OFFICE OF FAIR TRADING

Completed acquisition by Global Radio UK Limited of GCap Media plc

ME/3638/08

The OFT's decision on reference under section 22(1) given on 8 August 2008. Full text of decision published 27 August 2008.

THE PARTIES

1. Global Radio UK Limited (Global) is a privately-owned UK based commercial radio group, the activities of which comprise nine local radio analogue stations grouped under three principal brands (Heart, Galaxy and LBC). These stations are also broadcast on DAB digital radio. Global's stations are essentially limited to London, the Midlands and the North of England. Global accounted in 2007 for approximately 10 per cent of all UK commercial radio revenues.

2. GCap Media plc (GCap) was formed by the merger of Capital Radio plc and GWR plc in May 2005 and owns a portfolio of 71 local analogue radio licences across the UK, as well as the Classic FM national station. Many of these stations are also broadcast on DAB digital radio. For the financial year 2007, its turnover was some £200 million. GCap accounted in 2007 for approximately a third of all UK commercial radio revenues.

TRANSACTION

3. On 31 March 2008, a wholly owned subsidiary of Global announced that it had reached an agreement to acquire the entire share capital of GCap for approximately £375 million.

4. The transaction was completed on 6 June 2008. The OFT accepted initial undertakings from Global on 6 June 2008. On 8 August 2008, the OFT announced its Decision to suspend its duty to refer the completed acquisition by Global of GCap to the Competition Commission (CC) under section 22 of the Enterprise Act 2002 (the Act) because the OFT was considering whether to accept

appropriate undertakings from Global in lieu of reference. On 19 August 2008, the OFT accepted revised initial undertakings from Global in relation only to the parties' overlapping activities in the East and West Midlands in respect of which the OFT's duty to refer arose.

JURISDICTION

5. As a result of the transaction Global and GCap ceased to be distinct. The UK turnover of GCap exceeds £70 million, so the turnover test in section 23(1)(b) of the Act is satisfied. The OFT therefore believes that it is or may be the case that a relevant merger situation has been created.

BACKGROUND

6. In its Decision, the OFT found itself under a duty to refer on the basis that it believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition in relation to supply of regional radio advertising campaigns in each of the East Midlands and West Midlands.

   - Global offered a single regional 'play', Heart, in both areas (as well as Galaxy in West Midlands), while in each region GCap sells a regional bundle of some or all of its local stations.

   - The OFT's evidence, including customer concerns, indicated that the parties are the top two competitive choices for a very substantial proportion of advertising customers running regional radio advertising campaigns in the East and/or the West Midlands.

   - The OFT found that this competition eliminated by the merger would not be replicated by the remaining or new rival radio stations or other media sources.

7. In London, the OFT found that the parties' products were more of a complementary nature, so that the efficiencies generated out of the merger would outweigh any potentially anti-competitive effect.

8. On a national level, the OFT considered that any potential competition issues that arose out of the merger (through the creation of market power in the East Midlands and West Midlands) would be remedied as a result of the divestment of the stations in the East Midlands and West Midlands (see below). The OFT found no residual

competition issues on a national level as a result of the merger.

DIVESTMENT UNDERTAKINGS OFFERED BY GLOBAL

9. To address the OFT's competition concerns in respect of regional advertising in the East Midlands, Global offered to divest either: (a) the 106 licence with a Heart brand licensing agreement; or (b) the 106 licence without the Heart brand licensing agreement with the station to be re-branded with a different brand owned by the divestment purchaser.

10. To address the OFT's competition concerns in respect of regional advertising in the West Midlands, Global offered to divest all four GCap West Midlands stations – BRMB, Beacon, Mercia and Wyvern – with the accompanying Gold licences.

11. The OFT considered that the above remedies in both the East Midlands and West Midlands would be sufficient to place the divestment purchaser in a position to replace the competitive constraint on Global which would be lost as a result of the merger but considered that the risk profile of the undertakings in this case meant that it would be proportionate and appropriate to require Global to identify an up-front buyer that was named within the undertakings on which the OFT consulted publicly.

12. Global proposed LDC as the purchaser for the divested assets in the East Midlands and West Midlands. Global has therefore on 22 May 2009 entered into a sale agreement to transfer the 106 licence in the East Midlands and BRMB, Beacon, Mercia and Wyvern in the West Midlands to LDC. The sale agreement is conditional only on OFT acceptance of the undertakings in lieu and the necessary Ofcom approval of certain asset transfers.

13. In relation to the East Midlands, LDC will acquire the 106 licence. In addition, LDC will be given a right to use the Heart brand and the Heart brand licence agreement provides for LDC to use Heart's national programming content in some of its broadcasting time.

14. LDC is not a national radio station. It is therefore important, to maximise its future commercial prospects, that it be provided a means of selling advertising in both the East Midlands and the West Midlands to advertisers seeking a 'national' advertising campaign. For this reason, as anticipated by the undertakings in lieu, LDC will on completion of the sale enter into an advertising sales agreement with Global in order to allow LDC to obtain revenues from advertising booked through Global for 'national' campaigns.

CONSULTATION

15. On 3 June 2009 the OFT published the proposed undertakings inviting interested parties to give their views on them by 23 June 2009 pursuant to paragraph 2(1) Schedule 10 of the Act.

16. The OFT received two responses to its consultation which raised concerns over the following issues relating to the suitability of the proposed remedy. The OFT has considered each of the points raised and addresses them in turn below.

- The volume of network programming and the 'minutage' (that is, when and for how long advertising breaks are placed) would enable Global to restrict LDC's ability to increase capacity in order to win new business. As discussed in the consultation paper accompanying the undertakings in lieu, the OFT has scrutinised the terms of the Advertising Sales Agreement and the Heart brand licence agreement between Global and LDC and is satisfied that these do not impact on LDC's ability to compete with Global in the sale of regional advertising that does not form part of a national campaign. The OFT notes that the undertakings require that the Brand Licence must not impose a 'minimum quantity of national network programming that is materially detrimental to the commercial operation of the Station'; the OFT considers that it would not be appropriate in the context of the published undertakings in lieu to seek to be more prescriptive in this respect.

- The sale to LDC cannot restore pre-merger competition which was between two independent rivals, each with full control over programming and advertising sales. In respect of this concern, the OFT notes that its Decision found that the merger would lead to a realistic prospect of a substantial lessening of competition in respect of the supply of advertising time to regional advertisers in the East and West Midlands only. The divestment to LDC of the stations in the East and West Midlands (including the Heart brand licence agreement and the Advertising sales agreement) fully resolves this concern. The OFT believes that the fact that LDC will take some degree of network programming from Global in respect of the East Midlands does not, in itself, and provided the conditions in the undertakings are met, reduce or impair the effectiveness of the remedy given the specific concern identified in the Decision.

- The sale to LDC will not restore pre-merger competition as Global's strong position in commercial radio airtime at the national level remains given the Advertising Sales Agreement entered into between LDC and Global. In this respect, the OFT notes that its Decision did not find specific concerns in relation to advertising sales at a national level (see paragraph 21 and section III of the Decision). Indeed the OFT's Decision envisages that the remedy offered by Global could encompass an Advertising Sales Agreement at national level. To the extent that the merger resulted in any competition concerns in relation to any regional aspects of national advertising, competition is restored by the divestments given that advertisers and agencies will retain the right to approach LDC directly (and therefore not buy through Global) to the extent they wish to do so.

- Global will be supplying network content to Gold stations so that competition in the West Midlands will not be restored. The OFT notes in this respect that the Gold stations have a small audience. As LDC will operate four FM stations in the West Midlands, which have much wider audiences (which in turn makes them more appealing to advertisers), the OFT does not believe that the use of network programming on the Gold stations in the West Midlands materially impacts on the effectiveness of the remedy.

- LDC is a private equity purchaser and will remain reliant on Global's Heart and Gold brands (as it does not have the necessary commitment to build up an effective independent presence in the Midlands) until 'exit' is accomplished. The OFT notes that private equity purchasers may have a range of different strategies such that it would not be appropriate to discount them generally as divestment purchasers. In this case, and in particular as a result of the expertise brought in by LDC to run the stations in the East and West Midlands, the OFT believes that LDC will be an effective competitor in the short to medium term. In terms of longer term strategy, even if LDC were to wish to exit the market in due course, the OFT believes that it would have every incentive to build up a strong radio group in the Midlands (whether or not that involved continued use of the Global and Gold brands) as it would be seeking to maximise the value of the stations to increase its attractiveness to subsequent purchasers.

17. For the reasons given above, the OFT does not consider that it should modify or refuse to accept the original undertakings on the basis of these representations.

DECISION

18. The Decision concluded that the merger would be referred to the CC if the parties failed to give suitable undertakings pursuant to section 73 of the Act to address the competition concerns identified in the Decision.

19. The OFT considers that the undertakings provided by Global are clear cut and appropriate to remedy, mitigate or prevent the substantial lessening of competition and any adverse effects resulting from it. The OFT has therefore decided to accept the undertakings offered by Global.

20. The merger will therefore not be referred to the Competition Commission and the undertakings, which have been signed by Global, will come into effect from this date.

Annex to Decision – Consultation Paper

Completed acquisition by Global Radio UK Limited of GCap Media plc

21. The OFT's decision on reference under section 22(1) given on 8 August 2008 (the Decision). The full text of the decision was published on 27 August 2008.

THE PARTIES

22. Global Radio UK Limited (Global) is a privately-owned UK based commercial radio group, the activities of which comprise nine local radio analogue stations grouped under three principal brands (Heart, Galaxy and LBC). These stations are also broadcast on DAB digital radio. Global's stations are essentially limited to London, the Midlands and the North of England. Global accounted in 2007 for approximately 10 per cent of all UK commercial radio revenues.

23. GCap Media plc (GCap) is a public company listed on the London Stock Exchange. It was formed by the merger of Capital Radio plc and GWR plc in May 2005 and owns a portfolio of 71 local analogue radio licences across the UK, as well as the Classic FM national station. Many of these stations are also broadcast on DAB digital radio. For the financial year 2007, its turnover was some £200 million. GCap accounted in 2007 for approximately a third of all UK commercial radio revenues.

TRANSACTION

24. On 31 March 2008, a wholly owned subsidiary of Global announced that it had reached an agreement to acquire the entire share capital of GCap for approximately £375 million (225 pence per share in cash).

25. The transaction was completed on 6 June 2008. The OFT accepted initial undertakings from Global on 6 June 2008. The OFT's statutory deadline in this case is 6 October 2008. The parties submitted an informal merger notification on 23 May 2008. The OFT's extended administrative deadline expired on 31 July 2008.

JURISDICTION

26. As a result of this transaction Global and GCap have ceased to be distinct. The UK turnover of GCap exceeds £70 million, so the

turnover test in section 23(1)(b) of the Enterprise Act 2002 (the Act) is satisfied. The OFT therefore believes that it is or may be the case that a relevant merger situation has been created.

OFT's duty to refer

27. On 8 August 2008, the OFT announced its decision (the Decision) to suspend its duty to refer the completed acquisition by Global Radio UK Limited (Global) of GCap Media plc (GCap) to the Competition Commission under section 22 of the Enterprise Act 2002 (the Act) because the OFT was considering whether to accept appropriate undertakings from Global in lieu of reference.

28. The text of the Decision, published on 27 August 2008, provides details on the OFT's findings in respect of the parties' overlapping activities in the East Midlands, in the West Midlands, in London and at a national level.

29. The OFT found itself under a duty to refer on the basis that it believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition in relation to supply of regional radio advertising campaigns in each of the East Midlands and West Midlands.

    - Global offered a single regional 'play', Heart, in both areas (as well as Galaxy in West Midlands), while in each region GCap sells a regional bundle of some or all of its local stations.

    - The OFT's evidence, including customer concerns, indicated that the parties are the top two competitive choices for a very substantial proportion of advertising customers running regional radio advertising campaigns in the East and/or the West Midlands.

    - The OFT found that this competition eliminated by the merger would not be replicated by the remaining or new rival radio stations or other media sources.

30. In London, the OFT found that the parties' products were more of a complementary nature, so that the efficiencies generated out of the merger would outweigh any potentially anti-competitive effect.

31. On a national level, the OFT considered that any potential competition issues that arose out of the merger (through the creation of market power in the East Midlands and West Midlands) would be remedied as a result of the divestment of the stations in the East Midlands and West Midlands (see below). The OFT found no residual

competition issues on a national level as a result of the merger.

Divestment undertakings offered by Global

32. To address the OFT's competition concerns in respect of regional advertising in the East Midlands, Global offered to divest either: (a) the 106 licence with a Heart brand licensing agreement; or (b) the 106 licence without the Heart brand licensing agreement with the station to be re-branded with a different brand owned by the divestment purchaser.

33. To address the OFT's competition concerns in respect of regional advertising in the West Midlands, Global offered to divest all four GCap West Midlands stations – BRMB, Beacon, Mercia and Wyvern – with the accompanying Gold licences.

34. The OFT considered that the above remedies in both the East Midlands and West Midlands would be sufficient to place the divestment purchaser in a position to replace the competitive constraint on Global which would be lost as a result of the merger.

35. The OFT considered in its Decision that allowing Global to retain the right to sell advertising on the divested stations at a contracted / national level would still fulfil the OFT's 'clear-cut' standard for undertakings in lieu because:

    - this structure has been successfully tried and tested in the industry; for example, it is similar to the way GMG currently sells its brands – contracted advertising is sold through Global/GCap and local advertising is sold by the local sales teams, and

    - by way of practical consideration, there is already a separation between local and national sales teams within Heart's existing set-up.

Need for 'up-front' buyer

36. The OFT considered that the risk profile of the undertakings in this case, in particular in relation to the undertakings offered to remedy competition concerns in the East Midlands, and the limited number of purchasers that would be considered by the OFT to have the necessary expertise, resources, incentives and intention to operate the divested radio businesses as an effective competitor in the market place, meant that it would be proportionate and appropriate in this case to require Global to identify an up-front buyer that could be named within the draft undertakings the subject of this public consultation.

37. Global proposed LDC as the proposed purchaser for the divested assets in the East Midlands and West Midlands. Global has therefore entered into a sale agreement to transfer the 106 licence in the East Midlands and BRMB, Beacon, Mercia and Wyvern in the West Midlands to LDC. The sale agreement is conditional only on OFT acceptance of the undertakings in lieu and the necessary Ofcom approval of certain asset transfers.

Suitability of LDC as a proposed divestment purchaser

Expertise

38. LDC is a private equity business based in the Midlands backed by Lloyds Bank plc. LDC's bid provides for the stations in the East Midlands and West Midlands to be run by a management team led by Phil Riley. The OFT is therefore confident that LDC should be regarded as a suitable purchaser given that the management team has significant past experience of operating radio stations in the Midlands. In particular, Phil Riley has previously been Programme Director for BRMB and later worked for Chrysalis Group as Managing Director of 100.7 Heart FM and chief executive officer of Chrysalis Radio.

Need for a Heart brand licence in the East Midlands

39. In relation to the East Midlands, LDC will acquire the 106 licence. In addition, LDC will be given a right to use the Heart brand and the Heart brand licence agreement will allow LDC to use Heart's national programming content in some of its broadcasting time.

40. The OFT has scrutinised the terms of the brand licence in order to ensure that it leaves LDC able to compete with Global in relation to the sale of regional advertising. In accordance with the terms of the proposed undertakings in lieu, the brand licence agreement:

- does not provide Global with the ability to determine or influence LDC's choice of local programming staff or presenters, and

- does not prevent LDC from competing with Global in the East Midlands in the sale of regional advertising campaigns by imposing unreasonable or disproportionate minimum quality standards or by requiring an unusually high volume of national network programming.

41. In relation to the West Midlands, LDC will acquire the BRMB, Beacon, Mercia and Wyvern stations, including the right to the

relevant brand names. The need for a Heart brand licence therefore does not arise in relation to the West Midlands divestment.

Advertising sales agreement

42. LDC is not a national radio station. It is therefore important, to maximise its future commercial prospects, that it be provided a means of selling advertising in both the East Midlands and the West Midlands to advertisers seeking a 'national' advertising campaign. For this reason, as anticipated by the draft undertakings in lieu, LDC will on completion of the sale enter into an advertising sales agreement with Global in order to allow LDC to obtain revenues from advertising booked through Global for 'national' campaigns.

43. The OFT has scrutinised the terms of the advertising sales agreement in order to ensure that it leaves LDC able to compete with Global in relation to the sale of regional advertising. In accordance with the terms of the draft undertakings in lieu, the advertising sales agreement:

- leaves LDC with the sole ability to sell advertising on the divested stations to customers and agencies located in the East Midlands and West Midlands

- does not prevent any customer or advertising agency – including those that wish to buy a 'national' advertising campaign – from buying advertising in the East Midlands and West Midlands direct from LDC to the extent that they indicate they wish to do so, and

- does not undermine LDC's ability to compete with Global in the East Midlands and West Midlands by imposing unreasonable minimum requirements relating to national advertising time.

44. Taking all of the above factors in the round, the OFT considers that LDC is a suitable purchaser for the East Midlands and West Midlands stations since:

- LDC will benefit from the strong management team led by Phil Riley who has significant expertise in the radio sector and a strong relationship with radio in the East Midlands and West Midlands

- the OFT believes that LDC's acquisition of the 106 licence in the East Midlands – together with the Heart brand licence – and the acquisition of the four GCap West Midlands stations will allow LDC to compete with Global in relation to the supply of regional advertising

- the OFT believes that the advertising sales agreement between Global and LDC does not affect LDC's incentive to compete rigorously with Global in the East Midlands and West Midlands: in fact LDC has every incentive to grow the audiences of the stations it proposes to acquire given the higher revenues it can achieve from selling local advertising spots (which it will be selling entirely independently of Global)

- the OFT's Decision did not find specific concerns at a national advertising level; to the extent that the merger resulted in any competition concerns in relation to any regional aspects of national advertising, competition is restored by these divestments given that advertisers and agencies will retain the right to approach LDC directly (and therefore not buy through Global) to the extent they wish to do so, and

- LDC is not currently active in the radio sector in any part of the UK and so its acquisition of the East Midlands and West Midlands assets will not create any competition concerns.

Process going forward

The acceptance by the OFT of these proposed undertakings in lieu is dependent on this public consultation.

The OFT considers that the proposed undertakings offered by Global are clear cut and appropriate to remedy, mitigate or prevent the competition concerns identified in the Decision.

The OFT therefore gives notice that it is minded to accept undertakings in lieu in the form of the proposed undertakings.

Download the proposed undertakings in lieu at http://www.oft.gov.uk/advice_and_resources/resource_base/Mergers_home/register/undertakings-in-lieu/global

Before reaching a decision as to whether to accept the proposed undertakings, interested parties are invited to make their views known.

Representations should be made in writing to:

Sophia Stephanou

Mergers Group
Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London
EC4Y 8JX

Telephone: 020 7211 8513
Email: mailto:sophia.stephanou@oft.gsi.gov.uk

Deadline for comments: 23 June 2009