Neutral citation [2013] CAT 26

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1214/4/8/13

15 November 2013

Before:

THE HONOURABLE MR JUSTICE NEWEY
(Chairman)
PROFESSOR JOHN BEATH
ANDREW LENON QC

Sitting as a Tribunal in England and Wales

BETWEEN:

GLOBAL RADIO HOLDINGS LIMITED

Applicant

- and -

COMPETITION COMMISSION

Respondent

Heard at Victoria House on 3 October 2013

JUDGMENT

APPEARANCES

Lord Pannick QC, Mr Jon Turner QC, and Mr Alistair Lindsay (instructed by Slaughter and May) appeared for the Applicant.

Mr Daniel Beard QC and Mr Robert Palmer (instructed by the Treasury Solicitor) appeared for the Respondent.

1. These proceedings arise out of the acquisition by the applicant, Global Radio Holdings Limited ("Global"), of GMG Radio Holdings Limited, since renamed Real and Smooth Limited ("RSL"), in 2012. In May of this year, the respondent, the Competition Commission ("the Commission"), decided that the transaction has resulted, or may be expected to result, in a "substantial lessening of competition" and that Global should be required to dispose of certain interests in consequence. Global challenges that decision pursuant to section 120 of the Enterprise Act 2002 ("the 2002 Act").

BACKGROUND

2. Global is the largest commercial radio operator in the United Kingdom. Its interests include one national radio station, Classic FM, and local stations broadcasting under the brands Heart, Capital, Choice, LBC, Xfm and Gold. RSL, the third largest United Kingdom commercial radio operator, has regional and local stations broadcasting under the brands Real, Real XS and Smooth.

3. RSL was sold to Global by Guardian Media Group plc. The transaction was completed on 24 June 2012.

4. On 11 October 2012, the Office of Fair Trading ("OFT") referred the transaction to the Commission. The Commission published its decision on the reference on 21 May 2013.

5. In its report, the Commission found the relevant market to be the United Kingdom market for radio. The Commission noted that the market is "two-sided", in that suppliers compete for both advertisers and listeners. The Commission concluded that the interests of listeners are largely protected from the effect of a merger between commercial radio stations. It therefore focused its analysis primarily on the impact of Global's acquisition of RSL on advertisers.

6. The Commission identified two customer segments within the advertising side of the market: advertisers buying airtime on a campaign-by-campaign basis from local and regional stations or through small, local or regional agencies

("non-contracted advertising"); and airtime sold primarily to national advertisers under contracts between media-buying agencies and radio stations or groups ("contracted advertising"). In each segment, advertisers also sponsor radio stations or programmes, or buy promotions for broadcast on the radio (sponsorship and promotion, or "S&P"). Contracted advertising, including S&P purchased from contracted agencies, accounts for about 60% of commercial radio net revenue.

7. The Commission did not consider that Global's acquisition of RSL was likely to have major implications for competition in relation to contracted advertising. It said this in paragraph 7.173 of its report:

> "we concluded that any loss of competition as a result of the merger for advertisers buying airtime through contracted agencies and national S&P is likely to be relatively small. We did not consider this loss of competition, in itself, to be significant."

8. In contrast, the Commission found that the purchase of RSL has resulted, or may be expected to result, in a substantial lessening of competition in the supply of advertising services to non-contracted advertisers in seven areas. It summarised its thinking in these terms in its report:

> "18. We concluded that significant effects on competition were unlikely to arise in London and the West Midlands. We identified seven areas where the parties overlap which we considered would be likely to lead to significant adverse effects: the East Midlands; Cardiff; North Wales; South and West Yorkshire ...; Greater Manchester; the North-East; and Central Scotland. We also concluded that the significant adverse effects in Cardiff, South and West Yorkshire and Greater Manchester would be likely to contribute to a loss of competition across the wider areas of South Wales, Yorkshire, Humberside and Lincolnshire and the North-West respectively.
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> 19. We considered that the loss of competition in the seven areas would primarily affect non-contracted advertisers buying airtime and S&P from radio stations and groups in the overlap areas. Taking all the available evidence in the round, we concluded that the loss of competition was likely to lead to a significant change in the balance of negotiating advantage between Global and its non-contracted customers such that prices in each of the seven areas would be on average higher.
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> 20. In each of these areas we found that the loss of rivalry as a result of the merger was significant. It involved either the loss of one of the three main competitors or, in some cases the only main competitor, in the radio market. As such, the merger would give the merger parties high market shares of listeners and non-contracted revenue in each of the seven overlap areas and

reduce the number of radio competitors from either three to two or two to one.

21. We expected that the loss of rivalry in these areas would persist for a relatively long period of time. We found that entry was unusually difficult in commercial radio. This was because the scarcity of FM licences, needed to compete effectively, meant that it was virtually impossible for new radio stations to be established in the overlap areas such that they could offer credible alternatives to the merger parties. We found no evidence that this situation would change before digital switchover. We noted there was considerable uncertainty about the likely date for digital switchover and that it was not expected before 2018 at the earliest. We also considered that while access to the spectrum was currently the main barrier to entry to commercial radio, it was not clear how this would be affected by digital switchover and there was uncertainty over the extent of the other barriers to entry that were likely to remain after switchover.

22. As a result of the lack of availability of FM licences, and other factors, we did not consider either entry or expansion to be likely, timely and sufficient to offset a potential SLC [i.e. substantial lessening of competition]. Also, we concluded that any potential rivalry-enhancing efficiencies were not timely, likely or sufficient to prevent an SLC.

23. We therefore concluded that the merger has resulted in, or may be expected to result in, an SLC in a UK market."

9. The Commission decided that the substantial lessening of competition it had identified should be remedied by the divestment of certain interests. It stated in paragraph 9.296 of the report:

> "We therefore conclude that partial divestiture through a series of local divestitures to a suitable purchaser or purchasers is the least costly, least intrusive, effective remedy to the SLC [i.e. substantial lessening of competition] we have found and is a proportionate response to that SLC and its adverse effects. In our judgement, it therefore represents as comprehensive a solution as is reasonable and practicable to the SLC and its resulting adverse effects."

THE LEGISLATIVE FRAMEWORK

10. Section 22 of the 2002 Act deals with the circumstances in which the OFT is to refer a completed merger to the Commission. In general, the OFT is required by section 22(1) to make such a reference if it:

> "believes that it is or may be the case that—
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> (a) a relevant merger situation has been created; and
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> (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

By virtue of section 22(2), however:

> "The OFT may decide not to make a reference under this section if it believes that—
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> (a) the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference to the Commission; or
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> (b) any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned."

11. The expression "relevant merger situation" is explained in section 23 of the 2002 Act. Under section 23(2), a "relevant merger situation" can be created where two or more enterprises have ceased to be distinct enterprises and, "as a result, one or both of the conditions mentioned in subsections (3) and (4) below prevails or prevails to a greater extent". Subsections (3) and (4) state as follows:

> "(3) The condition mentioned in this subsection is that, in relation to the supply of goods of any description, at least one-quarter of all the goods of that description which are supplied in the United Kingdom, or in a substantial part of the United Kingdom—
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> (a) are supplied by one and the same person or are supplied to one and the same person; or
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> (b) are supplied by the persons by whom the enterprises concerned are carried on, or are supplied to those persons.
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> (4) The condition mentioned in this subsection is that, in relation to the supply of services of any description, the supply of services of that description in the United Kingdom, or in a substantial part of the United Kingdom, is to the extent of at least one-quarter—
>
> (a) supply by one and the same person, or supply for one and the same person; or
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> (b) supply by the persons by whom the enterprises concerned are carried on, or supply for those persons."

12. Where the OFT has made a reference under section 22 of the 2002 Act, the Commission is required by section 35(1) to decide the following questions:

> "(a) whether a relevant merger situation has been created; and
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> (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

If the Commission decides that there is an "anti-competitive outcome" (i.e. that a relevant merger situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services), it is obliged by section 35(3) to decide the following additional questions:

> "(a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition;
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> (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition; and
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> (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented."

In deciding those questions, the Commission is directed to have regard to "the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it" (section 35(4)) and may have regard to "the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned" (section 35(5)).

13. Section 41 of the 2002 Act provides for remedial action where the Commission has decided that there is an anti-competitive outcome. Section 41(2) states:

> "The Commission shall take such action under section 82 or 84 as it considers to be reasonable and practicable—
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> (a) to remedy, mitigate or prevent the substantial lessening of competition concerned; and
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> (b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition."

Section 42(3) stipulates:

> "The decision of the Commission under subsection (2) shall be consistent with its decisions as included in its report by virtue of section 35(3) ... unless there has been a material change of circumstances since the preparation of the report or the Commission otherwise has a special reason for deciding differently."

Like sections 35(4) and 35(5), sections 41(4) and 41(5) direct the Commission to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable and specifically empower it to have regard to the effect of any action on customer benefits.

14. Section 106 of the 2002 Act requires the Commission (and the OFT) to publish general advice and information about, among other things, the consideration by it of references under section 22. Such advice is to be prepared with a view to explaining relevant provisions of the 2002 Act to persons likely to be affected by them and indicating how the Commission expects such provisions to operate (see section 106(5)). The advice can include advice or information about the factors which the Commission may take into account in considering whether, and if so how, to exercise a function conferred by Part 3 of the 2002 Act (which encompasses sections 22 to 130).

15. The advice that the Commission has provided under section 106 of the 2002 Act includes the publications "Merger Assessment Guidelines" (published jointly with the OFT) and "Merger Remedies: Competition Commission Guidelines". Part 4 of the former document explains the Commission's understanding of the expression "substantial lessening of competition". It states:

> "4.1.2 Competition is viewed by the Authorities [i.e. the Commission and the OFT] as a process of rivalry between firms seeking to win customers' business over time by offering them a better deal. Rivalry creates incentives for firms to cut price, increase output, improve quality, enhance efficiency, or introduce new and better products because it provides the opportunity for successful firms to take business away from competitors, and poses the threat that firms will lose business to others if they do not compete successfully.
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> 4.1.3 The Authorities will consider any merger in terms of its effect on rivalry over time in the market or markets affected by it. Many mergers are either pro-competitive or benign in their effect on rivalry. But when levels of rivalry are reduced, firms' competitive incentives are dulled, to the likely detriment of customers. Some mergers will lessen competition but not substantially so because sufficient post-merger competitive constraints will remain to ensure that rivalry continues to discipline the commercial behaviour of the merger firms. A merger gives rise to [a "substantial lessening of competition"] when it has a significant effect on rivalry over time, and therefore on the competitive pressure on firms to improve their offer to customers or become more efficient or innovative. A merger that gives rise to [a "substantial lessening of competition"] will be expected to lead to an adverse effect for customers. Evidence on likely adverse effects will therefore play a key role in assessing mergers."

16. Section 120 of the 2002 Act allows a person aggrieved by a decision of the Commission to apply to the Competition Appeal Tribunal for a review of the decision. In determining such an application, the Tribunal is to apply "the same principles as would be applied by a court on an application for judicial review" (section 120(4)).

THE ISSUES

17. Global challenges the Commission's decision in relation to its acquisition of RSL on two grounds. The first relates to the meaning of "substantial lessening of competition", the second to whether the Commission erred in its approach to remedies as regards Greater Manchester and the North-West region. Global's notice of application contained a third ground of challenge, relating to survey evidence, but this was not ultimately pursued.

The meaning of "substantial lessening of competition"

18. It is Global's case that, in this context, "substantial" means "large", "considerable" or "weighty". The Commission, however, did not ask itself whether Global's purchase of RSL has resulted, or may be expected to result, in a large, considerable or weighty lessening of competition. Its decision should therefore, Global argues, be quashed in its entirety.

19. For its part, the Commission accepts that it did not specifically ask itself whether the "lessening of competition" it discerned was "large", "considerable" or "weighty", but maintains that it was under no obligation to do so. According to the Commission, it correctly directed itself to consider whether the lessening of competition was "substantial", applying its published guidelines in deciding the issue.

20. The word "substantial" is certainly capable of signifying "large", "considerable" or "weighty". That is confirmed by the decision of the House of Lords in *Palser v Grinling* [1948] AC 291. One of the issues in that case was when rent attributable to attendance or the use of furniture would form a "substantial part of the whole rent" for the purposes of section 10(1) of the Rent and Mortgage

Interest Restrictions Act 1923. Viscount Simon, with whom the other members of the House of Lords agreed, said (at 317):

> "'Substantial' in this connexion is not the same as 'not unsubstantial,' i.e., just enough to avoid the 'de minimis' principle. One of the primary meanings of the word is equivalent to considerable, solid, or big. It is in this sense that we speak of a substantial fortune, a substantial meal, a substantial man, a substantial argument or ground of defence."

21. "Substantial" was not, however, held to mean "large", "considerable" or "weighty" in *R v Monopolies and Mergers Commission ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23. That case concerned section 64 of the Fair Trading Act 1973, which dealt with when a merger reference could be made to the Monopolies and Mergers Commission, and subsection (3) of which corresponded to what is now section 23(4) of the 2002 Act. Like section 23(4) of the 2002 Act, section 64(3) referred to "a substantial part of the United Kingdom". The House of Lords had to consider what these words meant. Lord Mustill, with whom the other members of the House of Lords expressed agreement, noted (at 29) that the word "substantial" is "protean" in nature, capable of meaning "not trifling" at one extreme and "nearly complete" at the other. He went on:

> "It is sufficient to say that although I do not accept that 'substantial' can never mean 'more than de minimis,' or that in *Palser v. Grinling*; *Property Holding Co. Ltd. v. Mischeff* ... Viscount Simon was saying more than that in the particular statutory context it did not have this meaning, I am satisfied that in section 64(3) the word does indeed lie further up the spectrum than that. To say how far up is another matter. The courts have repeatedly warned against the dangers of taking an inherently imprecise word, and by redefining it thrusting on it a spurious degree of precision. I will try to avoid such an error. Nevertheless I am glad to adopt, as a means of giving a general indication of where the meaning of the word in section 64(3) lies within the range of possible meanings, the expression of Nourse L.J. ... 'worthy of consideration for the purpose of the Act.'"

Later in his speech, Lord Mustill said (at 32):

> "Nevertheless I believe that, subject to one qualification, it will be helpful to endorse the formulation of Nourse L.J. already mentioned, as a general guide: namely that the reference area must be of such dimensions as to make it worthy of consideration for the purposes of the Act. The qualification is that the word 'dimensions' might be thought to limit the inquiry to matters of geography. Accordingly I would prefer to state that the part must be 'of such size, character and importance as to make it worth consideration for the

> purposes of the Act.' To this question an inquiry into proportionality will often be material but it will not lead directly to a conclusion."

22. Lord Mustill proceeded to explain that views could potentially differ as to whether a part of the United Kingdom was "substantial". He said this (at 32):

> "Once the criterion for a judgment has been properly understood, the fact that it was formerly part of a range of possible criteria from which it was difficult to choose and on which opinions might legitimately differ becomes a matter of history. The judgment now proceeds unequivocally on the basis of the criterion as ascertained. So far, no room for controversy. But this clear-cut approach cannot be applied to every case, for the criterion so established may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational: *Edwards v. Bairstow* [1956] A.C. 14. The present is such a case. Even after eliminating inappropriate senses of 'substantial' one is still left with a meaning broad enough to call for the exercise of judgment rather than an exact quantitative measurement. Approaching the matter in this light I am quite satisfied that there is no ground for interference by the court, since the conclusion at which the commission arrived was well within the permissible field of judgment."

23. Lord Pannick QC, who appeared for Global with Mr Jon Turner QC and Mr Alistair Lindsay, accepted that, to succeed on this part of the case, he needed to distinguish *R v Monopolies and Mergers Commission ex p South Yorkshire Transport Ltd.* In seeking to do so, Lord Pannick advanced essentially two arguments. The first relied on this passage (at 31) from Lord Mustill's speech in the *South Yorkshire* case:

> "As regards geographical extent the reference to a substantial part of the United Kingdom is enabling, not restrictive. Its purpose is simply to entitle the Secretary of State to refer to the commission mergers whose effect is not nationwide. Like the asset-value criterion of section 64(1)(b), the epithet 'substantial' is there to ensure that the expensive, laborious and time-consuming mechanism of a merger reference is not set in motion if the effort is not worthwhile."

Lord Pannick submitted that the present case differs from that before Lord Mustill because, here, the word "substantial" is "restrictive" rather than "enabling". Secondly, Lord Pannick invoked article 1 of the First Protocol to the European Convention on Human Rights ("A1P1"). He said that it is apparent from the Commission's "Merger Remedies: Competition Commission Guidelines" that it will generally require the forced divestment of assets if it finds an "anti-competitive outcome" and argued that only a "large",

"considerable" or "weighty" lessening of competition could justify such an interference with property rights. In support of this contention, Lord Pannick referred to *Amato Gauci v Malta* (2011) 52 EHRR 25, where the European Court of Human Rights said this (in paragraph 56):

> "Any interference with property must also satisfy the requirement of proportionality. As the Court has repeatedly stated, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, the search for such a fair balance being inherent in the whole of the Convention. The requisite balance will not be struck where the person concerned bears an individual and excessive burden."

Lord Pannick submitted that the principle of proportionality cannot be satisfied unless the public interest said to justify an interference with the rights of the property-owner is "truly 'substantial', that is a lessening of competition which is very weighty or very grave".

24. There are, however, compelling arguments for rejecting the construction of "substantial lessening of competition" advanced by Lord Pannick:

(1) Where a word is used more than once in a piece of legislation, it is presumed to have the same meaning throughout unless the contrary intention is shown (see e.g. Bennion on Statutory Interpretation, 5th. ed., at section 373). *Assange v Swedish Prosecution Authority (Nos 1 and 2)* [2012] UKSC 22, [2012] 2 AC 471 illustrates that the presumption can be displaced. Nonetheless, the "substantial" in "substantial part of the United Kingdom" and that in "substantial lessening of competition" can be expected to have comparable meanings, unless there is something to indicate that that was not Parliament's intention;

(2) We do not think that the presumption can be ousted on the basis that the word "substantial" is "enabling" in the case of "substantial part of the United Kingdom", but "restrictive" with "substantial lessening of competition". The expression "substantial part of the United Kingdom" is used in the definition of "relevant merger situation" (see section 23 of the 2002 Act). The term "relevant merger situation" is itself used in section 22: the OFT's ability to make a reference to the Commission pursuant to

that section depends on it believing that it is or may be the case that a "relevant merger situation" has been created and that a "substantial lessening of competition" has occurred, or may occur, as a result. The expressions "substantial part of the United Kingdom" and "substantial lessening of competition" thus alike help to determine whether the OFT has power to make a reference to the Commission: the latter is "enabling" in the same way as the former. Lord Pannick argued that the "substantial" in "substantial lessening of competition" restricts the types of lessening of competition in respect of which remedial action can be ordered, but something very comparable could be said of the "substantial" in "substantial part of the United Kingdom". It could, for example, be described as restricting the parts of the United Kingdom relevant to the existence of a "relevant merger situation" and, hence, the circumstances in which the Commission can direct remedial action;

(3) The effect of the filters for which sections 22 and 23 of the 2002 Act provide is that a merger situation is only referred to the Commission under section 22 where (a) a transaction is of such scale as to meet one or both of the turnover and share of supply tests to be found in section 23 and (b) the OFT has not decided against a reference under section 22(2) on the basis that customer benefits outweigh any substantial lessening of competition and its adverse effects on the relevant market are not of sufficient importance. It cannot be assumed that Parliament intended the Commission to be able to intervene in merger situations satisfying these criteria only if there were a "large" lessening of competition in absolute terms. To the contrary, Parliament might be anticipated to have intended that a significant lessening of competition should suffice, regardless of whether the lessening of competition was large in absolute terms; and

(4) The Commission will not necessarily order the divestment of any assets even where it finds a substantial lessening of competition and, hence, an anti-competitive outcome. Section 35(3) of the 2002 Act requires the Commission to go on to consider whether any remedial action should be taken and, assuming that it is, the Commission is to take such action "as it

considers reasonable and practicable" to remedy, mitigate or prevent the substantial lessening of competition and its adverse effects. The Commission recognises that, at this stage, A1P1 is in point: it imports, the Commission accepts, an obligation to ensure that any remedial action is proportionate to the substantial lessening of competition and its adverse effects. We agree with the Commission, however, that A1P1 does not require the "substantial" in "substantial lessening of competition" to be construed as "large". Lord Pannick's submission was to the effect that A1P1 precludes divestment being ordered to remedy a large-scale merger causing a "substantial" lessening of competition and adverse effects, unless the lessening of competition is "large". We do not think that is correct. In our view, a "fair balance" can be "struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights" without reading "substantial" as necessarily meaning "large".

25. In all the circumstances, we do not accept Global's interpretation of "substantial lessening of competition".

The Commission's approach to Greater Manchester and the North-West region

The Commission's approach

26. Global owns three radio stations serving Greater Manchester (viz. Capital, Xfm and Gold) and one (Heart North West and Wales) that serves part of the wider North-West (around Cheshire and the Wirral). RSL has one Greater Manchester station (Real XS) and two North-West regional stations (Smooth and Real).

27. The Commission concluded that Global's acquisition of RSL would mean that the "main radio alternatives for advertisers in Greater Manchester would ... effectively reduce from three to two" (paragraph 7.93 of the report). It further considered that "the loss of Real and Smooth [i.e. RSL's regional stations] as alternatives for those advertisers primarily focused on Greater Manchester will ... also reduce competition" (paragraph 7.93). As regards competition in the wider region, the Commission said this (in paragraph 7.94):

> "The post-merger strength of the parties in Greater Manchester, and Greater Manchester's relative importance within the wider North-West, suggest that the merger will also affect competition for regional advertisers in the North-West. However, we also note that, to offer an alternative to Real and Smooth for regional advertisers, Global stations currently need to be bought as part of a bundle with other local radio stations in the North-West and Global has a relatively low share of listening hours across the region. The adverse effects of the merger are therefore likely to be particularly significant in Greater Manchester, compared with effects in the wider North-West."

28. The Commission concluded that "in the absence of any countervailing factors, there are likely to be significant adverse effects in Greater Manchester as a result of the merger and that competition will be reduced across the North-West" (paragraph 7.95). In the Commission's view, these adverse effects could be addressed effectively by the divestiture of (a) Capital or, alternatively, (b) Real XS with either of RSL's regional stations.

Ground (a): Real and Smooth as alternatives to the Greater Manchester stations

29. Global's first criticism of the Commission's approach relates to the Commission's view that Real and Smooth, RSL's regional stations, represent alternatives to the Greater Manchester stations for advertisers primarily focused on Greater Manchester. Global's case is that, although the point was crucial to what divestment should be ordered, the Commission merely assumed that advertisers primarily focused on Greater Manchester regarded the two regional stations as an alternative option for their advertising. According to Global, the Commission made no finding to this effect, and failed to assess evidence pointing in the other direction.

30. Lord Pannick contrasted the Commission's approach to Greater Manchester with that it adopted in relation to the West Midlands. As to the latter, the Commission said this in paragraph 7.40 of the report:

> "Looking first at Birmingham, we note that Smooth covers a wider area than Capital and that advertisers who want to advertise in Birmingham only are likely to perceive Orion's Free Radio Birmingham to be a better geographic alternative. We also note the difference in the average age of listeners between Capital and Smooth and the fact that Orion attracts a more similar demographic to Capital than Smooth. We therefore do not consider that the loss of rivalry from Smooth to Capital is likely to have significant adverse effects for advertisers wishing to advertise only in Birmingham because Orion appears to be the closer alternative to Capital, both in geographic overlap and in demographics."

Lord Pannick observed that the Commission thus made findings as regards the West Midlands, and he argued that it should also have done so (but did not) with Greater Manchester.

31. In support of his submissions, Lord Pannick referred us to the decision of the Court of Appeal in *Office of Fair Trading v IBA Healthcare Ltd* [2004] EWCA Civ 142, [2004] 4 All ER 1103. That concerned section 33(1) of the 2002 Act, which empowers the OFT to make a reference to the Commission if it "believes" that certain things are or may be the case. Morritt V-C explained (in paragraph 45) that that belief "must be reasonable and objectively justified by relevant facts". He went on:

> "In *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665, [1977] AC 1014 the question was whether the Secretary of State 'is satisfied'. Lord Wilberforce pointed out ([1976] 3 All ER 665 at 681–682, [1977] AC 1014 at 1047) that—
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> 'This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must enquire whether those facts exist, and have been taken into account, whether the judgment has been made on a proper self direction as to those facts, whether the judgment has not been made on other facts which ought not to have been taken into account.'
>
> It was not disputed that the belief must be reasonably held as accepted in para 3.2 of the OFT guidance quoted in [30], above."

In similar vein, Carnwath LJ said (at paragraph 93):

> "Under the present regime (unlike the 1973 Act) the issue for the OFT is one of factual judgment. Although the question is expressed as depending on the subjective belief of the OFT, there is no doubt that the court is entitled to inquire whether there was adequate material to support that conclusion (see the *Metropolitan Borough of Tameside* case [1976] 3 All ER 665 at 681–682, [1977] AC 1014 at 1047 per Lord Wilberforce)."

32. For his part, Mr Daniel Beard QC, who appeared for the Commission with Mr Robert Palmer, stressed that the report stated in terms that "the loss of Real and Smooth as alternatives for those advertisers primarily focused Greater Manchester will ... reduce competition" (paragraph 7.93 of the report) and said that there was evidence to support this conclusion. He argued that the Commission was under no obligation to make further express findings as to, for

example, whether or to what extent Real and Smooth currently win business from Greater Manchester advertisers. The Tribunal would (so it was submitted) be entitled to intervene only if the Commission acted irrationally, and it did not: the Commission had a basis in evidence upon which it was entitled to judge that the loss of regional alternatives would contribute to a reduction in competition.

33. Mr Beard referred us to the judgment of the Tribunal in *BAA Ltd v Competition Commission* [2012] CAT 3, paragraph 20 of which contains a summary of the relevant judicial review principles. This includes the following:

> "(3) The CC [i.e. Competition Commission], as decision-maker, must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it …: see e.g. *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B per Lord Diplock; *Barclays Bank plc v Competition Commission* [2009] CAT 27 at [24]. The CC 'must do what is necessary to put itself into a position properly to decide the statutory questions': *Tesco plc v Competition Commission* [2009] CAT 6 at [139]. The extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the CC, as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it: compare, e.g., *Tesco plc v Competition Commission* at [138]-[139]. In the present context, we accept Mr Beard's primary submission that the standard to be applied in judging the steps taken by the CC in carrying forward its investigations to put itself into a position properly to decide the statutory questions is a rationality test: see *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37 at [34]-[35] and the following statement by Neill LJ in *R v Royal Borough of Kensington and Chelsea, ex p. Bayani* (1990) 22 HLR 406, 415, quoted with approval in *Khatun*:
>
> 'The court should not intervene merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no reasonable [relevant public authority – in that case, it was a housing authority] could have been satisfied on the basis of the inquiries made.'
>
> (4) Similarly, it is a rationality test which is properly to be applied in judging whether the CC had a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did: see e.g. *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, 1325; *Mahon v Air New Zealand* [1984] AC 808; *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142; [2004] ICR 1364 at [93]; *Stagecoach v Competition Commission* [2010] CAT 14 at [42]-[45]."

34. We accept the essence of Mr Beard's submissions. The Commission expressly found that the loss of Real and Smooth as alternatives for advertisers primarily

focused on Greater Manchester will reduce competition, and, for the reasons explained to us by Mr Beard, there was evidence to support that finding. In the course of submissions, Lord Pannick accepted that the Commission had some evidence before it suggesting that the regional stations are used by advertisers targeting Greater Manchester, but criticised the Commission for failing to engage with competing evidence. Perhaps it would have been better if the Commission had addressed the relevant evidence in greater depth in its report. We do not, however, consider that it was bound to do so. A rationality test applies, and the Commission's approach was not irrational.

Ground (b): Reliance on "significant adverse effects" in the North-West

35. Global's second criticism focuses on paragraph 9.79 of the report. This reads as follows:

> "We therefore concluded that the divestiture of either Capital on its own, or Real XS in combination with either Real or Smooth, could form the basis of an effective remedy to the significant adverse effects we found in Greater Manchester and the North-West."

36. Global points out that the Commission had not in fact found there to be "significant adverse effects" in the North-West as distinct from Greater Manchester. In paragraph 7.95 of the report, the Commission had said:

> "We therefore conclude that, in the absence of any countervailing factors, there are likely to be significant adverse effects in Greater Manchester as a result of the merger and that competition will be reduced across the North-West."

The Commission had thus differentiated between "significant adverse effects" and "competition" and, as regards the North-West region, had merely found reduced competition.

37. Global suggests that the error in paragraph 9.79 of the report can be traced back to a "Remedies working paper" that the Commission produced in April 2013. This referred in paragraph 109 to a provisional conclusion that "the divestment of either Capital on its own, or Smooth or Real in combination with Real XS would remedy the [substantial lessening of competition] in Greater Manchester and the North West".

38. It is Global's case that, in the circumstances, the Commission can be seen to have taken an irrelevant consideration into account and that its decision should be set aside as a result. In support of this contention, Lord Pannick referred to *R (FDA) v Work and Pensions Secretary* [2012] EWCA Civ 332, [2013] 1 WLR 444. In that case, Lord Neuberger MR said (at paragraph 67):

> "Where a decision-maker has taken a legally irrelevant factor into account when making his decision, the normal principle is that the decision is liable to be held invalid unless the factor played no significant part in the decision-making exercise."

39. The Commission's position is that, even if the wording of paragraph 9.79 of the report might be said to be infelicitous, the Commission's concern was to remedy the problems that it had identified earlier in the report. That, it is said, is borne out by an examination of the section of the report which concludes with paragraph 9.79. The remedies chosen were thus selected to target the significant adverse effects in Greater Manchester and, in so doing, they would also remedy the loss of competition in the wider area of the North-West. As regards the "Remedies working paper", the Commission both warns against taking a single paragraph out of context and stresses that the document was only ever a working paper.

40. In our view, Global is seeking to attach undue weight to the wording used in paragraph 9.79 of the report (and paragraph 109 of the working paper). In a sense, paragraph 9.79 is accurate: since the North-West includes Greater Manchester, "significant adverse effects" in Greater Manchester may be said to be in the North-West as well. At worst, paragraph 9.79 is poorly expressed. We do not think that we can infer from it that the Commission took into account "significant adverse effects" which it had not identified. We note in this context that a report "should be read as a whole and should not be analysed as if it were a statute" (see *Tesco plc v Competition Commission* [2009] CAT 6, at paragraph 79, and *R v Monopolies and Mergers Commission ex p National House Building Council* [1993] ECC 388, at paragraph 23).

Ground (c): Global's remedy proposal

41. Global's final criticism concerns the Commission's response to the remedy Global proposed for Greater Manchester. As was noted in paragraph 9.65 of the report, Global's position was that, if required, it would be prepared to divest Gold, Real XS and Xfm. It argued that "together these stations would have a 27 per cent share of local commercial listening (compared with Capital 25 per cent), a substantial share of non-contracted airtime revenues in greater Manchester, substantial turnover and they would be able to share facilities".

42. The Commission, however, said this in paragraph 9.73 of the report:

> "We consider that based on the share of listening hours and revenues the divestiture of any one of Capital, Real or Smooth would appear to provide advertisers with a viable third choice in competition with Global and Bauer in Greater Manchester and the North-West. By contrast, Gold, Real XS and Xfm individually or collectively do not have sufficient reach and revenue shares to provide an effective constraint in Greater Manchester. In Greater Manchester individually they are significantly smaller than Capital, Real or Smooth and although combined their share of listening hours is comparable with Capital's their revenue share is significantly lower."

43. Global argues that the Commission can be seen from this paragraph to have been asking itself the wrong question. Its focus (Global says) was on how divestment of Gold, Real XS and Xfm would compare with divestment of Capital, not (as it should have been) on whether divestment of Gold, Real XS and Xfm would meet the requirements of sections 35(3) to 35(5) of the 2002 Act.

44. Mr Beard argued that the Commission did not merely compare Global's proposal with divestment of Capital, but arrived at the conclusion – as can be seen from paragraph 9.73 of the report – that Gold, Real XS and Xfm "do not have sufficient reach and revenue shares to provide an effective constraint in Greater Manchester". It was on this basis that the Commission decided that "a divestiture of one of Gold, Real XS or Xfm on its own, or in combination with each other, would not be effective in addressing the [substantial lessening of competition]" (paragraph 9.74 of the report). The Commission's approach reflected, it is said, paragraph 9.19 of the report, which states:

> "In assessing whether a particular local divestiture would be effective we considered whether a divestiture package would be of sufficient scale and coherence to remedy effectively the loss of competition resulting from the merger at a local level. We also had regard to the potential ability of any divestiture package to operate effectively as a stand-alone competitor, and the likelihood of finding a suitable purchaser."

45. We prefer Mr Beard's submissions for the Commission. In our view, paragraph 9.73 of the report does not show the Commission to have failed to ask itself whether divestment of Gold, Real XS and Xfm would suffice. Although the Commission drew a comparison with divestment of Capital, it stated in terms that Gold, Real XS and Xfm "do not have sufficient reach and revenue shares to provide an effective constraint in Greater Manchester" and that their divestment "would not be effective in addressing the [substantial lessening of competition]".

CONCLUSION

46. For the reasons set out above, we unanimously dismiss Global's application.

The Hon. Mr Justice Newey | Professor John Beath | Andrew Lenon QC

Charles Dhanowa O.B.E., Q.C.
(*Hon*)
Registrar

Date: 15 November 2013