CASE ME/6963/21

DYE & DURHAM (UK) LIMITED

D&D'S REVISED RESPONSE TO THE NOTICE OF POSSIBLE REMEDIES

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17 June 2022

CLIFFORD

CHANCE

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Completed acquisition by Dye & Durham Limited, through its subsidiary Dye & Durham (UK) Limited, of TM Group (UK) Limited

D&D's REVISED RESPONSE TO THE NOTICE OF POSSIBLE REMEDIES

1. INTRODUCTION

1.1 In its provisional findings dated 18 May 2022 (**"Provisional Findings"**), the Competition and Markets Authority (**"CMA"**) provisionally found that the completed acquisition by Dye & Durham Limited (**"D&D"**)[1], through its subsidiary Dye & Durham (UK) Limited (**"D&D UK"**) of TM Group (UK) Limited (**"TMG")**, the **"Merger"**) may have resulted in a substantial lessening of competition (**"SLC"**) in the supply of property search report bundles (**"PSRBs"**) in England and Wales (**"E&W"**).

1.2 For the avoidance of doubt, and as will be set out in the response to the Provisional Findings, D&D does not agree that there are grounds for a finding that the Merger may be expected to result in an SLC. This response should therefore not be considered as an acceptance of the Provisional Findings and it is made solely on the basis that an SLC finding is upheld in the CMA's final decision and without prejudice to any of the D&D's rights and further submissions.

1.3 The notice of possible remedies dated 18 May 2022 (the **"Remedies Notice"**) sets out the CMA's initial views on potential remedies which may address the SLC identified in the Provisional Findings. It identifies one potential structural remedy: full divestiture of TMG to re-create a similar market structure to that which existed at the time of the Merger.

1.4 The Remedies Notice also noted that TMG and each of the Shareholders[2] entered into agreements for the supply (**"Supply Agreements"**) of PSRBs, including property search reports supplied by other D&D businesses, for at least [✄] years on the same date as the share purchase agreement (**"SPA"**).[3] The CMA wishes to consider whether any action should be taken in relation to these agreements in conjunction with its assessment of a potential divestiture remedy.

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1 References to **"D&D"** in this Response also include its subsidiaries and affiliates.

2 Countrywide Group Holdings Limited, Connells Limited, and LSL Property Services plc (ie TMG's majority shareholders before the Merger).

3 D&D's wholly owned UK subsidiary, D&D UK, acquired the entire allotted and issued share capital of TMG for approximately £91.5 million pursuant to a share purchase agreement dated and effective on 8 July 2021 (Response to the Enquiry Letter, Annex 06.01 and Annex 03.01).

2. THE PROPOSED REMEDY

2.1 Without prejudice to D&D's position as regards the finding of an SLC or any of their other rights, D&D makes the following submissions in relation to the remedy proposed as a comprehensive resolution of the concerns raised by the CMA in the Remedy Notice:

2.1.1 Any divestment package related to TMG's business would cover all of its operations in E&W namely tmConvey, tmConnect, Conveyancing Data Services (**"CDS"**) and Mio (the **"TMG Divestiture Package"**) and all associated assets[4] but should exclude the Property Searches Scotland (**"PSS"**) business which operates outside of E&W.

2.1.2 There is no justification, nor necessity, for the CMA to take any action in relation to the Supply Agreements. Indeed, the arrangements are pro-competitive and it is important that they remain in place for the ongoing benefit of the TMG business. Moreover, D&D should be permitted to agree additional arrangements for the future supply of search reports to TMG as part of the divestment package to be agreed with a prospective purchaser.

2.2 The above points are explained in further detail below.

3. ANY TMG DIVESTMENT SHOULD BE LIMITED TO ITS ACTIVITIES IN E&W

3.1 The Remedies Notice has identified the divestment of the ***entire*** TMG business as a potential structural remedy. However, D&D considers that the imposition of such a remedy would be disproportionate and overly intrusive if it were to include TMG's separate business activities outside of E&W (namely the PSS business which solely operates in Scotland – a country in which D&D is not otherwise present). Importantly, the CMA has not identified any concerns in Scotland.

3.2 A TMG divestment remedy which excludes PSS would comprehensively address the CMA's concerns in relation to horizontal unilateral effects in E&W. In particular, it would:

3.2.1 restore a similar market structure to that which existed at the time of the Merger, ensuring that there are at least four large suppliers in the sector;

[4] The TMG assets that D&D would divest if it elected to take that option includes all of TMG's existing tangible and intangible assets relating to its business in E&W, including the technology platform on which tmConvey operates its business (including the compilation and sale of PSRB, all of its production, back office, software, management, IT, product, commercial, marketing, finance, and customer support teams).

3.2.2 provide the potential purchaser with the means to compete effectively and independently at a national level in E&W and replicate the rivalry that would have been provided absent the Merger in the CMA's counterfactual; and

3.2.3 not result in any structural changes in the Scottish market for the supply of PSRBs, as D&D has no presence in Scotland and has no plans to enter into Scotland in the foreseeable future.

It would be disproportionate for the CMA to require a divestment remedy involving non-overlapping markets

3.3 D&D considers that the retention of the PSS business will not negatively impact on the effectiveness of any remedy proposal and is not necessary in order to ensure that TMG will remain a competitive force in relation to the supply of PSRBs in E&W as referred to above. D&D expects that the integration of the PSS business within the D&D group would be relatively straightforward and beneficial to the operation of PSS in Scotland.

3.4 PSS is a separate business from the business of TMG in E&W. D&D understands that it provides similar products to tmConvey, but that the software is retrofitted for the specific requirements of the Scottish Market.[5] PSS also has its own Managing Director and a workforce based at premises based in Glasgow.[6]

3.5 While a Transitional Services Agreement is likely to be required for an initial period, to facilitate the transfer of PSS onto the D&D technology and operating systems, D&D submits that separating PSS from the rest of the TMG business will not be particularly difficult. D&D understands that PSS has its own employees, brand, product offerings and customer relationships. Back-office support to the extent currently provided by the broader TMG can be provided by D&D going forward.

3.6 The ability for TMG to compete in relation to the supply PSRBs in E&W will not be adversely affected by the non-inclusion of the PSS business in the remedy proposal. D&D understands that PSS accounts for [✄] proportion of overall TMG revenue. Moreover, E&W and Scotland are very different markets with little by way of synergies achieved through servicing both areas. Accordingly, D&D would not expect the costs for TMG of supplying PSRBs in E&W to materially increase as a result of not having revenues from PSS on the understanding that the majority of the costs associated with the provision of services by PSS relate to the [✄] where those employees are based.

3.7 Moreover, the integration of the PSS business within the wider D&D group will enhance the future capabilities of PSS. D&D currently operate in 3 of the 4 nations of the UK: England, Wales and Northern Ireland, in addition to the Republic of Ireland. D&D has grown organically as well as through acquisition, creating a leading platform

[5] Project Titan Acquisition Overview, 24 June 2021, page 9

[6] https://www.propertysearchesscotland.co.uk/about.html

for the businesses in those nations by sharing capability and breadth. PSS would naturally fit within D&D and enhance the customer capability offering outside of which they currently enjoy.

4. TREATMENT OF SUPPLY AGREEMENTS

4.1 D&D submits that there is no need for the CMA to take any action in relation to the Supply Agreements and it is indeed important that they remain in place for the ongoing benefit of the TMG business as explained below.

4.2 The CMA is aware that the Supply Agreements were entered into between TMG and each of its former shareholders on 8 July 2021. The Supply Agreements effectively documented and broadly replicated the pre-merger supply arrangements that existed as between TMG and its (now former) shareholders pursuant to the shareholder agreement. Maintaining the Supply Agreements effectively therefore preserves the pre-merger conditions in respect of their procurement behaviour.

4.3 The benefit of the Supply Agreements should remain with TMG as D&D understands its former shareholders are an important part of its client base. In 2021 alone, the value of TMG's sales to its former shareholders was £[✂].[7] Altering the terms of supply so as to weaken the purchasing commitment and the certainty of supply under the Supply Agreements [✂]. This would not only be unnecessary and disproportionate – it would [✂].

4.4 In seeking remedies that are effective in addressing the SLC, the CMA is under a duty to act proportionately and to select a remedy that is the least costly and intrusive remedy that it considers to be effective.[8] Consistent with that duty, there is no need for the CMA to change the Supply Agreements in order for any remedy to be effective. This includes the obligation under clause 2.1 of the Supply Agreements [✂]. Clause 5 of Schedule 1 in turn, effectively provides that [✂].

4.5 Maintaining the Supply Agreements in their entirety (including Schedule 1) is the least costly and intrusive action available to the CMA. It neither compromises the efficacy of any remedy in addressing the SLC nor gives rise to any competition concerns – indeed it is a pro-competitive action, as explained below:

4.5.1 As matters currently stand, environmental reports are supplied to TMG by Groundsure which is, in turn, owned by ATI. Groundsure is "*the **market leader** and accounts for [60-70%] of environmental search reports.*"[9] The second

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[7] Para 7.53 of the Provisional Findings

[8] Para 3.4 of the CMA's Guidance on Merger Remedies

[9] Para 6.125 of the PFs

largest supplier is Landmark with around 30-40% share of the supply of environmental search reports. In contrast, D&D (FCI), has only a 5-10% share.

4.5.2 It follows that switching the supply of environmental reports from the dominant provider (Groundsure) to a much smaller player (FCI) will be a pro-competitive action that will strengthen FCI's ability to compete in the market.

4.5.3 The Supply Agreements are on arms-length commercial terms and D&D will not obtain any ability to influence the competitive behaviour of TMG.

4.5.4 All of the suppliers of environmental reports are vertically integrated companies that also compete with TMG in the downstream market for property search report bundles. It follows that there is no difference in terms of incentive, motivation and competition risk if the environmental reports were to be supplied by any of Groundsure, Landmark or FCI.

4.5.5 Finally, as the CMA is aware, [✂], TMG, LSL and Connells will also lose the benefit of FCI's efforts if the Supply Agreements are not honoured.

5. SUITABLE PURCHASER

5.1 D&D considers that the following criteria would be appropriate in the CMA's assessment of a suitable purchaser of either of the relevant D&D or TMG businesses:

1.1.1 **Independence**: Following divestment, the potential purchaser should be fully independent of D&D subject to the following:

(a) D&D shall continue to supply search reports to TMG (including pursuant to the Supply Agreements and as may otherwise be agreed between TMG and D&D either as part of the terms of the divestment to be agreed with the potential purchaser or otherwise in the ordinary course of business);

(b) If it would be of assistance, D&D would be open to the possibility of facilitating a management buy-out or otherwise providing financial support to a prospective purchaser, for example by way of a loan on arms- length and usual commercial terms.

1.1.2 **Capability**: Potential purchasers should possess appropriate financial resources and expertise (including managerial, operational, and technical capability) to purchase and operate the relevant business. The TMG Divestiture Package would include all assets and infrastructure to allow the potential purchaser to operate and grow the divestment businesses.

1.1.3 **Presence:** D&D believes that it is not essential that the remedy taker has an existing presence in E&W provided that is capable of continuing the relevant business as part of its existing E&W operations or as a standalone E&W company

1.1.4 **Commitment**: The potential purchaser should provide an appropriate business plan and objectives for competing in the retail PSRB market in E&W and maintain and operate the divested business as a strong independent competitive force in the market.

1.1.5 **Absence of competitive concerns**: The potential purchaser should not itself present any possibility of an SLC.

6. REMEDY CAN BE ACHIEVED IN AN ACCEPTABLE TIMESCALE

6.1 D&D considers that it should be able to agree a sale agreement with a potential purchaser within a divestiture period of around 6 months.

7. CONCLUSION

7.1 D&D strongly disagrees with the conclusion in the Provisional Findings that the Merger gives rise to an SLC, and its views on the SLC finding will be set out in detail in its response to the Provisional Findings.

7.2 However, to the extent that the Provisional Findings are upheld in the CMA's final report, the only proportionate way in which to address the SLC identified in the Provisional Findings is by way of a divestment remedy that:

7.2.1 in relation to the TMG business, covers all of the TMG operations in E&W but excludes the PSS business in Scotland; and

7.2.2 does not take any action in relation to the Supply Agreements and allows D&D the freedom to agree additional arrangements for the future supply of search reports to TMG.

Clifford Chance LLP

17 June 2022