ Proposed Undertaking Offer, paragraph 2.2.

8. However, the Proposed Undertaking would not include around [X] of the approximately [X] retail customers of the existing [X] business retail customers, who are currently using, or with whom D&D is actively engaging in relation to the use of certain D&D products that would not be included in the Proposed Undertaking.⁷ These D&D products include [X]; [X];⁸ and [X].⁹
9. The Merged Entity's retention of the relevant [X] business retail customers would be effected by way of a transition services agreement, pursuant to which the [X] business would continue to service those customers for approximately [X] until the transfer of their accounts and services to one of the Merged Entity's platforms. D&D would not impose any non-solicit or non-compete provisions [X] retail customers retained by the Merged Entity.¹⁰
10. The Proposed Undertaking would also not include [X].¹¹ This is [X] through which the [X] business currently provides a range of ancillary services to its retail customers, including [X].¹²

[X] businesses

11. In relation to [X] business, the Proposed Undertaking would first involve assigning the current [X] agreements that are not [X] to the [X] business. A single combined [X] business would then be divested together with the [X] business to a [X] buyer.¹³
12. The combined [X] business would include the technology platform on which [X] business currently operates;¹⁴ all the infrastructure and assets, including IP rights, capabilities and resources to operate the combined [X] business independently of D&D;¹⁵ [X], a complementary [X] business that principally provides [X] to the [X]

⁷ Proposed Undertaking Offer, paragraph 2.3 and footnote 2.

⁸ ["] provides ["] to conveyancers in E&W through which it provides Property Search Report Bundles together with various ancillary services, including ["]. Response to the Enquiry Letter, paragraph 11.5.4.

⁹ D&D acquired ["] main product is ["], which provides ["]. Response to the Enquiry Letter, paragraph 11.5.8. See also ["].

¹⁰ Proposed Undertaking Offer, paragraph 2.3.

¹¹ Proposed Undertaking Offer, footnote 2 to paragraph 2.3.

¹² Response to the Enquiry Letter, paragraph 11.5.1.

¹³ Proposed Undertaking Offer, paragraph 2.4.

¹⁴ The ["] would be ["] prior to divestment or as part of the divestment via a transition services agreement. Proposed Undertaking Offer, paragraph 2.8.

¹⁵ Proposed Undertaking Offer, paragraph 2.8.

business;¹⁶ [X];¹⁷ around [X] retail customers;¹⁸ and around [X] staff, [X].¹⁹ The parts of the [X] business encompassed by the Proposed Undertaking are collectively referred to as the **Divestiture [X] Business** and together with the Divestiture [X] Business, the **Divestiture Business**.

13. The Proposed Undertaking would not include around [X] of the approximately [X] existing retail customers of [X] who currently use other D&D related products.²⁰

ASSESSMENT OF THE PROPOSED UNDERTAKING

14. As noted at paragraph 2 above, in the SLC Decision the CMA concluded that it is or may be the case that the Merger has resulted or may be expected to result in an SLC as a result of horizontal unilateral effects in relation to the supply of Property Search Report Bundles in E&W.
15. Section 73(2) of the Act provides the CMA with the ability to accept UILs for the purpose of remedying, mitigating, or preventing competition concerns. At the same time, section 73(3) of the Act requires the CMA to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it when deciding whether to accept UILs.
16. Accordingly, in order to accept UILs, the CMA must be confident that all the potential competition concerns that have been identified at phase 1 of a merger investigation would be resolved by the UILs without the need for further investigation.²¹ UILs are therefore considered appropriate only where the remedies proposed to address the competition concerns raised by the merger are clear-cut.²² This clear-cut requirement has two separate dimensions:
 - (a) in relation to the substantive competition assessment, 'there must not be material doubts about the overall effectiveness of the remedy';²³ and

¹⁶ Proposed Undertaking Offer, paragraph 2.7.

¹⁷ [X]. Proposed Undertaking Offer, paragraph 2.5.

¹⁸ Proposed Undertaking Offer, paragraph 2.6.

¹⁹ Proposed Undertaking Offer, paragraph 2.9.

²⁰ Proposed Undertaking Offer, paragraph 2.6.

²¹ [Merger Remedies \(CMA87\) \(December 2018\)](#), paragraph 3.27

²² [Merger Remedies \(CMA87\) \(December 2018\)](#), paragraph 3.27.

²³ [Merger Remedies \(CMA87\) \(December 2018\)](#), paragraph 3.28(a).

(b) in practical terms, 'UILs of such complexity that their implementation is not feasible within the constraints of the Phase 1 timetable are unlikely to be accepted.'²⁴

17. The CMA's starting point in deciding whether to accept a proposed UIL is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC, rather than accepting a remedy that simply mitigates the competition concerns identified at phase 1 of a merger investigation.²⁵
18. The CMA generally prefers structural remedies, such as divestiture, over behavioural remedies.²⁶ In identifying a divestiture package, the CMA will take, as its starting point, divestiture of all or part of the acquired business, because restoration of the pre-merger situation in a market or markets subject to SLC will generally represent a straightforward remedy.²⁷ The CMA may consider a divestiture drawn from the acquiring business if this is not subject to greater risk in addressing the SLC.²⁸ However, the CMA will generally prefer the divestiture of an existing business, which can compete effectively on a stand-alone basis, independently of the merger parties, to the divestiture of part of a business or a collection of assets.²⁹ This is because divestiture of a complete business is less likely to be subject to purchaser and composition risk and can generally be achieved with greater speed.³⁰ The Proposed Undertaking forms a part of the acquiring business, and is therefore more likely to be subject to greater risk than a divestiture of all or part of the acquired business.
19. The CMA has material doubts as to the Proposed Undertaking's ability to remedy the competition concerns identified in the SLC Decision, and restore the level of competition that would have prevailed absent the Merger, in the market for the supply of Property Search Report Bundles in E&W. In particular, and based on the information submitted by the Parties as part of the Proposed Undertaking offer:

²⁴ [Merger Remedies \(CMA87\) \(December 2018\)](#), paragraph 3.28(b).

²⁵ [Merger Remedies \(CMA87\) \(December 2018\)](#), paragraphs 3.30-3.31.

²⁶ [Merger Remedies \(CMA87\) \(December 2018\)](#), paragraph 3.46.

²⁷ [Merger Remedies \(CMA87\) \(December 2018\)](#), paragraph 5.6.

²⁸ [Merger Remedies \(CMA87\) \(December 2018\)](#), paragraph 5.6.

²⁹ [Merger Remedies \(CMA87\) \(December 2018\)](#), paragraph 5.12.

³⁰ [Merger Remedies \(CMA87\) \(December 2018\)](#), paragraph 5.12.

- (a) The Merged Entity would retain a significant part of the [X] business' existing retail customer base. The Merged Entity would retain around 40% of [X]'s existing retail customers which accounted for approximately [X]% of the [X] business sales by volume of Property Search Report Bundles in E&W in 2020. The CMA therefore considers that the Proposed Undertaking is not clear-cut because D&D would not divest the entirety of the [X] business' existing retail customers for Property Search Report Bundles in E&W.
- (b) The Merged Entity would also retain a relevant part of the [X] business' existing service offering to customers of Property Search Report Bundles in E&W. Specifically, the Merged Entity would retain [X] which currently allows the [X] business to offer a range of ancillary services to customers of Property Search Report Bundles in E&W. The CMA therefore considers that the Proposed Undertaking is not clear-cut because D&D would not divest the entirety of the existing [X] business assets and capabilities, including those associated with the provision of services ancillary to the provision of Property Search Report Bundles in E&W.
- (c) The Merged Entity would further retain some of [X]'s existing retail customers. The Merged Entity would retain around 9% of [X]'s existing retail customers, which accounted for approximately [X]% of [X]'s sales by volume of Property Search Report Bundles in E&W in 2020. The CMA therefore considers that the Proposed Undertaking is not clear-cut because D&D would not divest the entirety of [X]'s existing retail customer base for Property Search Report Bundles in E&W.

20. Overall, D&D claims that the Proposed Undertaking would amount to the divestment of a business accounting for approximately [10-20]% of the supply for Property Search Report Bundles in E&W in 2020. The CMA notes that this is significantly lower than the increment of approximately [20-30]% brought about by the Merger.

21. The CMA further notes that the [10-20]% share of supply attributed by D&D to the Divestiture Business overstates the latter's competitive strength:

- (a) First, pre-Merger the [X] business was D&D's [X] business active in the supply of Property Search Report Bundles in E&W, accounting for around [X]% of D&D's pre-Merger sales by volume and with a share of supply of

approximately [10-20]% (in 2020). However, the Divestiture [X] Business would be significantly smaller, accounting for [X] approximately [X]% of D&D's pre-Merger business' sales by volume and with a share of supply of [X] around [5-10] % (in 2020).

- (b) Second, while the Merger strengthens the Merged Entity's position as a larger national provider, the bulk of the Divestiture Business (accounting for around [X]% of the Divestiture Business sales volume and for a share of approximately [10-20] % in the supply of Property Search Report Bundles in E&W in 2020) would be formed by a newly-created [X] business which, as the Parties acknowledge, is formed by [X], most of which are not [X] by D&D pre-Merger. The Parties have not provided evidence that [X] would be able to exert a comparable competitive constraint to a single integrated firm, especially if [X] accounts for the majority of Divestiture Business' sales by volume and if most of [X] are not [X] by D&D. The CMA therefore, while recognizing that D&D has significant [X], does not consider this portion of the Divestiture Business' share of supply as comparable to the parts of the Divestiture Business made up of [X]. The CMA believes that this would impact the ability of the Divestiture Business to compete with the three largest national suppliers, ie the Merged Entity, ATI, and Landmark.

22. The CMA therefore considers that there are significant doubts as to the Proposed Undertaking's ability to effectively restore competition to the level that would have prevailed absent the Merger. As such, the CMA considers the Proposed Undertaking is not clear-cut and would not fully address the competition concerns identified in the SLC Decision.

DECISION

23. For the reasons set out above, after examination of the Proposed Undertaking, the CMA does not believe that it would achieve as comprehensive a solution as is reasonable and practicable to the SLC identified in the SLC Decision and the adverse effects resulting from that SLC.
24. Accordingly, the CMA has decided not to exercise its discretion under section 73(2) of the Act to accept UILs.

25. Therefore, pursuant to sections 22(1) and 34ZA(2) of the Act, the CMA will proceed to refer the Merger to its chair for the constitution of a group under Schedule 4 of the Enterprise and Regulatory Reform Act 2013 to conduct an in-depth investigation.

Joel Bamford
Senior Director, Mergers
Competition and Markets Authority
23 December 2021