
Anticipated acquisition by MacDonald, Dettwiler and Associates Limited of the PropertyFlow Group

The OFT's decision on reference under section 33(1) given on 30 March 2006.
Full text of decision published 18 April 2006.

Please note that square brackets indicate text or figures which have been deleted or replaced with a range at the request of the parties or third parties for reasons of commercial confidentiality.

PARTIES

1. **MacDonald, Dettwiler and Associates Limited** (MDA) is active in the supply of property search services in England and Wales. MDA's subsidiaries include: MDA Hub Ltd (MDAH), which holds a licence to run the National Land Information Service (NLIS) Hub (an on-line means of obtaining Local Authority (LA) property searches), and is responsible for transmitting requests from NLIS channel operators to the LAs and distributing their responses back; and MDA Channel (MDAC) an NLIS channel operator, trading as Transaction Online (TOL).
2. **PropertyFlow Group** has two operating subsidiaries, the Conveyancing Channel Ltd (CCL) and PSA Group Limited (PSA Group). CCL trades under the brand name Searchflow, and is a NLIS channel operator. PSA physically attends the LA premises and carries out a personal search on the Register. PropertyFlow's UK turnover for the year ended 31 December 2004 was £30.8 million.

TRANSACTION

3. MDA is proposing to acquire the entire issued share capital of PropertyFlow for consideration of £[] million. The parties notified the OFT of the transaction on 2 February 2006. An administrative deadline of 30 March 2006 therefore applies.

JURISDICTION

4. As a result of this transaction MDA and PropertyFlow will cease to be distinct. The parties overlap in the supply of NLIS services in England and Wales and achieve a share of supply of approximately [70-80] per cent in this segment. As a result, the share of supply test in section 23 of the Enterprise Act 2002 (the Act) is met. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

BACKGROUND

5. The OFT examined the property searches industry, and in particular the NLIS segment, in some detail in 2004 as part of a Competition Act 1998 (CA98) investigation into a complaint by TM Property (another NLIS channel operator) of alleged abuse of a dominant position by MDA. The OFT reached a decision of non infringement in August 2004 (the CA98 decision) on the basis that MDA was not dominant in the provision of property searches. This was mainly because the NLIS channels were considered to form part of a wider product market which included Local Authority (LA) postal searches and searches by Personal Search Companies (PSCs).
6. This sector was also assessed by the OFT as part of an MPI market study, which was completed in September 2005.¹ This study resulted in a number of recommendations aimed at making the industry more competitive. The Government Response to the MPI study accepted all of the OFT recommendations in principle, however, the recommendations may not be implemented in full for some time.

RELEVANT MARKET

7. The parties' activities overlap in the supply of property searches, in particular the provision of Con29 and LLC1² searches.

¹ OFT 810, Property Searches: A Market Study, September 2005.

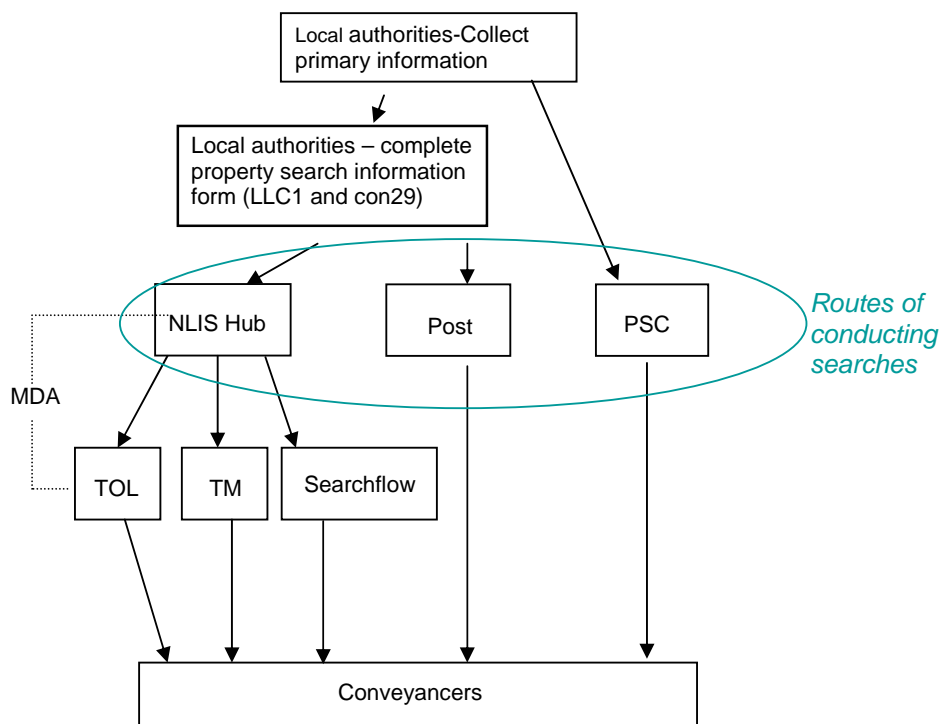
² The CON29 consists of a number of predetermined questions concerning the following areas: Planning; Highways; Environmental Health; Housing; and Building Control. The LLC1 discloses the registered entries affecting the property (such entries may include conditional planning consents or existence of a conservation area).

Product market

LLC1 and Con29 property searches

8. There are three main ways of sourcing Con29 and LLC1 property searches (see Diagram 1 below). The first is the traditional method of sending an application by post to the relevant LA (postal search). However in recent years two further methods have grown in prominence.
9. The National Land Information Service (NLIS) is an on line system for obtaining LA searches. NLIS searches are provided via a central hub and can be obtained from one of three licensed NLIS channel operators.
10. The final method of obtaining searches is via a PSC. LA's have a statutory obligation to allow individuals access for a statutory fee and PSCs obtain searches by attending the LA direct and inspecting the public record. They then compile their own search results; as opposed to LA searches and NLIS which are compiled by the LA. PSCs are particularly effective in areas where LA turnaround times are slow since a PSC search can often be faster and is usually cheaper than obtaining a search via either of the other two routes.

Diagram 1: ways of obtaining property searches from Local Authorities



11. As noted above, the OFT investigated the property search sector in some detail as part of the CA98 decision and concluded that the relevant product market was the market for the delivery of LLC1 and Con29 property searches provided by all available distribution channels, be it NLIS, PSCs or the LA itself (i.e. postal searches).³ This market definition was adopted due to the ability of customers to substitute between the different providers of these property searches with relative ease.
12. Since the CA98 decision the sector has been the subject of two major potential developments: the proposal by the Government to implement the OFT's market study recommendations; and the planned introduction of Home Information Packs (HIPs).
13. While all of the OFT's Market Study recommendations were accepted at least in principle by the Government, these recommendations have not been implemented yet. Therefore, the Market Study has not resulted in a change in market conditions that would warrant a different conclusion on the product scope. In any event, given the purpose of those recommendations is to re-enforce competition between PSCs, LA's and NLIS they would be unlikely to lead to a different conclusion on the product scope.
14. Third parties cited the introduction of HIPs as a major change in market conditions. However, HIPs are not due for implementation until June 2007 under the current timetable. There appears to be a degree of consensus amongst market participants that the introduction of HIPs will have a significant impact on the property searches industry, however it is difficult to conclude with any degree of precision what that impact may be, nor what the implications may be for market definition. Various views have been put forward, but all of these are essentially speculative. The potential impact of HIPs on competition in the sector is discussed later in this Decision.
15. The evidence received from customers during the course of this investigation generally supported a wider market definition including all three types of searches. The majority of customers who responded indicated that they make use of all three channels and considered PSCs in particular a viable substitute for searches conducted through the NLIS channel. This view was also supported by [].
16. Overall, there is limited evidence, much of which is speculative, to warrant a departure from the product scope of all types of LLC1 and Con29 property searches previously relied on by the OFT in its CA98 decision.

³ Office of Fair Trading, Decision No. CA 98/07/2004, *TM Property Services Limited's complaint against MacDonald Dettwiler (Hub) Limited and MacDonald Dettwiler (Channel) Ltd (trading as Transaction Online)*, 18 August 2004, p. 26

Other searches

17. The parties also provide a large range of other property searches such as Land Registry and environmental register searches where the source of raw data is not the LA and may not necessarily be routed via the NLIS hub.
18. In general, third parties did not raise concerns regarding other searches during the course of this case. However, one third party raised concerns in relation to high volume Land Registry searches. They noted that high volume customers require an online service whereby they request large numbers of Land Registry searches via a daily data file. They argued that the merging parties are the only two suppliers capable of supplying high volume customers. This raises the prospect that there may be a separate frame of reference for these high volume customers.
19. On the demand side, it is clear that low volume searches and high volume search services are substitutable at least to a degree. The same information is provided by both methods. Indeed, a number of the high volume customers who responded to the OFT investigation do use, and prefer, the low volume method. However searches by way of a data file could be considered more useful to the requirement in that the customer has to spend far fewer man hours ordering searches. On the supply side, there do not appear to be any restrictions on who can provide Land Registry searches and indeed customers can source these searches direct.
20. One third party noted that the Land Registry offers a direct service to business customers which, in their view, superior to the NLIS based systems. However, although the Land Registry Direct service offers billing accounts so that each search does not have to be individually paid for, it does currently necessitate manual ordering of Land Register searches. However, Land Registry is [already discussing] arrangements with other third party providers or with large customers direct for automated ordering.⁴
21. Therefore, it would appear that any attempt to exploit market power in the supply of Land Registry searches to high volume customers would encourage switching to Land Registry Direct by those customers or would provide a profitable opportunity for a third party entrant such as a PSC.
22. As a result, even on the narrowest possible frame of reference of Land Registry Searches to large volume customers, it does not appear that the parties will possess market power post-merger. Given this, it is not necessary to conclude on whether these searches constitute a separate market as regardless of the frame of

⁴ [].

reference chosen no competition concerns arise. Other property searches will therefore not be discussed further.

Geographic market

23. The CA98 case concluded that, despite some regional variation, for the purposes of that investigation the relevant geographic market for property searches was England and Wales.⁵
24. The OFT did not uncover any evidence during the course of its investigation that would warrant a departure from this view. One third party did suggest that variations across LAs suggested separate markets. However, on the supply side, NLIS and many PSCs operate across a number of local authorities and often nationally. The relevant geographic scope is therefore considered to be England and Wales.

HORIZONTAL ISSUES

Competition Assessment

25. Post-merger the parties will account for [10-20] per cent (increment [less than 10] per cent) of the supply of LLC1 and Con29 property searches in England and Wales, by volume. This results in post-merger HHI of around 3564 with a delta of 136. In comparison LAs still account for the majority of searches ([50-60] per cent).
26. However, these market shares may not give an accurate representation of the true nature of competition in this industry. In particular, third parties were generally of the view that Local Authorities are relatively inert as competitors and do not pose a significant competitive threat. The NLIS and PSC sectors have been growing rapidly at the expense of LA searches [].
27. Even if LAs are excluded from the analysis, the parties combined share of supply rises to [30-40] per cent (increment [10-20] per cent). On this basis there would be a post merger HHI of 2725 with a delta of 668. However, as before, this approach is also likely to misrepresent the nature of competition, by overstating the competitive strength of the parties. In reality the true picture of competition might lie somewhere between these two approximations.

⁵ Con29 and LLC1 searches are not available in Northern Ireland and Scotland due to the differences in property legislation applying in these jurisdictions.

28. Customers were generally of the view that MDA and PropertyFlow are close competitors, and possibly each other's closest competitor. The parties both have similar operating models as they both operate through the NLIS hub. Therefore, the competition which currently exists between the parties would be lost post-merger.
29. On the other hand, it is clear that there are a large number of competitors to the merged entity. When LA's are excluded from the shares of supply, competitors of particular note are TM property ([5-15] per cent), the third NLIS licence holder and the Property Search Group ([30-40] per cent), the largest PSC.
30. If the merged entity were to raise prices or reduce service levels to any material extent then it would be likely that their customers would switch to alternative property search suppliers. This view is supported by responses to OFT questions by customers. Of the seven customers who responded: six said that they had switched supplier in the past and five said that they would consider switching to another (non NLIS) channel.
31. Under prevailing conditions it would therefore appear that there is sufficient remaining competition within the property search industry such that although there may be some loss of competition, this is not expected to be significant.

Impact of HIPs on competition

32. Some competitors were strongly of the view that the OFT should take into account the likely impact of the introduction of HIPS on the competitive dynamics of the sector in which the merged entity will operate. HIPs will require the vendor of a property to compile a seller's pack containing all of the information usually required during a property transaction. Third parties claim that the introduction of HIPs will have inter alia the following dramatic effects on the property searches industry, favouring specialist NLIS providers such as the merged entity:
 - a. The customer for property searches will shift from Solicitors as present to specialist HIP compilers. These new customers are likely to require substantially higher volumes of searches than before.
 - b. HIPs will require certain pieces of information that PSCs are currently unable to provide.
 - c. The new HIP environment is likely to mean that customers will require searches quicker which may favour NLIS providers.
33. There are a number of problems with taking into account the alleged effect of HIPs in the OFT's analysis.

34. First, it is not clear what impact the introduction of HIPs will have on the industry and any views on this are necessarily speculative. The OFT CA98 decision found that NLIS did not have any particular advantages in terms of speed and that furthermore PSC searches are a more cost effective alternative. It is therefore possible that the introduction of HIPs may actually put the NLIS channel operators at a disadvantage, as the new specialist HIPs compilers may be more price sensitive than the Solicitors they replace.
35. Second, the potential effects outlined in paragraph 32 were covered in the OFT Market Study and several key recommendations of that study were aimed at addressing these problems specifically. For example, the OFT recommended that, by 2007, Local Authorities make available all the unrefined information they hold necessary to compile a property search for inclusion in a HIP to all those who ask. As noted earlier the Government has accepted these recommendations in full.
36. Furthermore, the Office of the Deputy Prime Minister (ODPM) considered that PSCs will still be able to supply information for HIPs and that making a HIP available before a property is marketed, could be done as easily by PSCs as a NLIS provider. ODPM believes that OFT's recommendation on 'access to data' will be implemented in due course and will assist in this regard. It also confirmed its intention to provide a level playing field for all search providers.
37. Given these factors, a counterfactual under which the introduction of HIPs results in a substantial shift in the market towards NLIS searches does not appear sufficiently imminent⁶ to warrant its inclusion in the OFT's analysis.

Barriers to entry and expansion

38. Barriers to entry for new NLIS channel operators would appear to be high given the limited number of licences⁷ currently available. This was supported by third party responses. Through its adoption of the OFT's Market Study recommendations the Government has signalled an intention to make more licences available in the future and open up access to the online system. However, as noted earlier actual implementation of the recommendations is yet to take place.
39. Conversely, there appears to be few barriers to entry as a PSC. The main source of data for personal searches is available to any member of the public via a statutory fee. Indeed there are already a large number of PSC present in the market.

⁶ OFT 516, *Substantive Merger Guidance*, paragraph 3.24.

⁷ As noted earlier, there are currently three licences (held by TM Property, Seachflow, and TOL) and there is an intention to tender a forth licence sometime in the future.

40. Overall, the evidence on barriers to entry is mixed. Nonetheless, given that the OFT has not identified any substantial lessening of competition in its earlier assessment, it is not necessary to come to a conclusion on barriers to entry, as even if high barriers were found to exist this would not affect the OFT's ultimate conclusion.

Buyer power

41. It would appear that customers can and do switch between different providers of property searches. However, there was limited evidence of customers exercising any countervailing buyer power, for example, to achieve lower prices.

VERTICAL ISSUES

42. A number of third parties have raised concerns regarding the fact that MDA operates both the NLIS hub and an NLIS Channel licence. They claim that this gives rise to the potential for vertical foreclosure or other anti competitive abuses. In particular they contend that holding the hub and two of the three licences currently in issue may make it easier for MDA to raise the price for access to the hub post merger. This view is in part supported by []. MDA have raised prices for access in the past, although they had to take C-NLIS⁸ to court.
43. It is important to note in this context is that the vertical relationship between operation of the NLIS hub and channel operator exists pre merger. Furthermore, OFT guidance indicates that vertical concerns are only likely to arise where market power exists or is created at some point in the supply chain. In this case, as detailed above, the evidence appears clear that the relevant market is currently wider than NLIS searches alone. The merged entity would therefore not possess any market power due to competition from PSCs and, to a lesser degree, LA postal searches. Any increase in the hub price would therefore be constrained by the fact that customers could switch away from NLIS channel operators to PSCs or LA postal searches for their local searches.

⁸ C-NLIS is a company which has been especially set up to: take over the contracts with information holders, channels and the hub currently held by LGIH, license the NLIS software and brand to those who meet the appropriate standards after 2008, broaden public interest and stakeholder involvement in the development and direction of an effective service, accelerate the LA modernisation process, and act as a 'guardian' of NLIS standards (for example IT connection standards) and the intellectual property rights of information holders, and as a protector and promoter of the NLIS brand.

THIRD PARTY VIEWS

44. Some of the customers who responded expressed concerns about the merger, whilst a number of others considered that sufficient alternative competitors would remain post-merger to allay any competition concerns. All of the competitors who responded raised concerns about the merger. These concerns have been addressed in greater detail above.

ASSESSMENT

45. The parties are both active in the supply and distribution of property searches, in particular LLC1 and Con29 property searches. Post-merger the parties would hold two of the three NLIS channel licences as well as the contract for operating the NLIS Hub.
46. There are three main ways of sourcing property searches: sending an application by post to the relevant LA; using the NLIS on-line service; and via a PSC. In the first two cases, the information is compiled by the LA, whereas the PSC compiles its own search based on the information gathered by inspecting the public record. A previous CA98 investigation by the OFT and a Market Study into the sector indicated that the frame of reference should include all three forms of property searches. This view was supported by third party evidence gathered during this investigation.
47. Post-merger, the parties will account for [10-20] per cent (increment [less than 10] per cent) of the supply of LLC1 and Con29 property searches in the England and Wales. LA postal searches account for a significant proportion of the sector ([50-60] per cent). If LA searches are excluded from the analysis, on the basis that they are relatively inert competitors, the parties combined share of supply increases to [30-40] per cent (increment [10-20] per cent). However, there are a number of other competitors present, particularly TM property ([5-15] per cent), the third NLIS licence holder and the Property Search Group ([30-40] per cent), the largest PSC.⁹ As a result, sufficient competitors would appear to remain to constrain the parties post-merger.
48. Some third parties argued that the introduction of HIPs in June 2007 would substantially alter the market giving NLIS providers, and thus the parties, a competitive advantage over other providers. However, the views put forward are speculative and the actual effects on the market of introducing HIPs are unclear. It is entirely possible that HIPs may put the NLIS channel operators at a

⁹ As noted earlier, these shares of supply are calculated excluding LAs.

disadvantage as new HIPs compilers may be more price sensitive. Several key recommendations of the OFT's Market Study, which have been accepted in principle by Government, were also aimed at increasing the availability of HIPs information to all providers and encouraging a level playing field. Furthermore, given the introduction of HIPs is still some time off, it would not appear to be sufficiently imminent to warrant its inclusion in the OFT's analysis.

49. Consequently, the OFT does not believe that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

DECISION

50. This merger will therefore **not be referred** to the Competition Commission under section 33(1) of the Act.