



COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 120 OF THE ENTERPRISE ACT 2002

CASE No. 1586/4/12/23

Pursuant to rules 14 and 26 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the “Rules”), the Registrar gives notice of the receipt on 21 April 2023 of an application for review (“the Application”) under section 120 of the Enterprise Act 2002 (the “Act”) by Dye & Durham Limited (“D&D Canada”) and Dye & Durham (UK) Limited (“D&D UK”) (together, “D&D” / the “Applicants”) of the decision of the Competition and Markets Authority (the “Respondent”) dated 29 March 2023 in relation to the divestment of TMG Group (UK) Limited (“TMG”) following the CMA’s final report dated 3 August 2022. The Applicants are represented by Dentons UK and Middle East LLP of One Fleet Place, London EC4M 7RA (Reference: Adrian Magnus).

D&D is a leading provider of software to legal, financial and business professions with customers in Australia, Canada, the United Kingdom and Ireland. It produces a range of software which (among other things) automates the property searches typically conducted when real estate is conveyed. The results of these searches are provided to conveyancers in the form of property search report bundles (or “PSRBs”).

On 8 July 2021, D&D acquired TMG. Like D&D, TMG also provides PSRBs to conveyancers across England and Wales. D&D did not seek prior merger clearance for its acquisition of TMG and, after the transaction completed, the CMA opened an investigation into the transaction. On 18 May 2022, the CMA published its provisional findings, in which it provisionally concluded that the merger may be expected to result in a substantial lessening of competition. On the same day, the CMA published a notice of possible remedies which identified divestiture as a potential remedy. D&D engaged with the CMA’s investigations and discussed possible remedies. On 3 August 2022, the CMA published its final report which required D&D to divest TMG in its entirety. On 13 October 2022, D&D gave (and the CMA accepted) a final set of Undertakings to divest its ownership of TMG (the “Final Undertakings”). In brief, the effect of the Final Undertakings is that D&D must divest TMG to a purchaser approved by the CMA by a specified date. If D&D does not do so, then the CMA may appoint a Divestiture Trustee to do so on D&D’s behalf.

According to the Application, since 13 October 2022, D&D has engaged in a private sale process to divest TMG by selling it to a third party buyer, in accordance with the Final Undertakings. As at the date of the Application, negotiations with bidders are continuing. However, D&D continues to have concerns that the sales process may not lead to a divestment of TMG on acceptable terms. D&D has, in consultation with its financial advisers and with the CMA, continued to explore other possible methods of divesting TMG in line with the Final Undertakings.

The Applicants submit that, by the Decision, the CMA declined to:

1. Approve a “Twin Track Divestment Process” (the “Proposal”) as an acceptable means of de-merging TMG from D&D and thereby complying with the Final Undertakings given by D&D to the CMA without any need for variation of the same. The Proposal envisaged the continuation of attempts by D&D to sell TMG to a third party purchaser, but to run in parallel with the proposed creation or allotment of shares in a new public limited company, known as Dye & Durham Callisto plc (“Spinco”), whose shares were admitted to trading on a market operated by the London Stock Exchange (“AIM”), to which D&D’s shareholding in TMG would be transferred (the “AIM Decision”). Spinco would then function as an independent entity, separate from D&D;
2. Vary D&D’s Final Undertakings (if the same were needed) so as to allow D&D to transfer its shareholding in TMG to Spinco, which would in turn operate as an independent PLC whose shares were admitted to trading on AIM, as a means of achieving the divestiture of TMG (the “Variation Decision”); or

3. Approve Spinco as a form of approved purchaser, even if no variation of the Final Undertakings were required (the “Approval Decision”).

The Applicants contend the effect of the decision is to:

- (a) prevent D&D from proceeding with the divestiture of TMG through a transfer of D&D’s shareholding in TMG to Spinco, a newly formed entity, even though Spinco would (once admitted to AIM) meet the CMA’s purchaser approval criteria;
- (b) prevent D&D from divesting TMG in a different manner from a direct sale to a third party purchaser, namely by transferring the shareholding in TMG to Spinco as an independent entity whose shares would be admitted to trading on AIM;
- (c) preclude variation of the Final Undertakings (if the same were needed) to permit a divestment of TMG via an AIM admission of Spinco, even though this would have the significant benefit of improving the competitiveness of the sales process and, if the sales process failed to produce a satisfactory outcome, would result in Spinco operating as a functionally independent entity, capable of competing with D&D in the relevant market; and
- (d) proceed on the narrow basis that a variation to the Final Undertakings would be required, that such a variation should not be permitted, and that the Proposal would not meet certain “suitable purchaser” requirements which the CMA would wish to apply.

D&D challenges the decision on the following principal grounds:

1. The CMA erred in law in finding that the Proposal would require a variation to the Final Undertakings given by D&D to the CMA. No variation was necessary, since the structure envisaged that (once admitted to AIM) Spinco could readily – and should – have been treated as a prospective purchaser of TMG, eligible for approval (**Ground 1**).
2. The CMA in fact proceeded in the Approval Decision to consider the purchaser approval criteria, but erred in law in applying those criteria on the facts of this case, with the resulting erroneous legal conclusion that the purchaser approval criteria were not met (**Ground 2**). In particular:
 - a. The CMA erred in law in considering the purchaser approval criteria in relation to TMG itself, or to the shareholders of TMG/Spinco, rather than to Spinco.
 - b. The CMA erred in law in finding that the independence criteria were not met.
 - c. The CMA erred in law in finding that the capability and commitment criteria were not met.
 - d. The Approval Decision was otherwise *Wednesbury* unreasonable in taking into account irrelevant considerations, failing to take into account material considerations, was vitiated by procedural unfairness and/or was irrational.
3. Alternatively, to the extent that the Tribunal finds against D&D on Ground 1, but rules in favour on Ground 2, the CMA erred in law in taking the Variation Decision, finding that no variation to the Final Undertakings should be given, since the Proposal brings with it a suitable purchaser mechanism which has the additional advantage of enabling existing shareholder values to be maintained, with no associated risk to the competition concerns that lie behind the divestiture requirement. The Variation Decision was in those circumstances disproportionate, vitiated by other errors of law and/or was *Wednesbury* unreasonable (**Ground 3**).
4. D&D also challenges the CMA’s decision refusing to extend the deadline for divesting TMG until four weeks after the conclusion of the Application (the “Extension Decision”). As D&D’s challenge to the AIM Decision will become academic unless the deadline is extended, D&D contends that the Extension Decision is disproportionate and infringes D&D’s statutory right to pursue an effective review of the contested Decision (**Ground 4**).

The Applicants seek the following relief from the Tribunal:

1. An order that the Variation and Approval Decisions be quashed and remitted to the CMA to take a new decision in accordance with the Tribunal's ruling.
2. A direction that D&D be permitted to divest itself of TMG by means of the divestiture process identified in the Application, subject to the imposition of such reasonable conditions as the CMA may seek and the Tribunal endorse.
3. An order that the deadline for divestiture be extended until after the determination of the Application and any further decision of the CMA on remittal.
4. An order that D&D is entitled to payment of its costs by the CMA on the standard basis, to be subject to a detailed assessment if not agreed.
5. Such other relief as the Tribunal may consider appropriate.

Any person who considers that he has a sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

Please note that: (i) a direction of the President is currently in place as to the electronic filing of documents (see paragraph 2 of the [Practice Direction](#) relating to Covid-19 published on 20 March 2020); and (ii) any request for permission to intervene should be sent to the Registrar electronically, by email to registry@catribunal.org.uk, so that it is received within three weeks of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by telephone (020 7979 7979) or email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, KC (Hon)
Registrar

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