

Completed acquisitions by Bauer Media Group of certain businesses of Celador Entertainment Limited, Lincs FM Group Limited and Wireless Group Limited, as well as the entire business of UKRD Group Limited

Decision to refer

ME/6809/19; ME/6810/19; ME/6811/19; and ME/6812/19

The CMA's decision to refer under section 22 of the Enterprise Act 2002 given on 7 August 2019. Full text of the decision published on 15 August 2019.

Please note that [X] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

Introduction

1. Between 31 January 2019 and 31 March 2019 Heinrich Bauer Verlag KG (trading as Bauer Media Group (**Bauer**)), through subsidiaries, bought:
 - (a) From Celador Entertainment Limited (**Celador**), 16 local radio stations and associated local FM radio licences (the **Celador Acquisition**);
 - (b) From Lincs FM Group Limited (**Lincs**), nine local radio stations and associated local FM radio licences, a [X] interest in an additional local radio station and associated licences, and interests in the Lincolnshire [X] and Suffolk [X] digital multiplexes (the **Lincs Acquisition**);
 - (c) From The Wireless Group Limited (**Wireless**), 12 local radio stations and associated local FM radio licences, as well as digital multiplexes in Stoke, Swansea and Bradford (the **Wireless Acquisition**); and

- (d) The entire issued share capital of UKRD Group Limited (**UKRD**) and all of UKRD's assets, namely ten local radio stations and the associated local FM radio licences, interests in local multiplexes, and UKRD's 50% interest in First Radio Sales Limited (**FRS**) (the **UKRD Acquisition**).
2. The acquired businesses are collectively referred to as the **Targets**. The four acquisitions are collectively referred to as the **Acquisitions**, and individually they are referred to as an **Acquisition**. Bauer and the Targets are together referred to as the **Parties**.
3. On 24 July 2019, the Competition and Markets Authority (**CMA**) decided under section 22(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that:¹
- (a) a relevant merger situation has been created as a result of the Celador Acquisition, and the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom;
- (b) a relevant merger situation has been created as a result of the Wireless Acquisition, and the creation of that situation has resulted, or may be expected to result, in an SLC within a market or markets in the United Kingdom;
- (c) a relevant merger situation has been created as a result of the Lincs Acquisition, and the creation of that situation has resulted, or may be expected to result, in an SLC within a market or markets in the United Kingdom; and
- (d) a relevant merger situation has been created as a result of the UKRD Acquisition; and the creation of that situation, in combination with the Celador Acquisition, the Wireless Acquisition, and the Lincs Acquisition, has resulted, or may be expected to result, in an SLC within a market or markets in the United Kingdom.
4. On the date of the **SLC Decision** (ie the above decisions),² the CMA gave notice pursuant to section 34ZA(1)(b) of the Act to Bauer of the SLC Decision. However, in order to allow Bauer the opportunity to offer undertakings to the CMA for the purposes of section 73(2) of the Act, the CMA did not refer the

¹ [Celador Acquisition case page](#); [Lincs Acquisition case page](#); [Wireless Acquisition case page](#); and [UKRD Acquisition case page](#).

² [Celador Acquisition case page](#); [Lincs Acquisition case page](#); [Wireless Acquisition case page](#); and [UKRD Acquisition case page](#).

Acquisitions for a phase 2 investigation pursuant to section 22(3)(b) on the date of the SLC Decision. On 24 July 2019 the CMA extended the statutory four-month period mentioned in section 24(1) of the Act for all four Acquisitions by notice pursuant to section 25(4) of the Act.

5. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings for the purposes of section 73(2) of the Act, it must do so before the end of the five working day period specified in section 73A(1)(a) of the Act. The SLC Decision stated that the CMA would refer the Acquisitions for a phase 2 investigation pursuant to section 22(1), and in accordance with section 34ZA(2) of the Act, if no undertakings for the purposes of section 73(2) of the Act were offered to the CMA by the end of this period (ie by 31 July 2019); if Bauer indicated before this deadline that it did not wish to offer such undertakings; or if the undertakings offered were not accepted.
6. On 31 July 2019, Bauer offered a behavioural undertaking (the **Proposed Behavioural Undertaking**), as well as three structural undertakings (the **Proposed Structural Undertakings**) (together the **Proposed Undertakings**), to the CMA for the purposes of section 73(2) of the Act.

Proposed Behavioural Undertaking

7. Bauer offered an undertaking to provide national radio advertising sales representation (**National Sales Representation**) to those third party radio stations which, as at 31 March 2019, had received national sales representation from FRS (excluding the radio stations Bauer bought through the Acquisitions [X]). These third party radio stations are referred to as **FRS stations**.
8. Bauer undertook to offer National Sales Representation to FRS stations on such terms as already agreed between FRS stations and FRS and in effect as at 31 March 2019. Bauer may also offer FRS stations new terms and conditions which, if accepted by a FRS station, may be amended from time to time by mutual agreement. However, FRS stations would be free to choose which terms and conditions suit them best. Consequently, FRS stations would be guaranteed terms and conditions which are at least as favourable to them as those offered to them by FRS as at 31 March 2019.
9. Should an FRS station reject Bauer's terms and conditions at any point during the period of this undertaking, they would be free to request National Sales Representation from Bauer at a future date before the end of the undertaking on terms equivalent to those being offered by Bauer to FRS stations, either on

the terms as agreed between FRS stations and FRS on 31 March 2019 or on the new terms and conditions, if accepted by the FRS station.

10. Bauer submitted that it would not require any FRS station to rebrand its radio station businesses or otherwise source or license content from Bauer as a condition of any offer to provide National Sales Representation services. FRS stations would, however, be free to request such agreements if they considered these commercially attractive to them.
11. [X]:
 - (a) [X]; and
 - (b) [X].
12. [X].
13. [X], Bauer committed to maintaining FRS' arrangements with those stations it bought through the Acquisitions. This commitment would be for a period of up to [X] months (to allow the required time for FRS stations to give notice to FRS), thereby ensuring the continued viability of FRS for this interim period. Following this [X]-month period, FRS stations would have the option to accept Bauer's terms (as described in paragraphs 8-12 above).
14. Bauer additionally offered, on request, to provide National Sales Representation services to non-FRS stations (**Additional Stations**) on terms which are at least equivalent to such terms as already agreed between FRS stations and FRS and in effect as at 31 March 2019.
15. Bauer offered to commit to the Proposed Behavioural Undertaking for a period of [X] years, subject to any fact, matter, event, circumstance, condition or change which substantially and / or adversely affected the business or operations of Bauer and an FRS station or an Additional Station.
16. For the duration of the undertaking, Bauer offered to appoint a Monitoring Trustee approved by the CMA in order to:
 - (a) monitor compliance by Bauer with the obligations and any orders and/or directions given to Bauer by the CMA;
 - (b) take any steps necessary to ensure compliance by Bauer, as well as informing the CMA if the Monitoring Trustee concludes that Bauer is failing or will fail to comply with the obligation;

- (c) give written directions to Bauer to take steps as described in the directions for the purpose of securing Bauer's compliance with its obligations under the undertakings; and
- (d) comply at all times with any reasonable instructions or directions made by the CMA to ensure compliance with the undertakings and provide the CMA with such information and reports in relation to the carrying out of the Monitoring Trustee functions as the CMA may require.

Proposed Structural Undertakings

- 17. Bauer offered undertakings to divest the following local radio stations:
 - (a) In the West Midlands, [✂].
 - (b) In Yorkshire, [✂].
 - (c) In the West of England, [✂].
- 18. Bauer offered, in the alternative, to make these divestments on an upfront buyer basis should the CMA request this as a condition for accepting the Proposed Structural Undertakings.

Assessment of the Proposed Undertakings

- 19. In the SLC Decision, the CMA concluded that it is or may be the case that:
 - (a) the **Celador Acquisition** has resulted, or may be expected to result in an SLC in the supply of commercial radio services in the UK as a result of horizontal unilateral effects in the supply of commercial radio advertising in the **West of England**, in relation to the overlaps between: (i) Celador's Sam FM and The Breeze (South West); and (ii) Bauer's Kiss West;
 - (b) the **Wireless Acquisition** has resulted, or may be expected to result in an SLC in the supply of commercial radio services in the UK as a result of horizontal unilateral effects in the supply of commercial radio advertising in **the West Midlands**, in relation to the overlaps between: (i) **Wireless's** Signal 107; and (ii) Bauer's Free Radio FM Birmingham & Black Country and Free Radio FM Shropshire; and
 - (c) The **Lincs Acquisition** has resulted, or may be expected to result in an SLC in the supply of commercial radio services in the UK as a result of horizontal unilateral effects in the supply of commercial radio advertising

in **Yorkshire**, in relation to the overlaps between: (i) Lincs' Trax FM, Dearne FM, and Rother FM; and (ii) Bauer's Hallam FM; and

(d) The **Celador Acquisition**, the **Wireless Acquisition**, the **Lincs Acquisition**, and the **UKRD Acquisition** have collectively resulted, or may be expected to result in an SLC as a result of vertical effects in the supply of commercial radio advertising as a result of the loss of FRS as a national radio advertising sales house (the **FRS SLC**).

20. The SLC Decision stated that if, pursuant to section 73A(2) of the Act, the CMA decides that there are no reasonable grounds for believing that it might accept any undertaking offered by the Parties, or a modified version of it, then the CMA will refer the Acquisitions for a phase 2 investigation, pursuant to sections 22(1) and 34ZA(2) of the Act.
21. The CMA has an obligation under the Act in the phase 1 stage of its review to have regard, when accepting undertakings in lieu of a reference (**UILs**), to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it (section 73(3) of the Act). Accordingly, the remedies proposed must be clear-cut and capable of ready implementation.³ This means, amongst other things, that the CMA must be confident that, if the UILs are accepted, there is no material doubt about their overall effectiveness; and that all potential competition concerns that have been identified in its investigation would be resolved by means of the UILs without the need for further investigation.⁴
22. The CMA's starting point in deciding whether to accept a proposed UIL is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC (rather than accepting a remedy that simply mitigates the competition concerns).⁵

Assessment of Proposed Behavioural Undertaking

23. At phase 1, the CMA is generally unlikely to consider that behavioural undertakings will be sufficiently clear-cut to address the identified competition concerns, as behavioural undertakings bring a number of risks which can reduce their effectiveness or create competition concerns elsewhere, and can

³ CMA Guidance, [Merger Remedies of 13 December 2018 \(CMA 87\)](#), paragraph 3.27.

⁴ CMA 87, paragraph 3.27.

⁵ CMA 87, paragraphs 3.30 and 3.31.

be difficult to monitor and enforce.⁶ Nevertheless, despite its preference for structural remedies, the CMA does not inevitably refuse behavioural UIL offers. In particular, the CMA will consider behavioural undertakings where it considers that divestment would be clearly impractical or is otherwise unavailable. Mergers raising vertical concerns are potentially more suitable for some form of behavioural undertaking, as are mergers in markets in which there already exists a significant degree of regulation.⁷

24. The design of behavioural remedies should seek to avoid four particular risks:
- (a) Risks that the conduct required to address the SLC or its adverse effects cannot be specified with sufficient clarity to provide an effective basis for monitoring and compliance, and thus may be insufficiently specific to allow effective enforcement (**specification risk**);
 - (b) As behavioural remedies generally do not deal with the source of an SLC, risks that other adverse forms of behaviour may arise if particular forms of behaviour are restricted (**circumvention risk**);
 - (c) Risks that the remedy may create market distortions that reduce the effectiveness of the measures and/or increase their effective costs (**distortion risk**);
 - (d) Risks that the remedy may be ineffectively monitored or enforced, for example, as a result of the complexity of information required to monitor compliance; limitations in monitoring resources; and asymmetry of information between the monitoring agency and the business concerned (**monitoring and enforcement risk**).⁸
25. In the present case, the CMA assessed: (i) the effectiveness of the Proposed Behavioural Undertaking to address the relevant identified SLC, namely the FRS SLC; and (ii) whether the Proposed Behavioural Undertaking is capable of ready implementation. Having carefully considered the Proposed Behavioural Undertaking, the CMA does not believe that it is a comprehensive and clear-cut solution to the concerns identified in the SLC Decision because of the specification, circumvention, distortion, and monitoring and enforcement risks set out below.

⁶ CMA 87, paragraphs 3.32 and 7.4.

⁷ CMA 87, paragraph 3.32.

⁸ CMA 87, paragraph 7.4.

Effectiveness of the Proposed Behavioural Undertaking to address the FRS SLC

26. For a remedy to be comprehensive and clear-cut, there must be no material doubts about the overall effectiveness of the remedy in relation to the substantive competition assessment.⁹
27. The CMA is not confident that the proposed undertaking would comprehensively address the FRS SLC, as it has the following material doubts about its scope and effectiveness.

Specification risk

28. Bauer has offered to represent FRS stations on terms at least as favourable to them as those offered by FRS as at 31 March 2019, [REDACTED]. However, at this stage of its investigation, the CMA has doubts about whether [REDACTED] would effectively address the FRS SLC.
29. [REDACTED]. The CMA has therefore been unable to rule out potential specification risks in relation to the Proposed Behavioural Undertaking.

Circumvention risk

30. While the Proposed Behavioural Undertaking ensures that Bauer will be obliged to serve FRS stations on the basis of certain terms and conditions, it does not address other potential effects of the FRS SLC. In particular, the CMA does not believe it fully addresses the risk that Bauer could discriminate in favour of its own stations in situations where both a Bauer and an FRS station are suitable for reaching a given target audience.
31. At this stage of its investigation, the CMA holds material doubts that the safeguards submitted by Bauer would be sufficient to mitigate this risk. The CMA has therefore not been able to rule out potential circumvention risks in relation to the Proposed Behavioural Undertaking.

Distortion risk

32. The CMA considers that for the Proposed Behavioural Undertaking to have a realistic chance of effectively addressing the FRS SLC, it needs to cover a considerable period of time (as the FRS SLC is not time-limited). At the same time, however, the CMA believes that a long-term undertaking could lead to

⁹ CMA 87, paragraph 3.28 (a).

market distortion. For instance, it could distort market prices for radio advertising and influence FRS stations' incentives to compete for local radio advertising customers over a significant period of time. The CMA has therefore not been able to rule out distortion risks in relation to the Proposed Behavioural Undertaking.

Whether the Proposed Undertaking is capable of ready implementation

33. In order for the Proposed Undertaking to be acceptable it must also be capable of ready implementation.¹⁰ Behavioural remedies typically require ongoing monitoring and enforcement, which can give rise to certain risks, as considered below.

Monitoring and enforcement risk

34. The Proposed Behavioural Undertaking would be monitored and enforced by a Monitoring Trustee. However, the CMA is concerned by the risks associated with monitoring and ensuring compliance with all the provisions of an undertaking of considerable complexity over a very long period (particularly where there is likely to be some asymmetry of information between the CMA and Bauer around, for example, customer negotiations).
35. Full compliance with the terms of the undertaking would be critical, given Bauer's underlying incentive to self-preference its own radio stations over the FRS stations, in ensuring that the Proposed Behavioural Undertaking would be fully effective. Moreover, changes in the market over the [redacted]-year period could create additional complexities in monitoring and compliance that the current provisions in the Proposed Behavioural Undertaking may not be suited to address.

Conclusion on the Proposed Behavioural Undertaking

36. Given all the reasons set out above, and in the light of the requirement for an undertaking at phase 1 to be clear-cut, the CMA has material doubts about comprehensiveness and effectiveness of the Proposed Behavioural Undertaking, as well as whether it can be effectively implemented, monitored and enforced over its entire duration.

¹⁰ CMA 87, paragraph 3.27.

Proposed Structural Undertakings

37. As discussed above at paragraphs 17 to 19(c), the Parties also offered Proposed Structural Undertakings to address the further SLCs identified by the CMA in relation to local overlaps in the West of England, the West Midlands and Yorkshire.
38. Given the CMA's decision that it would not be appropriate to exercise its discretion under section 73(2) of the Act to accept the Proposed Behavioural Undertaking in lieu of reference in relation to the FRS SLC, the CMA has not needed to reach a conclusion on the effectiveness of the Proposed Structure Undertakings and their potential to be readily implemented.

Decision

39. For the reasons set out above, after examination of the Proposed Behavioural Undertaking, the CMA does not believe that it would achieve as comprehensive a solution as is reasonable and practicable to the SLC identified in the SLC Decision and the adverse effects resulting from that SLC.
40. Accordingly, the CMA has decided not to exercise its discretion under section 73(2) of the Act to accept undertakings in lieu of reference.
41. Therefore, pursuant to sections 22(1) and 34ZA(2) of the Act, the CMA has decided to refer the Acquisitions to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 to conduct a phase 2 investigation.

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7 August 2019