

**CASE ME/6963/21**

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

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**SUPPLEMENTARY RESPONSE TO PROVISIONAL  
FINDINGS**

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**SUBMISSION DATED  
27 June 2022**

## **DEFINITIONS**

Unless otherwise indicated, any defined terms and acronyms used in this response shall have the same meaning as those provided in the Provisional Findings.

**ME/6963/21**

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

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

**1. INTRODUCTION AND EXECUTIVE SUMMARY**

- 1.1 This response 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**"), as provided in unredacted form on 21 June 2022 (the "**Confidential PFs**") by the Competition and Markets Authority ("**CMA**") in relation to the completed acquisition of TMG by D&D (the "**Transaction**").
- 1.2 The Parties do not propose to restate their position on every issue covered by the Confidential PFs or to address each error set out therein. Rather, 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 (the "**Response to the AIS/WPs**"); the Responses to the CMA's follow-up questions of 19 and 21 April 2022; the Response to the PFs of 8 June 2022 (the "**Response to the PFs**"); and the oral evidence provided during the Response Hearings on 14 June 2022 (together, the "**Previous Submissions**").
- 1.3 The Parties consider that the information unredacted in the Confidential PFs corroborate their Previous Submissions. In particular:
- 1.3.1 The unredacted share of supply data provides further evidence that the parties are not particularly close competitors and that they are, and will remain, constrained.
- 1.3.2 Third-party evidence that was redacted in the PFs corroborate that the Parties are not close competitors and that smaller and regional players will continue to constrain the Merged Entity.
- 1.3.3 The market share estimates in the Confidential PFs suggest that the PFs misstated the magnitude of certain differences in shares of supply. In particular, it appears that there is a [X] difference between the Parties' shares of supply when based on the environmental reports compared to when based on the partial response the CMA received from competitor data.

**2. THE UNREDACTED SHARE OF SUPPLY DATA PROVIDES FURTHER EVIDENCE THAT THE PARTIES ARE NOT PARTICULARLY CLOSE COMPETITORS AND THAT THEY ARE CONSTRAINED**

- 2.1 The PFs provisionally conclude that the Merged Entity will not face sufficient competitive constraints post the Merger.<sup>1</sup> The Previous Submissions explain why this conclusion is flawed, and section 3 below sets out further third-party evidence that is consistent with the Previous Submissions in this regard. Moreover, this section explains that the unredacted share of supply data is consistent with the Parties being constrained by their competitors.
- 2.2 First, the PFs note that the share of supply in the "others" category has been declining, and claims that this is evidence that they are a diminishing competitive force.<sup>2</sup> This is based on a drop from a [%] combined share of supply in 2018 to an [%] combined share of supply in 2021.<sup>3</sup> However, although the PFs recognise that D&D's share of supply has fallen since 2018<sup>4</sup>, it fails to recognise that TMG's share of supply has also fallen since 2018. Moreover, and more importantly, the Parties combined share of supply [%]. In particular, when Independent Franchisees are excluded, the Parties' combined share of supply [%].<sup>5</sup> Given that the PFs claim that the drop in the share of supply of the "other" category is evidence that they are a diminishing competitive force, it must carry that finding through to the Parties' share of supply data.<sup>6</sup>
- 2.3 Second, the Parties provided multiple items of switching data to evidence that the Parties are not particularly close competitors. The PFs discount such data partially on the basis that the limited switching between the Parties may reflect the fact that ATI has accounted for a substantial share of switching away from D&D and TMG, which in turn is due to ATI's recent market growth. The PFs also assert that there is some evidence (the PFs do not specify which evidence) that ATI's growth is slowing, and also asserts that there is limited evidence to suggest that ATI will continue to increase its market share in future years. The PFs consider that, given this, little weight should be attached to the limited switching between the Parties.<sup>7</sup>
- 2.4 The additional information disclosed in the Confidential PFs is not consistent with the PFs' findings. In particular, ATI's market share has [%] increased [%] between 2018 and 2021. What is of note in this regard is that [%].<sup>8</sup> This strongly suggests both that ATIs growth is not slowing, and that ATI's market share will continue to increase in future years. Indeed, this growth is of particular importance since, as noted in section 4 below, properly analysed, ATI's share of supply in 2021 [%].

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<sup>1</sup> PFs, paragraphs 7.105 *et seq.*

<sup>2</sup> PFs, paragraph 7.141 and 7.143. The shares of supply cited in this paragraph are based on Tables 7.1 and 7.2 below. As noted in section 4 below, these Tables overstate the Parties' shares of supply.

<sup>3</sup> PFs, paragraph 7.25(f).

<sup>4</sup> PFs, paragraph 7.25(d).

<sup>5</sup> [%].

<sup>6</sup> The Parties combined share of supply [%]. However, as the PFs recognise (PFs, paragraph 7.202 *et seq.*), even if the Independent Franchisees are 'counted' towards the Parties' combined market shares, they constrain D&D and will continue to constrain the Merged Entity. Accordingly, even on the CMA's case, [%].

<sup>7</sup> PFs, paragraph 7.72 to 7.73.

<sup>8</sup> PFs, Table 7.1.

**3. THIRD-PARTY EVIDENCE IN THE CONFIDENTIAL PFS CORROBORATES THE PREVIOUS SUBMISSION**

3.1 The Response to the PFs explain that, in contrast to the wide range of evidence on which the Parties rely, the PFs rely on a selective evidence pool, often comprising limited strands of third-party statements.<sup>9</sup> It also now transpires that much of the third-party evidence disclosed only in the Confidential PFs is inconsistent with the PFs findings. For example:

3.1.1 **Multi-sourcing:** The Previous Submissions explained that multi-sourcing is prevalent, that it is undertaken by customers to intensify competition, and that it increases the ease by which customers can switch.<sup>10</sup> Paragraph 6.76 of the PFs state that "*Our engagement with large law firms and Panel Managers suggested that some had found switching PSRB supplier to be a difficult and/or lengthy process due to the need to integrate with other software.*" The Confidential PFs reveal, however, that [REDACTED], submitted that it can [REDACTED].

3.1.2 **Closeness of competition:** Paragraph 4.4.1 of the Parties' Response to the PFs noted that the PFs appeared to have undertaken no, or insufficient, analysis of the constraint that X-Press Legal imposes on the Parties. This apparent omission was important, since X-Press Legal operates through 27 franchisees. The Confidential PFs demonstrate that, instead, the PFs failed to take account of [REDACTED].<sup>11</sup>

3.1.3 **Competitive constraints and entry and expansion:** The Confidential PFs also provide evidence that, contrary to the assertions in the PFs, smaller competitors are able to increase their market shares rapidly and have done so in practice. For example, [REDACTED].<sup>12</sup>

**4. THE CONCLUSIONS DRAWN IN THE PFS FROM THE SHARE OF SUPPLY DATA ARE FLAWED**

4.1 The PFs' primary basis for calculating the total market size for the supply of PSRBs in E&W is by totalling up the sales volume data that it was provided by the Parties and the Parties' competitors.<sup>13</sup> Appendix B of the PFs provides an alternative basis for calculating the total market size, which is based on the volume of environmental search reports purchased from the three main environmental report providers (FCI, Groundsure, and Landmark in E&W, in 2021).<sup>14</sup>

4.2 The Response to the AIS/WPs explains that the total market size based on the environmental search reports is likely to be a more reliable measure than the estimates based on competitor data. This is because, as the PFs recognise<sup>15</sup>, environmental search reports cover 98% of PSRBs. In contrast, the PFs note that the CMA only received data from 36<sup>16</sup> out of the 88 listed CoPSO members (excluding the Parties) – a response rate of only 41%. The market

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<sup>9</sup> Response to the PFs, section 2.

<sup>10</sup> See, for example, section 3 of Appendix 1 to the Response to the AIS/WPs.

<sup>11</sup> PFs, paragraph 7.138.

<sup>12</sup> PFs, paragraph 8.29.

<sup>13</sup> See Tables 7.1 and 7.2 of the PFs.

<sup>14</sup> See Tables 3 and 4 of Annex B to the PFs.

<sup>15</sup> See paragraph 5 of Annex B to the PFs.

<sup>16</sup> Paragraph 3 of Annex B to the PFs states that the tables list 34 of the smaller supplies, and the tables also list Landmark and ATI.

size estimated on the basis of competitor data is therefore less robust and complete than the estimate based on environmental search reports.

- 4.3 The response of the PFs appears to be that any inaccuracy does not matter, since the delta resulting from the measures is not significant.<sup>17</sup> This response is flawed, however. First, the PFs offer no response to the point of principle, that the data based on environmental search reports is more robust. Second, the differences in the results between the two measures is material. When calculated on the basis on environmental search reports, the Parties' share of supply in 2021 is lowered to [X]% when Independent Franchisees are excluded ([X]% when Independent Franchisees are included). The increment is also lowered to [X]%. It therefore appears that the PFs' primary use of a less complete and robust total market size figure [X] overstates both the Parties' combined market share and the size of the increment.
- 4.4 It is also notable that ATI's share of supply in 2021 when based on environmental reports was [X]%. Even when analysing the market on this static basis, ATI's share of supply is therefore [X], properly analysed. Moreover, and as explained at paragraph 2.4 above, the evidence suggests that ATI's market share will continue to increase in future years. This may further reduce the ([X]) delta between ATI and the Merged Entity. Accordingly, properly analysed, the PFs cannot conclude that the shares of supply support its "*assessment that the Merger creates a clear market leader*".

**Clifford Chance LLP**

27 June 2022

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<sup>17</sup> Paragraph 6 of Appendix B to the PFs.