

CASE ME/6963/21

DYE & DURHAM (UK) LIMITED / TM GROUP (UK) LIMITED

RESPONSE TO PROVISIONAL FINDINGS

SUBMISSION DATED
8 June 2022

ME/6963/21

**ACQUISITION BY DYE & DURHAM (UK) LIMITED
OF TM GROUP (UK) LIMITED**

**RESPONSE TO THE COMPETITION AND MARKET AUTHORITY'S
PROVISIONAL FINDINGS**

1. INTRODUCTION AND EXECUTIVE SUMMARY

- 1.1 This submission is made on behalf of Dye & Durham Limited ("**D&D**"), Dye & Durham (UK) Limited ("**D&D UK**"), and TM Group (UK) Ltd ("**TMG**") and, together with D&D and D&D UK, the "**Parties**") in response to the provisional findings (the "**PFs**") by the Competition and Markets Authority ("**CMA**") in relation to the completed acquisition of TMG by D&D (the "**Transaction**").
- 1.2 This Response should be read in conjunction with the Parties' previous submissions to the CMA, including but not limited to the Response to the Issues Letter of 16 November 2021, the Response to the Issues Statement of 11 February 2022, the oral evidence provided during the Main Party Hearings on 12 April 2022, the Response to the Annotated Issues Statement and Working Papers of 14 April 2022, and the Responses to the CMA's follow-up questions of 19 and 21 April 2022.
- 1.3 The Parties do not propose to restate their position on every issue covered by the PFs or to address each error set out therein. Instead, the Parties urge the CMA to review the detailed submissions and evidence previously provided and, in particular, to undertake a proper assessment, weighing and application of the evidence in the discharge of its statutory duties.
- 1.4 The Parties strongly disagree with the PFs that the Transaction has resulted in, or may be expected to result in, a substantial lessening of competition in the supply of property search report bundles ("**PSRBs**") in England & Wales (the alleged "**SLC**").
- 1.5 In discharging its statutory duties pursuant to s.35 of the Enterprise Act 2002, the CMA is required to show that, on the balance of probabilities, the alleged SLC is *more likely than not*: this requires sufficient evidence to support each of the following components:
 - 1.5.1 the Parties are sufficiently close competitors for the Transaction to raise competition concerns;
 - 1.5.2 that, notwithstanding the significant number of PSRB suppliers in the market, the competitive constraints exercised by these suppliers (whether individually or in aggregate) is not sufficient to mitigate the effects of the Transaction;
 - 1.5.3 that the Transaction would weaken competitive conditions in the market to such an extent that the Merged Entity could profitably increase prices, lower the quality of their products or customer service, reduce the range of their products / services, and/or reduce innovation; and
 - 1.5.4 that there are material barriers to entry and/or expansion which would be likely to prevent new entry or expansion from taking place in a timely and sufficient manner to mitigate any potential adverse effects of the Transaction.

- 1.6 The totality of the available evidence shows a very different reality, which does not support any of the above propositions. In particular:
- 1.6.1 The CMA's own survey (the "**Survey**") provides the best available evidence that: the Parties are not especially close competitors; there is considerable ongoing competitive constraints assisted by customer multi-sourcing; and switching regularly occurs not only as between the four largest suppliers of PSRBs but also other suppliers.
 - 1.6.2 The PFs also dismiss significant and detailed quantitative evidence supplied on switching including the RBB loss analysis based on the Parties' sales data, and evidence presented on the Parties' overlapping customers. Most of the 15 pieces of quantitative evidence on closeness show switching between the Parties is less than that might be expected even in a "7-6" scenario.
 - 1.6.3 Instead of giving due weight to the clear and valid quantitative evidence, the PFs favour less representative third party views taken outside of the Survey and incorrect inferences drawn from a limited number of internal documents.
 - 1.6.4 This obvious failure in the assessment of the overall evidence is compounded by factual errors in the PFs which misrepresent the significance and nature of integration with case management software ("**CMS**") and ancillary services for competition in the supply of PSRBs.
- 1.7 In summary, there is insufficient evidential support for the theory of harm proposed by the CMA in the PFs, and it is not sufficiently established under the legal standard of proof required at a Phase 2 inquiry. On a proper assessment, weighing and application of the totality of the available evidence, the only logical conclusion is that the Transaction will not adversely affect competition. The CMA has failed to meet its burden to establish on the balance of probabilities that the Transaction is more likely than not to give rise to the alleged SLC.

2. FAILURE TO APPROPRIATELY BALANCE THE TOTALITY OF EVIDENCE

- 2.1 The CMA is required in exercising its statutory duty to put itself into a position to reach a lawful and rational decision. This requires a proper assessment of the available evidence to ensure that there is a "*sufficient basis in light of the totality of the evidence available*"¹ for making the assessments and reaching the conclusions that are set out in the PFs. In particular, evidence of probative value should be weighted appropriately in the assessment and the reasons provided in the PFs to support the CMA's provisional findings should be "*intelligible and adequate*".² The PFs fall well short of these standards.
- 2.2 Instead, it is clear from the PFs that the approach to the assessment of evidence has been highly selective, evidence has been misinterpreted and conflated, and strong bodies of evidence have been discounted in favour of weaker evidence of less probative value. These errors have resulted in erroneous conclusions that do not provide a firm foundation for any claim that the hypothetical theory of harm put forward in the PFs has been established to the legal standard of proof required at a Phase 2 inquiry.

¹ BAA v Competition Commission [2012] CAT 3.

² *Ibid.*

The Survey does not support the SLC

- 2.3 The Survey does not support the alleged SLC. To the contrary, it is strongly supportive of the body of evidence provided by the Parties and the various economic analyses, all of which point in the same direction. In particular:
- 2.3.1 The Survey shows that multisourcing is widespread, that there are low levels of switching between the Parties and that the Parties are not viewed as close alternatives to one another, which is inconsistent with the PFs' analysis of the closeness of competition between the Parties.
- 2.3.2 The Survey also does not support the provisional conclusions as to integration with CMS and ancillary services being important factors for competition in relation to the supply of PSRBs.
- 2.4 The Survey was undertaken on behalf of the CMA and was made up of **170** respondents. The respondents were representative of the Parties' customer bases, comprising conveyancers *"who varied by size and their degree of residential or commercial focus"*.³ The Survey was also exclusively of purchases of PSRBs (rather than necessarily purchasers of any ancillary services). That is, the Survey was focused on, and representative of, the relevant group of customers that would be affected were an SLC to arise.
- 2.5 The PFs acknowledge that the coverage of the Survey was *"good"*; that there was *"no indication of bias"*; and that it was *"sufficient to draw robust inferences"*.⁴ Therefore, the Survey should be regarded as the best available source of "truth" in determining the factors that drive customer choice and are important for competition in the market; and it should be given proper and proportionate weight and certainly more weight than the limited number of telephone calls undertaken with, in particular, large law firms.
- 2.6 In relation to the aspects of the Survey which the PFs seek to discount by treating the results *"with caution"*,⁵ it is noted that this primarily relates to the Survey responses on switching between the Parties. The PFs consider these responses to be unreliable. However, while the sample size might be smaller for this particular aspect of the Survey, the CMA should not simply disregard this but should weigh these responses appropriately in light of the totality of the evidence. In particular, the Survey itself found that the proportion of respondents who viewed one Party as a valid alternative to the other was only 7-16%, i.e. even less than the proportion expected from a merger reducing the number of firms in the market from 7 to 6 (16.7%).⁶ These results are derived from a sample size of **over 100**; a level above which the

³ Paragraph 12 of the PFs.

⁴ Paragraph 10 of Appendix E of the PFs.

⁵ Paragraph 36 of the PFs.

⁶ The proportion of respondents who viewed one Party as a good alternative to the other was 7-14%. The lower bound assumes that Index PI and PSG Connect are independent franchisees of D&D and is derived from a sample of 145 responses and at least 114 respondents, whilst the upper bound assumes the opposite and is derived from a sample of 136 responses and at least 105 respondents. These figures also exclude responses whose best alternative was the same Party (e.g. TMG being stated as the best alternative to TMG) or "Don't know". The proportion of respondents listing one Party as the best alternative to the other was 7-16%. The lower bound assumes that Index PI and PSG Connect are independent franchisees of D&D and is derived from a sample of 79 respondents, whilst the upper bound assumes the opposite and is derived from a sample of 76 respondents. These figures exclude respondents whose best alternative was the same Party (e.g. TMG being stated as the best alternative to TMG) or "Don't know".

PFs appear to place full evidential weight on the results.⁷ That the separate, and various, sources of economic evidence on closeness of competition are consistent with the switching data presented in the Survey is corroborative of the fact that these responses on switching have sufficient evidential weight.

The economic evidence does not support an SLC

- 2.7 The PFs dismiss and seemingly seek to discredit the detailed and extensive economic evidence in the form of the Survey and the Parties' submitted evidence.
- 2.8 Of the 15 available pieces of quantitative evidence on closeness of competition between the Parties, the PFs appear to place weight on only 5 pieces.⁸ The PFs dismiss quantitative evidence on switching from the CMA's own customer survey, the RBB loss analysis based on the Parties' sales data, and the evidence on the Parties' overlapping customers. The reasons for doing so are unfounded and inconsistent. The evidence that the PFs seek to rely on instead is less representative and of limited probative value.

Evidence from other third parties is less representative than the Survey and should be treated as such

- 2.9 In addition to the Survey, the CMA spoke to "*several*" law firms including some Top 100 law firms which "*specialise in large transactions*"; as well as "*some*" law firms which are large or medium-sized customers for D&D.⁹
- 2.10 It is accepted that, in discharging its duties to answer the statutory question, the CMA can and should take account of the full body of evidence that is available. It should do so, however, in a rational and proportionate manner. The feedback received from "*several*" large law firms is very obviously not representative of the Parties' customer bases or the main area of customer overlap (or, more generally, the wider market), and certainly significantly less representative than the Survey both in terms of the number of respondents and the spread of these respondents across different parts of the market. This is particularly the case given that, the supply of PSRBs to the Top 100 law firms "*represents a relatively small part of the overall market*"¹⁰ and only 10-5% of D&D's business.¹¹
- 2.11 Yet, there are numerous examples in the PFs where disproportionate weight appears to have been given to the feedback received from customers outside of the Survey. This has resulted in the PFs arriving at a number of critical and erroneous conclusions, examples of which are set out in this Response.

Evidence from the Parties' internal documents

⁷ Appendix E, paragraphs 10-11 of the PFs.

⁸ The PFs consider the evidence of customers' choice of best alternative supplier to each Party at Figures 7.1-7.4. The PFs also summarise at paragraph 7.70: "*We consider that the switching estimates reported in the Tables above suggest material switching between the Parties, consistent with them being close competitors with one another. This is especially the case when customer switching is weighted by revenues, which we consider to be a better indicator of the competitive constraint the Parties provide on each other.*"

⁹ Paragraph 2.28 of the PFs.

¹⁰ Paragraph 7.224 (b) of the PFs.

¹¹ Paragraph 7.51 of the PFs.

- 2.12 The PFs seek to rely on the Parties' internal documents, a number of which have been taken out of context or misinterpreted. The PFs appear to ignore the explanations provided by the Parties as to the context and relevance of certain of these documents and proceed to incorrectly view these documents as having probative value.
- 2.13 For example, the PFs refer to certain of TMG's internal documents which were prepared solely for TMG's sales team meetings.¹² The documents were created to motivate TMG's sales team and not to provide any analytical or strategic view as to TMG's view of the market or the credibility of other suppliers. In one case, it is not even certain that the document was presented.¹³ In any event, it is erroneous to draw any inferences from documents which were prepared to be deliberately subjective. Yet, the PFs appear to dismiss out of hand the explanations provided by TMG as to the context and purpose of these documents leading the PFs to make inferences which are unsafe.
- 2.14 The PFs take the same approach to D&D's internal documents where, for example, the absence of references to the long tail of, particularly, regional suppliers in certain documents prepared for D&D's Board and Executive Leadership Team appears to have been wrongly construed as evidence that those smaller suppliers do not exercise a competitive constraint on the Parties. Again, the PFs appear to have dismissed without reasonable basis the explanations provided by D&D as to the context and purpose of these documents.

3. THE PARTIES ARE NOT SUFFICIENTLY CLOSE COMPETITORS FOR THE TRANSACTION TO GIVE RISE TO COMPETITION CONCERNS

- 3.1 The PFs purport to assess whether the Parties are "*sufficiently close competitors for the merger to raise competition concerns*".¹⁴ However, they fail to do so in several ways:
- 3.1.1 First, their approach to assessing the evidence is misconceived. Rather than considering the extent to which the Parties constrain each other pre-merger, the PFs merely assert that, given the existence of some customer switching between them, the Parties are sufficiently close competitors for the Transaction to raise competition concerns.¹⁵ This reasoning is incorrect. In fact, taken in the round, the 15 pieces of quantitative evidence on closeness consistently show that the constraint posed by each Party on the other is more in line with that expected in a "7-6" scenario than the "4-3" scenario characterised in the PFs.¹⁶ This means the Parties are **not** sufficiently close competitors for the Transaction to raise competition concerns.
- 3.1.2 Second, the PFs only place weight on a small and selective part of the available quantitative evidence. The remaining evidence is dismissed for reasons which are unfounded and inconsistent. For instance, several pieces of evidence are dismissed entirely due to having a "low" sample size, while at the same time the PFs take into account evidence based on a sample size of as little as three.

¹² Annex TM022 and Annex TM2653

¹³ Annex TM2653.

¹⁴ Paragraph 7.32 of the PFs.

¹⁵ Paragraphs 7.74 and 7.104b of the PFs.

¹⁶ The more than 15 pieces of evidence comprise the 14 pieces of switching analysis presented in the Response to the AIS, Table 1, and the evidence on the customer overlap and multi-sourcing discussed in the RBB Report, titled '*Evidence on market size and Multi-sourcing – update with 2021 data*', dated 24 February 2022.

- 3.1.3 Third, the evidence that the PFs do place weight on is misinterpreted. Properly considered, that evidence shows that the Parties are not sufficiently close competitors for the Transaction to raise competition concerns. Both the switching evidence and the survey evidence that the PFs do consider indicate that the extent to which each Party constrains the other is significantly less than that expected in a "4-3" scenario.
- 3.2 In short, exculpatory evidence has been ignored or dismissed selectively without good reason, while other evidence has been misinterpreted. . These points are explained and substantiated in further detail below.

The PFs fail to consider properly the extent to which the Parties are close competitors

- 3.3 The PFs correctly identify that the key question for the competitive assessment is "*not whether the Parties are 'particularly' close competitors but whether they are sufficiently close competitors for the Merger to raise competition concerns*." ¹⁷ In other words, the PFs must seek to establish the extent to which each Party is constraining the other pre-merger. If that constraint is small, then the merger is not likely to raise competition concerns.
- 3.4 However, the PFs have failed to consider the evidence properly against this standard. The PFs continue to place undue weight on the structural assumption because, in the words of the PFs, "*competition mainly takes place among few firms*", then "*there is a strong prima facie likelihood that the two firms are close competitors*". The PFs find that the switching data shows that "*each Party competes with... the other Party*". ¹⁸ This alone is apparently sufficient for the PFs to state that the switching data "*supports the conclusion that the Parties are close competitors*". ¹⁹ This reasoning is misconceived. The mere existence of switching between the Parties is not sufficient to conclude that they are close enough competitors for the merger to raise competition concerns.
- 3.5 In fact, the wide range of quantitative evidence consistently shows that the extent to which one Party constrains the other pre-merger is limited. Most of the 15 pieces of quantitative evidence on closeness show switching between the Parties is less than that expected in a "7-6" scenario. That is, in a market with 7 equally differentiated suppliers, it would be expected that switching from one Party would go to the other Party one in six times, i.e. 17%: yet most of the quantitative evidence indicates lower rates of switching than this. ²⁰ Therefore, the quantitative evidence shows consistently that the Parties are **not** sufficiently close competitors for the Transaction to raise competition concerns.

The PFs wrongly dismiss valid quantitative evidence on closeness of competition

- 3.6 Of the 15 available pieces of quantitative evidence on closeness of competition between the Parties, the PFs wrongly appear to place weight on only 5 pieces. ²¹ The PFs dismiss

¹⁷ Paragraph 7.32 of the PFs (emphasis added).

¹⁸ Paragraph 7.74 of the PFs: "*The Parties' own data indicates that each Party competes with ATI, the other Party and Landmark. The data also indicates that each Party competes with other, smaller competitors...*"

¹⁹ Paragraph 7.104b of the PFs.

²⁰ Response to the AIS, Table 2.1. Moreover, all of the analyses show switching between the Parties is less than 25% (i.e. less than that expected in a 5-4 scenario), including those that the PFs take into account.

²¹ The PFs consider the evidence of customers' choice of best alternative supplier to each Party at Figures 7.1-7.4. The PFs also summarise at paragraph 7.70: "*We consider that the switching estimates reported in the Tables above suggest material switching between the Parties, consistent with them being close competitors with one another. This is*

quantitative evidence on switching from the CMA's own customer survey, the RBB loss analysis based on the Parties' sales data, and the evidence on the Parties' overlapping customers. The reasons for doing so are unfounded and inconsistent, as explained below.

CMA customer survey data

- 3.7 The evidence on switching rates between the Parties provided in the customer survey, based on more than 25 responses, is dismissed by the PFs due to a low sample size.²²
- 3.8 It appears, however, that the PFs are inconsistent in dismissing evidence based on its sample size. For example, the PFs do take into account evidence from only 3 calls with the Parties' customers to suggest the Parties are close competitors (even though just 2 of these 3 customers appeared to consider that the Parties were alternatives to one another).²³ This is clearly selective and inconsistent with dismissing the customer survey results from more than 25 responses based on the sample size.
- 3.9 Moreover, this evidence from the customer survey forms one part of a much wider set of information on customer switching, all of which points to the same conclusion: the Parties are not sufficiently close competitors for the Transaction to raise competition concerns. Even if one single piece of evidence is based on a small sample size (albeit far greater than the 3 responses on which the CMA appears to rely) and so, by itself, carries less weight, this is not an appropriate reason to discount the *aggregate* finding of many different pieces of evidence that point in the same direction. That is, the *cumulative weight* of evidence from the CMA's own survey, the Parties' internal documents, and RBB's assessment of the Parties' transaction data points strongly to the view that the Parties are not sufficiently close competitors for the Transaction to raise competition concerns.

RBB loss analysis

- 3.10 The evidence from the RBB switching analysis is dismissed for several reasons: that it mostly considers customers that switched after the Transaction, that it is based on a small sample size and that it is not based on contemporaneous records. Each of these arguments is misconceived.
- 3.11 First, the PFs consider that the analysis mostly covers a period after the merger.²⁴ This critique is invalid for the following reasons.
 - 3.11.1 Fundamentally, the losses considered in the analysis are in fact likely to have occurred before Q3 2021 (i.e. before the merger in July 2021) rather than during it. This is because customers were considered lost if they did not purchase at all in Q3 2021.²⁵ It is likely that most customers that are considered lost decided to stop purchasing from the relevant Party before the start of Q3 2021 (i.e. during Q2). Most

especially the case when customer switching is weighted by revenues, which we consider to be a better indicator of the competitive constraint the Parties provide on each other."

²² Paragraph 7.65a of the PFs.

²³ Paragraph 7.87 of the PFs summarises three responses, one of which states (emphasis added): "*The large law firms Eversheds Sutherland and Devonshires did not identify D&D as a possible alternative to TMG, reflecting D&D's limited presence in serving Top 100 Law Firms engaged in large transactions.*"

²⁴ Appendix D, paragraph 14 of the PFs: "*RBB's estimates only cover the second half of 2021 – that is, mainly after D&D acquired TMG in July 2021*".

²⁵ Appendix D, footnote 11 of the PFs.

customers that decided to stop purchasing from one Party in the period after the merger are likely to have purchased at least some volumes in Q3 2021 and therefore would not have been considered as a lost customer in the analysis.

- 3.11.2 In any event, the Parties note that D&D and TMG have continued to be run as separate businesses during the course of the CMA's investigation. The Parties continue to offer the same prices and quality of service as they would have done absent the merger. Therefore, the extent of switching between the Parties is likely to have been the same in reality as it would have been absent the merger.
- 3.11.3 Moreover, this argument has not been raised previously by the CMA. The Parties have therefore lacked the opportunity to clarify this point and therefore any conclusions arrived at as a result of this would be procedurally unfair. Indeed, the Parties were asked by the CMA to provide an updated version of this analysis that included Q4 2021 (i.e. a later period than that originally considered) but were not asked to consider an earlier period.²⁶
- 3.12 Second, the PFs consider that the analysis is based on a "very low" number of losses. Again, however, this critique is invalid, for the following reasons.
 - 3.12.1 The total number of separate losses in the RBB analysis is at least [X].²⁷ This is not a "very low" number. Moreover, the finding that [X] is a "very low" number is inconsistent with the treatment of evidence elsewhere in the PFs. For example:
 - (a) consideration is given elsewhere to only 3 calls with the Parties' customers to suggest the Parties are close competitors.²⁸
 - (b) 37 customer responses to the survey are used to conclude that "*TMG is the second most common competitor considered as an alternative by D&D's customers*".²⁹
 - (c) 32 competitor responses to the CMA's survey were used to conclude that the Parties are among each other's closest competitors.³⁰
 - 3.12.2 Moreover, this switching evidence forms one part of a much wider set of information on customer switching, all of which points to the same conclusion: the Parties are not sufficiently close competitors for the merger to raise competition concerns. Therefore, a small sample size for this part should again not be used to invalidate its contribution to the wider picture.
- 3.13 Third, the PFs dismiss the analysis because it is not based on contemporaneous records of wins and losses. The PFs suggest that "*The estimates may therefore be affected by a number of factors, including the growth or decline of the Parties' customers' client base and*

²⁶ Response to the CMA's s.109 Notice dated 25 January 2022, Question 12.

²⁷ I.e. [X] unique lost customers for D&D and [X] unique lost customers for TMG for the Q3 and Q3-Q4 analysis. An additional analysis of D&D's lost customers in Q4 contained a further [X] lost customers. See the Response to the Issues Statement, paragraph 4.13.

²⁸ Paragraph 7.87 of the PFs. In fact, only two of these customers even appeared to consider that the Parties were alternatives to one another.

²⁹ Paragraphs 7.88 and 7.98 of the PFs.

³⁰ Appendix C, footnotes 1 and 7 of the PFs mention 32 respondents. Paragraph 7.104e concludes on this evidence.

transactions, as well as customer switching to and from other competitors."³¹ This critique is also invalid, for the following reasons.

- 3.13.1 It is not likely to be the case that losses (i.e. a customer that purchased from one Party in Q1 and Q2 2021 but not in e.g. Q3 2021) that have been included in the analysis are unrelated to customer switching to competitors or the other Party. This is because each loss was confirmed individually by the relevant Party. Customers were not included in the analysis if they had left the market or purchased only sporadically and continued to purchase from the relevant Party after the end of the analysis.³²
- 3.13.2 Moreover, it is not likely to be the case that losses were mistakenly assigned to competitors rather than the other Party. This is because a variety of different benchmarks were used to test whether sales at the other Party increased at the same time as the loss. In almost all cases these benchmarks gave the same results.³³ This suggests that the analysis is robust.

Customer overlap

- 3.14 The PFs give several reasons for dismissing the evidence that the level of customer overlap between the Parties, given the level of multi-sourcing in the market, is consistent with a "7-6" scenario rather than a "4-3 scenario".³⁴ First, because the inferences relied on the (supposedly inaccurate) assumption that customers purchased equally from a given number of alternative suppliers. Second, because the PFs do not accept that triple-sourcing is widespread. Third, because the PFs consider that the extent to which the Parties' customers overlap might not be an indication of closeness of competition.
- 3.15 Each of the arguments in the PFs are manifestly incorrect.
- 3.16 First, the analysis does not rely on the assumption that customers purchase equally from a given number of suppliers, contrary to the assertion made in the PFs:³⁵
 - 3.16.1 In fact, the expected overlap analysis makes no assumption that customers purchase equally from all of their suppliers. It simply estimates the expected overlap given that customers choose at least some volumes from each of a given number of suppliers out of the total number of firms in the market. Likewise, a customer is counted as overlapping between the Parties if it purchases any volumes from both Parties, regardless of the amount.
 - 3.16.2 Moreover, the expected customer overlap between the Parties, given that customers source from a particular number of suppliers, is the same regardless of whether all customers source from that number of suppliers or if customers only source from that number of suppliers on average. This is shown by the following examples:

³¹ Appendix D, paragraph 15 of the PFs.

³² Appendix D, footnote 11 of the PFs.

³³ Five different benchmarks were used in each analysis (PFs, Appendix D, footnote 11). Only [X] from D&D in the Q3 2021 analysis was considered a loss to TMG under some benchmarks and not under others. The remaining losses were all considered the same way under all benchmarks. (See the ranges of results presented in PFs, Appendix D, Table 4.)

³⁴ Paragraph 7.80 of the PFs.

³⁵ Paragraph 7.80 of the PFs.

- (a) When all customers source from 2 suppliers out of 3 firms in the market, it is expected that the customer overlap between two suppliers is 50% (with equally differentiated firms) (i.e. customers purchasing from supplier A will also purchase from either supplier B or supplier C).
- (b) The outcome is the same in the following example, where customers multi-source from 2 suppliers on average but not all do so. In this example, one third source from a single supplier, one third source from 2 suppliers, and one third source from 3 suppliers. Single-sourcing customers sourcing from supplier A are expected to also source from supplier B 0% of the time (by definition). Dual-sourcing customers of supplier A are expected to also source from supplier B 50% of the time (as above), Triple-sourcing customers sourcing from supplier A are expected to also source from supplier B 100% of the time (because they source from all 3 firms in the market). Across these 3 groups of customers, on average they are expected to source from supplier B 50% of the time.³⁶ This is the same as if they were all sourcing from two suppliers.

3.16.3 This also confirms that the existence of some single-sourcing customers does not invalidate the analysis.³⁷

3.17 Second, the evidence demonstrates that triple-sourcing is widespread. It also demonstrates that it is more common for larger customers. Therefore, it is appropriate to compare the volume-weighted customer overlap between the Parties with that expected under triple-sourcing:

3.17.1 Analysis prepared by RBB shows that, of the Parties' common customers, 80% are purchasing from at least three suppliers (i.e. both Parties and at least one other supplier). This analysis is in no way predicated on a multiplier of 1.7, contrary to the claim in footnote 408 of the PFs.³⁸

3.17.2 Moreover, the CMA's own customer survey confirms that triple-sourcing is widespread. On average, respondents that multi-source use 3 suppliers.³⁹ The average number of suppliers of 2.2 to 2.4 reported in the PFs across single- and multi-sourcing customers also implies that there must be many triple-sourcing (or more) customers.⁴⁰

³⁶ I.e. $0\% * 33\%$ (for single sourcing customers); plus $50\% * 33\%$ (for dual-sourcing customers); plus $100\% * 33\%$ (for triple sourcing customers). The same result applies if different proportions of customers purchase from different numbers of suppliers. Consider the example where 20% source from a single supplier, 60% source from 2 suppliers, and 20% source from 3 suppliers. The average number of suppliers customers source from is still 2. The expected customer overlap across all customers is calculated as $20\% * 0\%$ (single-sourcing customers sourcing from supplier A are expected to also source from supplier B 0% of the time); plus $60\% * 50\%$ (dual-sourcing customers of supplier A are expected to also source from supplier B 50% of the time); plus $20\% * 100\%$ (triple-sourcing customers sourcing from supplier A are expected to also source from supplier B 100% of the time). This again gives an expected overlap of 50%. More technically, this occurs because the relationship between the expected overlap and the number of firms that customers choose to source from is linear for any given number of firms (i.e. it increases in a fixed proportion as the number of firms that customers choose to source from increases). Please see Table 2 below which shows this in more detail.

³⁷ As mentioned at paragraph 7.79 of the PFs.

³⁸ This has previously been explained in the Response to the AIS, at paragraph 2.16.

³⁹ As explained in the Response to the AIS and WPs, paragraphs 2.10.3a and b.

⁴⁰ Footnote 406 of the PFs.

- 3.17.3 Furthermore, the evidence suggests that larger customers are more likely to multi-source. While 55% of the Parties' customers multi-source on an unweighted basis, this figure increases to 80% when weighted by customer size (i.e. the number of transactions they register with the Land Registry).⁴¹ The customer survey also suggests that smaller customers tend to single-source more often, with the most popular reason for single-sourcing being that one supplier is enough for the type/amount of conveyancing done.⁴² Therefore, it seems likely that the weighted average number of suppliers used by customers would be significantly larger than the unweighted average of 2.2 to 2.4 from the survey.
- 3.18 In any event, even if multi-sourcing of the level found in the survey is used (instead of triple sourcing) the qualitative findings are unchanged. This is explained as follows:
- 3.18.1 When comparing survey data and actual data, a like-for-like comparison is required. That is, the unweighted average number of suppliers used by survey respondents must be compared with an unweighted customer overlap based on actual data. When this comparison is made, the evidence (again) shows that the customer overlap observed in practice is consistent with the Parties *not* being close competitors.
- 3.18.2 Larger customers tend to multi-source to a greater extent, as explained above. Therefore, when weighting by volume, we would expect to see a larger customer overlap between the Parties. As a result, comparing the expected customer overlap based on an unweighted average against an actual customer overlap weighted by volume would not be informative. A more appropriate comparison for the average number of suppliers used by respondents to the survey as presented in the PFs, i.e. 2.2-2.4, is the unweighted customer overlap.
- 3.18.3 Table 1 below shows that the actual unweighted customer overlap between the Parties is 20-27%.⁴³ As expected, this is lower than the weighted customer overlap, which is 30%. The table shows the proportion of each Party's customers that also purchase from the other Party. The second column shows this weighted by volume (i.e. as already submitted in the RBB report). The third column shows this unweighted (i.e. counting each individual customer once).

Table 1: Proportion of each Party's customers that also purchase from the other Party, 2019-2021

Party	Customer overlap weighted by volume	Unweighted customer overlap
D&D	[20-30]%	[20-30]%

⁴¹ As explained in the Response to the AIS and WPs, paragraph 2.10.3a.

⁴² This response had 49 net agreements, compared to 19 for the next most popular response. Survey, Figure 4 (note that net agree is defined as the difference between the number of respondents that indicate agreement minus the number that indicate disagreement).

⁴³ Please see the RFI3 Q23 onwards data pack – PFs update.zip attached for the details of this analysis. This is an updated version of the data pack “RFI3 Q23 onwards data pack.zip” submitted to the CMA for RFI 3. The only change from that original submission is that this data pack includes two additional Stata dofiles: (i) *2.11 TM sales 2019-21 (common customers) for common customers analysis - weighted and unweighted.do* under the “2. Cleaning and Combining the Datasets; and (ii) *3.16 Common Customer analysis - weighted and unweighted.do*” under the “3. Analysis. After running the master dofile, the relevant output for the table is produced in file “*Common Customer Analysis - weighted and unweighted.xlsx*” under the “Common Customer” folder.

TMG	[20-30]%	[20-30]%
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Source: Parties' data

Notes: Excludes SDG customers, for which customer level volume data are unavailable. For consistency with previous submissions, these results include only residential sales. However, the results are not substantially different when including commercial sales as well. When determining the number of residential customers, only those that have a positive residential volume or revenue are included. These results include customers for which LR scores could not be identified. Conservatively, customers are considered common if they purchase from both Parties regardless of the product, i.e. a customer who purchases residential volumes from D&D and commercial volumes from TM Group would be considered common.

3.18.4 This unweighted customer overlap of 20-27% is consistent with that expected in a "7-6" or a "6-5" scenario if customers purchase from 2.3 suppliers on average. Table 2 below shows that the expected customer overlap if customers purchase from 2.3 suppliers on average is 22% if there are 7 firms in the market and 26% if there are 6 firms in the market. Different scenarios for the average number of suppliers that customers source from are shown in the rows (the highlighted row shows customers sourcing from 2.3 suppliers on average). The columns show different scenarios for the number of firms in the market (assuming they are equally differentiated). Each cell shows the proportion of customers of firm A that are expected to also purchase from firm B, given the number of firms and the preference for multi-sourcing.⁴⁴

Table 2: Stylised relationship between number of firms in market, customers' multi-sourcing preference and expected proportion of customer overlap with symmetric differentiation

Type of multi-sourcing (rows)	3 firms	4 firms	5 firms	6 firms	7 firms	8 firms
2 suppliers	50%	33.3%	25%	20%	16.7%	14.3%
2.3 suppliers*	65%	43.3%	32.5%	26%	21.7%	18.6%
3 suppliers	100%	66.7%	50%	40%	33.3%	28.6%
4 suppliers	N/A	100%	75%	60%	50%	42.9%
5 suppliers	N/A	N/A	100%	80%	66.7%	57.1%
6 suppliers	N/A	N/A	N/A	100%	83.3%	71.4%

Source: RBB

* The estimate for 2.3 suppliers is calculated by taking 0.3 times the distance between the estimate for 2 suppliers and 3 suppliers for each number of firms (columns) separately. For example, the estimate for 3 firms is computed by taking 50% (the distance between the 2 and 3 suppliers estimates), multiplying that by 0.3 to get 15%, and adding that to 50% (the 2 suppliers estimate). This is appropriate because the relationship between the average number of suppliers customers multi-source from (the rows) is linear for any given number of firms in the market (the columns).

3.19 In addition, contrary to the assertions in the PFs, the customer overlap between the Parties is likely to reflect closeness of competition.⁴⁵ The most common reason by far given by customers for multi-sourcing is to facilitate competition. On a net basis, it is twice as popular as the next most popular response to the customer survey (51 net agreements compared to 26).⁴⁶ Therefore, it is likely that, the closer competitors are, the larger their customer overlap would be. As a result, the fact that the Parties have a relatively low share of common

⁴⁴ For further details, please see the RBB Report, titled 'Evidence on market size and Multi-sourcing – update with 2021 data', dated 24 February 2022.

⁴⁵ Paragraph 7.80 of the PFs.

⁴⁶ Figure 6.1 of the PFs.

customers (certainly much lower than a "4-3" or even a "5-4" scenario would suggest) indicates that they are relatively distant competitors.

Parties' internal documents

- 3.20 The PFs appear to place little weight on the analysis of TMG's and D&D's switching data based on their internal documents by number of customers.⁴⁷ However, these results are relevant and should be considered alongside the other evidence. The results weighted by revenue could be skewed by larger customers or customers that happened to purchase more or less from the Party in the year before being lost relative to other years. The results by number of customers would not be affected by this.
- 3.21 Moreover, it should be noted that the PFs misread Table 7.6 of the Survey and state incorrectly at paragraph 7.70b that D&D won the second highest share of customers lost by TMG. The correct reference should be the third highest, behind Landmark.

The evidence the PFs do place weight on shows that the Parties are not close competitors

- 3.22 The evidence that the PFs do place weight on has also been misinterpreted. It is in fact consistent with the Parties being distant enough competitors for the merger not to give rise to competition concerns.
- 3.23 The switching evidence that the PFs do place weight on (the revenue-weighted results from the Parties' switching data) still shows switching between the Parties of less than that expected in a 5-4 scenario (i.e. less than 25%).
- 3.24 Moreover, the PFs omit important evidence in respect of smaller suppliers. The PFs mention, in relation to the survey results for the best alternative supplier to each Party, that "*the results suggest that smaller suppliers are also considered as a valid alternative by some customers of both Parties*". While this is correct, it does not properly account for several other important conclusions from these results:
- 3.24.1 First, that the proportion of customers that list the other Party as the best alternative is in all cases at or less than that expected in a "7-6" scenario (17%).⁴⁸
- 3.24.2 Second, that smaller suppliers are listed as a valid alternative more often than the other Party in all interpretations of the results the CMA considers:⁴⁹
- (a) when considering which competitors are a *good* alternative to D&D, respondents mention "Other" competitors (21) more often than ATI (12) and TMG (8) combined;

⁴⁷ Paragraph 7.70 of the PFs.

⁴⁸ See the Response to the AIS and WPs, Table 1. The results are not materially different when considering "good" alternatives: 12-14% of responses listed TMG as a good alternative to D&D (i.e. 8 out of 58 or 67, depending on whether PSG and Index are treated as part of D&D), and 4-14% of responses listed D&D as a good alternative to TMG (i.e. 3 or 11 out of 78, depending on whether PSG and Index are treated as part of D&D).

⁴⁹ Figures 7.1-7.4 of the PFs. See also paragraph **Error! Reference source not found.** above.

- (b) when considering which competitors are the *best* alternative to D&D, customers mention "Other" competitors (15) as often as ATI (9), TMG (4) and Landmark (2) combined;
- (c) when considering which competitors are a *good* alternative to TMG, customers mention "Other" competitors (15) more often than D&D including its franchise brands (11) and a similar number of times as Landmark (16)
- (d) when considering which competitors are the *best* alternative to TMG, customers mention "Other" competitors (9) more often than D&D including its franchise brands (8).

3.24.3 Third, that smaller suppliers are mentioned as suppliers more often (70 times) than Landmark (66 times) and ATI (56 times).⁵⁰

3.24.4 Fourth, the survey data show that 8 losses from either Party go to "Others", compared to just 2 to the other Party.⁵¹

4. THE PFS FAIL TO PROPERLY ASSESS COMPETITIVE CONSTRAINTS FROM OTHER SUPPLIERS AND INTERMEDIARIES

- 4.1 The PFs contain a number of incorrect conclusions on the competitive constraints that exist in the market. These errors appear to have been facilitated by a highly selective and erroneous approach to the assessment of the evidence. Moreover, the PFs fail to provide adequate reasons for discounting sound evidence provided from various sources as to the significant competitive constraints that will continue to constrain the Merged Entity.

The PFs fail to take proper account of evidence on competitive constraints imposed by suppliers outside of the largest four

- 4.2 The PFs fail to take proper account of the body of evidence which evidences that the Merged Entity will face substantial competitive constraints from suppliers outside of the largest four.

- 4.3 First, the PFs discount evidence from the Parties' internal documents showing that smaller and/or local and regional players are a competitive constraint on an individual basis:

4.3.1 For example, in its response to the CMA's follow-up questions after the main party hearing on 12 April, D&D provided the CMA with internal documents which suggest that D&D consider these players to be strong competitors:

- (a) an internal D&D sales update noted that the sales manager is "*trying to win local work*". This evidences D&D also focuses on local areas to compete with regional suppliers.⁵²
- (b) a presentation titled "*UK Customer Success*" which is a weekly update from D&D's Southern sales team reporting that turnaround time and cancellations or switches to official searches are "roadblocks" in the area. As local and regional suppliers often have a competitive advantage over national providers,

⁵⁰ Survey, page 10.

⁵¹ Survey, page 18.

⁵² Response to CMA's follow-up questions dated 13 April 2022, Annex 02.

due to their ability to build deeper relationship with local authorities, they can offer quicker turnaround times which is valued highly by customers.⁵³

- (c) a number of D&D internal documents also suggest that D&D customers did switch to smaller or regional suppliers, such as [REDACTED], and D&D has had to adapt its pricing strategy to win customers from these suppliers.⁵⁴

4.3.2 Similarly, TMG provided the CMA with internal documents which evidence the effectiveness of other suppliers in competing and winning business from TMG:

- (a) [REDACTED] switched from TMG to [REDACTED];
- (b) [REDACTED] chose to use [REDACTED] instead of TMG;
- (c) [REDACTED] switched to [REDACTED]; and
- (d) [REDACTED] switched to [REDACTED].

4.3.3 The CMA is also aware that that TMG has recently lost two business from two significant customers:

- (a) [REDACTED] to an [REDACTED] (worth approximately £[REDACTED] per annum); and
- (b) [REDACTED] to [REDACTED] (worth approximately £[REDACTED] per annum).⁵⁵

4.4 The PFs also fail to adequately explain how the individual effectiveness of smaller players has been assessed:

4.4.1 For example, the PFs note that X-Press Legal operates through 27 franchisees but there appears to be no, or insufficient, analysis of the constraint that this imposes on the Parties;

4.4.2 There is also a lack of analysis of those "smaller" suppliers who have told the CMA that they operate on a national level;⁵⁶

4.4.3 The PFs either have not taken account of evidence from the Parties as to the number of new search companies that have recently entered the market, or fail to provide adequate reasons for dismissing the competitive constraint these suppliers exercise on the Parties. For example, there does not appear to have been an adequate assessment of the constraints exercised by Elan Technology, Your Search Partner, Property Search Direct and PSR Legal (to name just a few). These are particularly important omissions given that these suppliers have been established by former D&D employees with relevant industry expertise and relationships;⁵⁷ and

⁵³ Response to CMA's follow-up questions dated 13 April 2022, Annex 01.

⁵⁴ Response to CMA's follow-up questions dated 31 April 2022, Annexes 03-08.

⁵⁵ The CMA has been informed about these customer losses through TMG's biweekly compliance reporting.

⁵⁶ Paragraph 3.51 of the PFs.

⁵⁷ D&D's response to CMA's questions of 13 April 2022.

- 4.4.4 The PFs assert that the competitive constraints exercised by other suppliers is likely to diminish in the future⁵⁸ – this is a baseless conclusion which is not supported by evidence.
- 4.5 The PFs also fail to take account of the collective strength of IPSA and CoPSO members and the fact that these organisations help facilitate the effectiveness of their members:
- 4.5.1 The PFs, in particular, ignore important evidence which shows that IPSA membership helps facilitate the competitiveness of local and regional suppliers by, for example, organising regional seminars with local conveyancers, noting that those suppliers *"could get 20-30 or more...most of whom could be your potential clients"*.⁵⁹ This is just one example of the opportunities afforded to local and regional suppliers from IPSA membership, which helps these suppliers compete.
- 4.5.2 The PFs also overlook evidence from IPSA suggesting that regional suppliers have the ability to expand nationally. For example, IPSA confirmed that its members can obtain searches outside the area they cover through IPSA. IPSA also noted that it had launched "IPSA Searches", which, according to its website, is a *"truly national conveyancing search solution"*, and that IPSA is *"a collaboration of truly independent Local Search Firms"* who *"pride [themselves] on [their] local knowledge, unrivalled experience, honesty and accuracy"*, and most importantly, that customers can *"enjoy all the benefits of using a local expert with personal service (you are never a number) and FULL national coverage"*.⁶⁰ The CMA also acknowledges that *"smaller suppliers may be able to provide a more personalised service than the large, national suppliers"*.⁶¹
- 4.6 The PFs ignore other evidence that evidence the competitive constraint exercised on the Parties by smaller suppliers:
- 4.6.1 A smaller supplier notes to the CMA that *"we can compete very well when looking at High Street solicitors or small conveyancing firms"*⁶², which, as the CMA suggests in the PFs, is a significant part of the overlap in the Parties' activities.⁶³ Responses from other smaller suppliers also paint the same picture of a highly competitive market for the supplier of PSRBs to small and medium sized law firms and conveyancers.
- 4.6.2 A smaller supplier noted that it could reach larger firms through panels: *"We don't work directly to large conveyancers we provide searches to panels who get the business from larger conveyancers and panel it to us for a small price, so they make money from the client and pay us a smaller fee and we use their platform to return searches"*. This corroborates the Parties' submission that it is possible for small suppliers to reach out to large customers through intermediaries and search panels.

⁵⁸ Paragraph 7.218 of the PFs.

⁵⁹ Response to CMA's follow-up questions dated 31 April 2022, Annex 09.

⁶⁰ IPSA Searches [website](#).

⁶¹ Paragraph 7.153 of the PFs.

⁶² Appendix C, paragraph 5(f) of the PFs.

⁶³ Summary of PFs, paragraph 34.

- 4.7 Finally, the PFs take a highly selective approach to interpreting the Survey evidence. The PFs erroneously conclude that "[a] *relatively small number of respondents use smaller suppliers*".⁶⁴ The data collected under the Survey does not support this conclusion. Instead:
- 4.7.1 the Survey data shows that 8/18 (over 44%) losses from either Party go to "others", compared to just 2/18 (less than 12%) to the other Party;⁶⁵
 - 4.7.2 regional experts are mentioned as suppliers more often (70 times) than Landmark (66 times) and ATI (56 times);⁶⁶
 - 4.7.3 when considering which competitors are a *good* alternative to D&D, respondents mention other competitors (X-Press Legal Services, Move Reports UK, local authorities, water companies and others) more often (21 times) than ATI (12 times) and TMG (8 times) combined;⁶⁷
 - 4.7.4 when considering which competitors are the *best* alternative to D&D, customers mention other competitors (15 times) as often as ATI (9 times), TMG (4 times) and Landmark (2 times) combined;⁶⁸
 - 4.7.5 when considering which competitors are a *good* alternative to TMG, customers mention other competitors more often (15 times) than D&D including its franchise brands (11 times) and a similar number of times as Landmark (16 times);⁶⁹ and
 - 4.7.6 when considering which competitors are the *best* alternative to TMG, customers mention other competitors more often (9 times) than D&D including its franchise brands (8 times).⁷⁰
- 4.8 A proper assessment of the totality of evidence does not support the finding of an SLC. Rather, it shows that suppliers outside of the largest four exercise considerable constraint on the Parties, both individually and in aggregate.

The CMA fails to take proper account of evidence on competitive constraints imposed by D&D Franchisees

- 4.9 The PFs acknowledge that "*in aggregate, the D&D Indirect franchisees may exert some competitive constraint on the Merged Entity*", that the "*D&D Indirect franchisees are able to differentiate their offering in relation to price and local or personal service*", and that their aggregate market share has increased over the period 2018-2021.⁷¹ The Parties agree with these observations and note that these provisional conclusions are inconsistent with the PFs stating that "*any competitive constraint that the D&D Indirect franchisees may exert on the Merged Entity is likely to be limited and inferior to the constraint exerted by a fully*

⁶⁴ Survey, page 10.

⁶⁵ Survey, page 15.

⁶⁶ Survey, page 10.

⁶⁷ Figure 7.1 and 7.2 of the PFs.

⁶⁸ Survey, figure 7.

⁶⁹ Figure 7.3 and 7.4 of the PFs.

⁷⁰ Survey, figure 8.

⁷¹ Paragraph 7.202 of the PFs.

independent competitor". The Parties strongly disagree with this provisional conclusion, in particular:

- 4.9.1 The PFs discount the fact that D&D loses meaningful volumes to independent franchisees. It also ignores the Survey evidence which shows that losses from D&D to Index PI were greater than those from D&D to TMG.⁷² The only rational conclusion from this evidence is that there is real and material competition between D&D and independent franchisees.
- 4.9.2 The PFs note that the cost to D&D in losing business to a D&D Indirect franchisee is less than the cost of losing business to an independent rival, given the royalties that D&D would earn from D&D Indirect franchisees. However, practically speaking, D&D still has a strong incentive to compete against the D&D Indirect franchisees, as it loses up to 80% of its revenue net of variable costs when losing a customer to the franchisees.⁷³ Moreover, the franchisees have a strong incentive to compete against D&D. If they gain a customer from D&D because they earn nothing if D&D serves that customer directly.
- 4.9.3 Similarly, the PFs refer to the purported increase in importance of digitisation and ancillary services and suggest that D&D Indirect franchisees may become more dependent on D&D in the future. This is purely an assumption which is not supported by evidence.

The PFs fail to take proper account of evidence on competitive constraints imposed by intermediaries

- 4.10 The PFs fail to adequately explain the basis on which the constraints imposed by intermediaries on the Merged Entity have been assessed. Furthermore, the PFs make a number of assumptions to support the conclusion that intermediaries do not exert sufficient constraints on the Merged Entity, which are not supported by the body of evidence.
- 4.11 The PFs appear to accept that, on average, intermediaries are able to negotiate lower prices (net of referral fees) than small, medium and large conveyancers⁷⁴. This is supported by the Parties' evidence which, for example, shows that TMG (CDS) were required to reduce prices for PSRBs sold through the United Legal Services platform. Yet these facts are inconsistent with the conclusion that intermediaries do not provide pricing constraints on the Merged Entity.
- 4.12 The PFs also dismiss the Parties' submission that ATI would be likely to start providing services to intermediaries following any price increase post-merger by relying on the subjective views of ATI.⁷⁵ Relying on these views is misguided for the following reasons.
 - 4.12.1 Objectively, considering the size and the growth rate of ATI, it would be very well placed to start serving intermediaries at short notice as it is one of the biggest suppliers of PSRBs in the market.

⁷² Survey, pages 15-16. Three respondents reported switching from D&D to Index PI, compared to two to TMG.

⁷³ Paragraph 7.170b of the PFs.

⁷⁴ Paragraphs 6.54-6.55 of the PFs.

⁷⁵ Paragraph 7.214(c) of the PFs.

- 4.12.2 It would also appear unlikely that ATI has no incentive to expand to this segment, given that other similarly placed firms are already serving it. Widening ATI's reach to this new customer base would be likely to bring ATI higher revenue net of variable costs from intermediaries and would be likely to have no detrimental effect on its profits from its existing customer base.
- 4.12.3 Moreover, even if ATI is currently not interested in serving this segment of the market, that does not mean that it would not be interested following a price increase post-merger. Following such a price increase it would appear rational for ATI to start serving these customers. The resulting credible threat of ATI doing this would ensure that prices to intermediaries remain at pre-merger levels.
- 4.12.4 Furthermore, it is important not to put a significant weight on ATI's subjective submission in this matter, as ATI has a strong interest in the Transaction not going forward.
5. **MISREPRESENTATION OF THE SIGNIFICANCE AND NATURE OF INTEGRATION WITH CMS AND ANCILLARY SERVICES FOR COMPETITION IN THE SUPPLY OF PSRBs**
- 5.1 The PFs overstate and therefore misrepresent the importance of integration with CMS and ancillary services in driving competition in the supply of PSRBs. The PFs arrive at a number of manifest errors and irrational conclusions as a result of failures in the acquaintance and balancing of the evidence available.
- CMS integration and ancillary services are not important factors for competition in the supply of PSRBs**
- 5.2 First, the PFs erroneously conclude that *"the degree of integration with case management software, and the ancillary services offered"* are important to customers.⁷⁶ This is untrue and not at all supported by the evidence. The PFs arrive at this conclusion in the context of considering the aspects of quality which are important to customers; yet this conclusion is based on a misinterpretation of the Survey evidence and does not take proper account of all of the available evidence:
- 5.2.1 The PFs appear to support this conclusion by referring to the Survey and noting that *"functionality and quality of the software platform are important drivers of customer choice"*.⁷⁷ Irrespective of the accuracy of this statement as regards the choice of software platform, it is of no material relevance to the overall assessment of the importance of *CMS integration and ancillary services* and their relevance to the choice of PSRB provider.
- 5.2.2 Specifically, it is incorrect to interpret the above statement as relating to anything other than the overall functionality and quality of the PSRB ordering platform, rather than its integration with CMS or the capacity to offer ancillary services. Moreover, there are various functional and quality aspects of a PSRB ordering platform and this

⁷⁶ Paragraph 6.42 of the PFs.

⁷⁷ Paragraphs 6.31 – 6.43 of the PFs.

statement does nothing to identify which of those aspects may be important to customers.

- 5.2.3 For most customers, there are no material differences in the ease at which they are able to order directly through a PSRB platform as compared to ordering via CMS. The PFs assert that it is "*advantageous for PSRB platforms to be integrated into case management software (if they use it)*" simply because a conveyancer "*would have already logged on*".⁷⁸ This drastically overplays the significance of PSRB platforms in a conveyancer's decision making but, in any event, there are no material differences with ordering PSRBs via CMS as compared to ordering direct via a supplier's online platform or otherwise. The Parties demonstrated at the Site Visit the ease and speed at which PSRBs can be ordered directly from a PSRB supplier.
- 5.2.4 In any event, the PFs appear to rely on the wrong survey question to assess the importance of CMS and ancillary services. The Survey unquestionably shows that customers do not consider compatibility with CMS or the provision of ancillary services to be an important parameter of competition – these are not material factors that drive customer choice.
- 5.2.5 In considering this latter question, the PFs note that "*our customer survey did not show integration with case management software and ancillary services to be the most important factor for many customers...*".⁷⁹ In fact, rather than "*many*", 153 respondents out of 170 (i.e. **90%**) did **not** consider it to be either the most important factor in choosing a PSRB supplier, or even an important factor; **only seven** respondents of 170 (i.e. **4%**) considered it to be the most important factor. In relation to the importance of ancillary services, **only four** (i.e. **2.3%**) considered this to be the most important factor.⁸⁰ This is compelling evidence, from a substantive and representative sample of customers, that integration with CMS and ancillary services are not important drivers of competition.
- 5.2.6 To arrive at an alternative conclusion would require the balance of evidence to be weighted to the contrary. In this context, the PFs disproportionately weigh in the balance feedback received from other third parties, in particular from large law firms. Yet the views of large law firms are not indicative of the drivers of competition in the wider market. The Parties have explained that the needs of large law firms, typically focused on commercial transactions, are very different to other customers. Moreover, as the PFs note, large law firms "*represent[s] a relatively small part of the overall market*"⁸¹ and only **[0-5]%** of D&D's business.⁸²
- 5.2.7 Even if the views of large law firms were indicative of the wider market, which is denied, this would not be sufficient to shift the balance of evidence to support the conclusions arrived at in the PFs. Firstly, the PFs note that in the context of its Inquiry the CMA spoke to "*several*" law firms including "*some*" 'Top 100' law firms which specialise in large transactions, as well as "*some*" law firms which are large or

⁷⁸ Paragraph 3.16 of the PFs.

⁷⁹ Paragraph 6.120 of the PFs.

⁸⁰ Survey, page 18.

⁸¹ Paragraph 7.224 (b) of the PFs.

⁸² Paragraph 7.51 of the PFs.

medium-sized customers for D&D.⁸³ This is very clearly less representative than the Survey evidence and should be weighed appropriately in this context. Secondly, even of the evidence that the PFs seek to rely on, it appears that only one Top 100 law firm and one Panel Manager refer specifically to ancillary services in the context of considering important aspects of the functionality and quality of the software platform; none specifically mention integration with CMS as important, the only mention of which comes from ATI, a competitor.

- 5.2.8 The PFs also refer to two of D&D's internal documents as evidence that PSRB suppliers benchmark their offerings against their competitors and asserts that these documents *"suggest that such integration is an aspect of quality on which suppliers compete"*. This analysis is flawed. First, the document referred at paragraph 6.40(a) of the PFs, actually suggests that D&D [X]: "[X]" A proper reading of this document would suggest that D&D is not particularly advanced in relation to CMS integration and ancillary services. Therefore, it is not appropriate to present D&D as having a material advantage over other suppliers in this regard. In any event, the mere fact that the Parties may or may not consider integration with CMS and various ancillary services in their internal documents does not mean these are important aspects of quality that are important to customers or are key drivers of competition customer choice, particularly when the evidence from customers themselves overwhelmingly shows that they are not.
- 5.3 The PFs later go on to consider recent market trends and conclude, at paragraph 6.120, that *"case management software and ancillary services is a **significant** factor for competition in this market..."*⁸⁴ This is an irrational assertion which is unsupported by the evidence:
 - 5.3.1 As noted above, the Survey evidence from the customers themselves is entirely inconsistent with the conclusion that CMS integration and ancillary services are important to customers or that they drive choice.
 - 5.3.2 The PFs consider that the evidence on CMS integration and ancillary service is *"to some extent mixed"*.⁸⁵ This is disingenuous given the strength of the Survey evidence, and the lack of probative value of the other evidence on which the PFs seek to rely. Nevertheless, even if the evidence was *"to some extent mixed"*, this would not be a sufficient basis in light of the totality of the evidence available for the PFs to make a conclusion on this point.
 - 5.3.3 It is therefore inexplicable that the PFs, in light of evidence it considers to be *"mixed"*, and which is contrary to the overwhelming Survey evidence from a substantive and representative sample of customers, could provisionally conclude that integration with CMS and ancillary services are a ***"significant factor"*** for competition in this market.
 - 5.3.4 It is also worth noting that when the PFs seek to rely upon the Survey evidence relating to the functionality and quality of the software platform, it finds that the evidence from the survey is *"sufficiently robust"*.⁸⁶ Yet, when considering the correct

⁸³ Paragraph 13 of the PFs.

⁸⁴ Paragraph 6.120 of the PFs.

⁸⁵ *Ibid.*

⁸⁶ Paragraph 4.19 of the PFs.

question, the answers to which are overwhelmingly supportive of the fact that integration with CMS and ancillary services are not important, the PFs discount or attach disproportionately less weight to the Survey evidence. This is disingenuous and highlights the inconsistent approach applied to the evidence throughout the PFs.

- 5.3.5 On a proper assessment of the evidence, the only rational conclusion is that CMS and ancillary services are **not** significant factors for competition in the market, and rate below other factors (such as timeliness, accuracy, price and even customer service) which are greater drivers of customer choice and competition in the market. Accordingly, it cannot be stated that suppliers which are not integrated with CMS or offer ancillary services are at a competitive disadvantage as compared to those suppliers which do have these capabilities.

Switching

- 5.4 Thirdly, the PFs suggest that integration with "*other software*" is a factor that makes switching a "*difficult and/or lengthy process*".⁸⁷ A proper balancing of the body of evidence does not support this conclusion:

- 5.4.1 The PFs refer to the CMA's engagement with large law firms and Panel Managers, concluding that "*some*" (i.e. a subset of an already unrepresentative subset) had found switching more difficult. It is noted that, even of this small sample, one large law firm considered that switching is "*straightforward*" and a Panel Manager said that they had been able to switch in "*only three days*";⁸⁸
- 5.4.2 The PFs then go on to erroneously state that "*integration with other software*" was mentioned as important by a number of survey respondents. The reference to paragraph 6.120 here is unclear.⁸⁹ Nevertheless, this statement significantly conflates the Survey evidence (for the reasons set out above);
- 5.4.3 In any event, this conclusion ignores that switching overall is easy. The PFs themselves note that there are "*few technical or contractual barriers to switching*".⁹⁰ That there are "*few technical*" barriers to switching is consistent with the Survey evidence which shows that switching is common, and is facilitated by widespread multisourcing. This is further supported by the findings at Phase 1 which found that "[a]lmost all the Parties' customers that responded to the CMA's merger investigation submitted that switching Property Search Report Bundles provider is easy".⁹¹ This is entirely inconsistent with the conclusion that CMS integration makes switching difficult.

Economies of scale

- 5.5 Finally, the PFs conflate the limited evidence on economies of scale to suggest that entry and expansion by smaller suppliers would be unlikely because, lacking the economies of scale in covering overheads available to larger suppliers, they would not be able to make the necessary

⁸⁷ Paragraph 6.76 of the PFs.

⁸⁸ Paragraph 6.76 of the PFs.

⁸⁹ Paragraph 6.77 of the PFs.

⁹⁰ Paragraph 6.88 of the PFs.

⁹¹ Phase 1 Decision, paragraph 124.

investments into integrated software systems and the provision of ancillary services. This is entirely unsupported by the evidence:

- 5.5.1 Firstly, again, this assertion is based on the false premise that CMS integration and ancillary services are important factors for competition in the supply of PSRBs. A proper assessment of the evidence would show that they are not.⁹²
- 5.5.2 In light of this, the evidence on past expansion, in particular by ATI, Index and CDS, is in fact relevant for the assessment, contrary to claims made in the PFs.⁹³ This evidence shows that it is possible for smaller players to expand quickly in this market.
- 5.5.3 Even if investments into integrated software systems and the provision of ancillary services are required in order for smaller competitors to expand, once they do so they will be able to take advantage of any economies of scale. Any such investments would simply require financing. This financing is likely to be available, as, once the investment has been made, and the resulting expansion has happened, this initial financing would be repaid. The payback period will be even faster if there is a price increase post-merger. As a result, any price increase post-merger would be likely to trigger expansion.
- 5.5.4 In any event, large scale expansion by smaller competitors (or entry) is not necessary to prevent an SLC resulting from the merger. The evidence consistently shows that the Parties are not close enough competitors for the merger to raise competition concerns and that smaller competitors (even at their current size) comprise an important constraint, in aggregate, on the Parties.
- 5.6 For all of the reasons set out in this submission, it would be unsafe for the CMA to proceed to a decision in line with the erroneous conclusions contained in the PFs. The Parties' greatest concern is that the conclusions are fundamentally inconsistent with the plentiful available evidence which shows a lack of closeness between the Parties and plentiful ongoing competitive constraint. The Parties urge the CMA to reconsider and to acknowledge that the evidence undeniably shows that it is more likely than not that there is no SLC arising from this Transaction.

Clifford Chance LLP

8 June 2022

⁹² As the Parties have explained from paragraphs 5.1 above.

⁹³ Paragraph 8.17 of the PFs.