



COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 120 OF THE ENTERPRISE ACT 2002

CASE No. 1214/4/8/13

Pursuant to rules 15 and 25 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) (the “Rules”), the Registrar gives notice of the receipt on 14 June 2013 of an application for review under section 120 of the Enterprise Act 2002 (the “Act”), by Global Radio Holdings Limited (“Global”) against a decision dated 21 May 2013 (the “Decision”)¹ made by the Competition Commission (the “Commission”). Global is represented by Slaughter and May of One Bunhill Row, London EC1Y 8YY (ref: Philippe Chappatte).

Global is a privately owned commercial radio company which operates one national station, Classic FM, and local stations broadcasting under the brands Heart, Capital, Choice, LBC, Xfm and Gold. On 24 June 2012 Global completed its acquisition of GMG Radio Holdings Limited, which has since been renamed Real and Smooth Limited (“RSL”) (“the Transaction”). RSL operates regional and local radio stations broadcasting under the brands Real, Real XS and Smooth. The Transaction was referred to the Commission by the Office of Fair Trading on 11 October 2012 under section 22 of the Act. In the Decision, the Commission found that the Transaction has resulted, or may be expected to result, in a substantial lessening of competition in the supply of radio advertising services to non-contracted advertisers in seven areas of the UK and, as a result, divestments were required by the Commission.

The divestments required by the Commission are identified in paragraph 9.99 of the Decision, namely: (1) Smooth or Capital in the East Midlands; (2) Real or Capital in Cardiff and South Wales; (3) Real or Heart in North Wales; (4) Capital or Real XS with either Real or Smooth in Greater Manchester and the North-West; (5) Real or Smooth or Capital in the North-East; (6) Real or Capital in South and West Yorkshire; and (7) Real or Capital in Central Scotland.

Global challenges the Decision on the following judicial review grounds:

1. The Act requires that a relevant merger situation should give rise to a “*substantial* lessening of competition”, before potentially draconian remedial action may be taken by a competition authority, including the compulsory divestment of the parties’ property. In this statutory context, the qualifying word “*substantial*” must be given a strong meaning, signifying an effect on competition of a considerable magnitude. In reaching its finding that the loss of rivalry arising from the Transaction has resulted, or may be expected to result, in a substantial lessening of competition, the Commission at no stage in its Decision considered the need to investigate whether the effect would be “substantial” in this sense, or indeed anything more than “discernable” or “merely trifling”. All of the Commission’s key findings and conclusions in the Decision were consistent with there being only a small – even a very small – effect on competition. Despite this, the Commission proceeded to make a decision that severe and intrusive remedies should be imposed, under which the parties must submit to the compulsory divestment of radio stations in a number of areas in the UK. In these circumstances, the Commission erred in law in its understanding of the requirements of the Act and its application to those requirements.
2. The Commission failed to take reasonable steps to acquaint itself with relevant information to enable it to answer the statutory question referred to it, namely to determine whether the Transaction had resulted, or may be expected to result in a “substantial lessening of competition”. Despite the fact that survey evidence of customer behaviour and preferences was important, and even potentially

¹ A non-confidential version of the Decision is available on the Competition Commission’s website at: http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/global-radio-gmg/130521_global_radio_gmg_final_report.pdf

decisive, evidence in this investigation, the Commission failed to take steps to ensure that such evidence was available and could be taken into account. On the contrary, it left it to the parties to gather key survey evidence for the purposes of the investigation, which it then rejected as deficient. The Commission could and should have taken reasonable steps to ensure that the parties' surveys would be conducted in a way acceptable for its purposes. The Commission thereby caused or significantly contributed to the absence in its Decision of robust survey evidence which would have cast light on the strength of the options available to advertisers as alternatives to the merging parties' radio stations in affected areas, and so enabled the Commission to form a view on the issue whether any lessening of competition in the affected areas was or was not "substantial" within the meaning of the statutory phrase.

3. In assessing the effect of the Transaction in Greater Manchester and the North-West region, and appraising Global's proposed remedies for the area, the Commission:
 - a) erred in law in finding that, as a result of the Transaction, advertisers primarily focusing on Greater Manchester would suffer a "substantial lessening of competition" owing in part to the loss of RSL's North-West regional stations, Smooth and Real, as a separate credible option for campaigns targeted at the Greater Manchester area. The Commission had no evidential basis for the finding that advertisers primarily focused on Greater Manchester actually regarded the two regional stations as an alternative option for their advertising purposes, and it failed to carry out any or any sufficient inquiry into the matter in view of the need to establish a "substantial" lessening of competition;
 - b) erred in law by imposing remedies in order, in part, to address the mere "*lessening*" of competition it had identified in the entire North-West region, although its statutory powers were limited to addressing the *substantial* lessening of competition it had purportedly identified in the limited sub-area of Greater Manchester, or in failing to comply with its statutory obligation under section 104 of the Act to consult (with reasons) regarding any proposed finding of substantial lessening of competition in the North-West; and/or
 - c) erred in law in assessing the remedy proposed by Global for Greater Manchester: the Commission merely compared it with a remedy that it had determined would be acceptable, namely the disposal of Capital, and it failed to assess whether Global's proposal met the test in sections 35(3) to (5) of the Act.

Global seeks the following relief from the Tribunal:

- a) a declaration pursuant to section 120(4) of the Act that one or more of the grounds of review are well-founded;
- b) a quashing order pursuant to section 120(5)(a) of the Act in respect of the Decision in so far as the Decision concluded as follows: that the Transaction has resulted, or may be expected to result, in a substantial lessening of competition in the supply of non-contracted advertising and sales and promotion services in the East Midlands, Cardiff, North Wales, South and West Yorkshire, Greater Manchester, the North-East and Central Scotland; 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; and that a series of local divestitures to a suitable purchaser or purchasers was therefore required; as described in paragraphs 6.52 to 6.94, 6.135(c), 7.8 to 7.17, 7.34 to 7.125, 8.1 (final sentence), 8.5 (third and fourth sentences), 8.7, 8.9 8.12 and 9.18 to 9.100 and Appendices G and I thereof;
- c) an order referring the matter back to the Commission with a direction to reconsider and make a new decision under section 36 of the Act in accordance with the ruling of the Tribunal pursuant to section 120(5)(b) of the Act; and

- d) an order that the Commission pay Global the costs it has reasonably incurred in bringing its application.

By way of directions Global requests that the Tribunal fix a case management conference at the earliest convenient date following receipt of the notice of application (and prior to the defence) in order to lay down an expedited timetable.

Any person who considers that he has 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.

Pursuant to the Order of the President of the Tribunal abridging time for applying for permission to intervene (made 18 June 2013), any request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London, WC1A 2EB, so that it is received **no later than 5pm on 1 July 2013**.

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 post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC(Hon)
Registrar

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