



BAUER MEDIA
COMPLETED ACQUISITIONS BY BAUER OF CELADOR, LINCS, WIRELESS AND UKRD
RESPONSE TO THE PROVISIONAL FINDINGS REPORT

1. **EXECUTIVE SUMMARY**¹

- 1.1 This is the Response of Bauer Media Limited ("**Bauer**") to the CMA's Provisional Findings Report dated 5 December 2019 (the "**Provisional Findings**") in respect of the completed acquisitions by Bauer of certain businesses from Celador Entertainment Limited ("**Celador**"), Lincs FM Group Limited ("**Lincs**"), Wireless Group Limited ("**Wireless**") and UKRD Group Limited ("**UKRD**") (each a "**Target**"). These acquisitions each constitute a "**Transaction**" and are referred to collectively as the "**Transactions**". UKRD has a 50% interest in First Radio Sales Limited ("**FRS**"), a national sales house which sells national radio advertising on the behalf of radio stations, including the Targets, [X] and other independent radio stations (the latter are referred to as the "**Third Party Stations**" below).
- 1.2 Bauer welcomes the CMA's Provisional Findings that there is no SLC in relation to the supply of national radio advertising, vertical effects in relation to the supply of local radio advertising as a result of the loss of FRS as a national sales house, or the supply of local radio advertising in Yorkshire, the West of England and Shropshire.
- 1.3 However, on the balance of probabilities the evidence does not support the finding of an SLC in relation to: (1) the representation for national advertising to independent radio stations (the "**Representation SLC**"); or (2) the supply of local advertising in Wolverhampton (the "**Wolverhampton SLC**").
- 1.4 As a preliminary matter, Bauer notes that its ability to respond fully to the Provisional Findings has been impaired by the CMA's failure to adequately disclose to Bauer the gist of the evidence the CMA relies upon in formulating its conclusions, notwithstanding Bauer's multiple reasoned requests for such disclosure.

The Counterfactual

- 1.5 Bauer submits that the CMA has erred in its provisional assessment of the counterfactual. There is no evidence to support the conclusion that FRS would in the counterfactual have continued to operate to provide national advertising representation for up to 10 years.
- 1.6 It is clear on the evidence that without further station losses FRS would likely fail within [X]. Once known station losses are taken into account then it is likely that FRS would fail in a much shorter period than [X]. Moreover, it is likely that there would be other station losses within that [X] period. It is therefore implausible that FRS would continue to provide representation for more than [X] and certainly not [X] or even 10 years as this would depend on FRS not losing any stations, [X]. The reasons for this are set out below.
- 1.7 First, it is common ground that FRS is strategically challenged. Bauer has submitted below revised financial modelling taking account of updated financial information in the Provisional Findings including FRS' FY20 budget which shows that even without station departures FRS become loss making within at most [X].
- 1.8 Second, the CMA accepts that there will be station losses, in particular, that [X]. However, the evidence is that there would be more departures than just the [X] stations.
- 1.9 The CMA is wrong to conclude that [X] would not have been entered into in the counterfactual. [X]. It is therefore likely that Bauer [X] would have entered [X] in the counterfactual and that [X] would have left FRS.
- 1.10 In any event [X] exists and the CMA needs as part of its competitive assessment to take it into account. In particular, the CMA must assess the impact on FRS' viability of [X] leaving FRS in the context of the Representation SLC.

¹ In the interests of brevity, capitalised terms not defined in this Executive Summary are defined in Sections 2 to 6 below.



- 1.11 [X] are important to FRS as they account for c.£[X] of FRS' commission revenues. FRS' FY20 budget, which includes [X] and UKRD commission revenues, projects pre-tax profits of only c.£[X]. Without [X] and [X] as customers FRS is unviable. Indeed, [X]. The CMA acknowledges that losing the [X] (without taking account of the loss of [X]) will push it to break even.
- 1.12 More fundamentally, the CMA's approach to the [X] in the counterfactual is inconsistent with its treatment of these agreements in relation to the Representation SLC. The CMA relies on the [X] as evidence that Bauer is a potential competitor to FRS in the counterfactual. Consistent treatment of the [X] can only result in the finding that there is no Representation SLC. Either the [X] is likely in the counterfactual in which case [X] and there can be no Representation SLC, or it is not likely in which case the evidential basis for Bauer as a potential competitor with FRS falls away.
- 1.13 Third, there is strong evidence that other stations would have left. This is supported by the views of "significant" FRS stations which have submitted that FRS would struggle to retain clients. These stations' concerns about the continued underperformance of FRS are borne out by the fact that in the past three years listening to commercial radio has grown by 5% while listening to FRS' stations has decreased by c. 20%. The loss of stations by FRS would lead to other FRS stations seeking alternative representation. Moreover, if the CMA is correct that Bauer is a potential competitor with FRS in the counterfactual (which Bauer disputes) it would follow that a consequence of that competition is that FRS would lose further stations.
- 1.14 Fourth, the CMA has made a legal error by only assessing the cumulative effects of four legally separate transactions without assessing which specific Transaction (or combination of Transactions) give rise to the SLC.

The Representation SLC

- 1.15 The provisional finding that there is an SLC in relation to the supply of representation for national advertising to independent stations is not made out on the balance of probabilities.
- 1.16 Prior to the Transactions, Bauer was not a competitor with FRS in the supply of representation for national advertising. Bauer's strategy, as evidenced by its behaviour over the past decade, has been to acquire stations rather than represent them. This brings both increased revenue (i.e. 100% of all advertising sales compared to just sales commission on national advertising sales, which are a small proportion of total advertising sales, around 15%) and also certainty that Bauer can increase audience share. By contrast, representation deals always carry the risk that a station or group of stations could be [X] or could simply give notice, for example to seek representation elsewhere or focus exclusively on local sales. Bauer's focus on acquisitions (including the Transactions) was consistent with its overall strategy of [X].
- 1.17 Bauer could in theory have offered to represent the FRS stations individually, but this would not have delivered the critical mass required to [X] in any material way absent the Transactions. Bauer was therefore not a competitor to FRS prior to the Transactions.
- 1.18 [X].
- 1.19 Following the Transactions, it became attractive for Bauer to represent the remaining FRS stations as a group. This is because Bauer could take on their representation in one go and because part of Bauer's desired increase in share had been secured as a result of the Transactions, [X]. As a group, the remaining FRS stations, whilst not making a significant enough impact [X] on their own to enable Bauer to [X], constitute a critical mass, [X].
- 1.20 There is still a risk (and likely an increased risk) that [X] some of the Third Party Stations to counter the effect of the Transactions. However, this threat only serves to increase Bauer's incentive to represent the Third Party Stations to compete against Global.
- 1.21 Against that background it is clear that the CMA has erred in its provisional conclusion that Bauer is in the counterfactual a potential competitor with FRS, with the result that the Transactions reduce the number of suppliers of national advertising representation to independent radio stations from three (FRS, Global and Bauer) to two (Global and Bauer).



- 1.22 The evidence does not support the conclusion that Bauer would be an actual or potential competitor to FRS. Even if it were, the FRS stations would be better off represented by Bauer and so no SLC arises. Moreover, there is no scope for sustainable competition with Bauer and therefore no SLC as FRS would not be viable if it lost any stations as a result of that competition.
- 1.23 First, the evidence does not support the claim that Bauer would have been a potential competitor to FRS in the counterfactual. Bauer's strategy has been to focus on acquisitions and absent the Transactions it would have pursued other acquisitions. Representation of a critical mass of the Third Party Stations makes sense following the Transactions but not as an alternative to them. [REDACTED]. There is also no evidence that Bauer has constrained the terms offered by FRS pre-Transactions and the one purported example given by the CMA does not change this. In fact Bauer's limited involvement in representation is entirely consistent with it not competing with FRS. Bauer agrees that it now has strong incentives to represent the Third Party Stations following the Transactions (for the reasons set out above). However, this is a result of the Transactions.
- 1.24 Second, the conclusion that Bauer is a potential competitor to FRS is inconsistent with the CMA's findings in relation to the counterfactual which are that Bauer would not have entered an agreement [REDACTED] and more generally FRS would not have lost any stations for up to 10 years.
- 1.25 Third, if Bauer was a competitor to FRS in the counterfactual then it has to be assumed that it would be an effective competitor and that FRS would lose stations to Bauer. Bauer does not face the strategic challenges of FRS, has share deals with media buying agencies and a number of FRS stations consider that Bauer would be a more effective sales house. Those station losses would include but likely not be limited to [REDACTED] (which the CMA accepts would leave FRS in any event). Any loss of [REDACTED] would make FRS unviable. There is no scenario in which FRS could sustainably compete with Bauer and Global.
- 1.26 Fourth, the CMA concludes that, following the Transactions, Bauer has incentives to represent the FRS stations and that they are likely to be better off in terms of advertising revenues with Bauer representation. By contrast the suggestion by some FRS stations that Bauer might selectively worsen terms to those stations that overlap locally with Bauer is speculative. Importantly, [REDACTED].
- 1.27 Fifth, assuming the Transactions do give rise to the loss of Bauer as a potential competitor then the loss of competition is not substantial, is very short lived and is offset by pro-competitive efficiencies in terms of better representation of independent stations through a wider range of advertisers and increased volume of sales and increased competition between Bauer and Global to represent stations. Bauer's strategy to [REDACTED] through the Transactions increases competition for national advertising and in turn the importance of representing independent stations as part of that competition.

The Wolverhampton SLC

- 1.28 The provisional finding that there is an SLC in relation to the supply of local advertising in Wolverhampton is not made out on the balance of probabilities. The CMA's provisional SLC finding seems to be based on an unclear and apparently unreasoned statement raised by just one advertiser. There is, in contrast, substantial evidence which does not support the existence of a SLC.
- 1.29 First, it is clear that Signal 107 and Free Radio in Wolverhampton are very differentiated offerings and not close alternatives for advertisers:
- 1.29.1 Signal 107 has a very low share of listening as compared to Free Radio;
- 1.29.2 Local advertisers do not view them a close alternatives and (with one exception) are not concerned about the transaction;
- 1.29.3 There is a significant difference in coverage area with Signal 107 (Wolverhampton) covering only 40% of the population covered by Free Radio (Wolverhampton);



- 1.29.4 There is a material difference in price with advertising on Free Radio being [X]% more expensive than Signal 107 and Free Radio advertisers tend to spend [X] as Signal 107 advertisers;
- 1.29.5 The lack of competitive interaction is supported by switching data which shows that despite high levels of local advertiser churn they are not switching between Free Radio and Signal 107.
- 1.30 Second, non-radio advertising is a strong constraint on each of Free Radio and Signal 107. This is supported by evidence of the local advertisers who have stated that if either station was not available they would move either some or all of their radio advertising spend to non-radio and other radio broadcasters.
- 1.31 Third, any loss of competition is not substantial given the limited competitive interaction between Free Radio and Signal 107 and is offset by the pro-competitive efficiencies arising from the Transaction, notably a more attractive product for Signal 107 listeners which would be distributed in more innovative ways. This will attract more listeners benefiting local advertisers and allow Signal 107 to better compete with non-radio advertising.

Relevant Customer Benefits

- 1.32 The Transactions give rise to a number of benefits both inside and outside the markets in which SLC's have been provisionally found but which the CMA is required by section 30 EA02 to take into account in the assessment of possible remedies, in the event that the CMA maintains its Provisional Findings.
- 1.33 First, there are benefits to the Target stations in relation to deregulation which can be best realised under Bauer's ownership as they are more readily attained by larger station groups. These benefits will result in enhanced content and investment in local news; enhanced digital distribution and innovation; the growth in revenue streams and the scope for costs savings, all of which will improve the attractiveness of the Targets to listeners and advertisers.
- 1.34 Second, at the national level there will be increased competition between Bauer and Global for advertising, with the result that advertisers will benefit from lower prices as well as more efficient purchasing of the Target stations' advertising.
- 1.35 Third, as noted above there are benefits for represented stations in terms of both the effectiveness of that representation and the rivalry between Bauer and Global to represent them.
- 1.36 In light of these benefits, and the at best limited nature of the CMA's provisional SLC findings, Bauer submits that, for the reasons set out further in its Response to the Notice of Possible Remedies:
- 1.36.1 any structural remedy in respect of the Representation SLC (which would effectively involve the prohibition of one or more of the Transactions) would be disproportionate – and in any event ineffective as it would not prevent FRS from becoming [X]; and
- 1.36.2 as regards the Wolverhampton SLC, the divestment of all of the acquired Wireless business (i.e. prohibition of that Transaction) would be disproportionate. Moreover, the divestment of the Signal 107 Wolverhampton licence alone is an effective remedy, and therefore requiring the divestment of any greater package of Signal 107 licences would be disproportionate.

2. INTRODUCTION

- 2.1 Bauer welcomes the CMA's findings in respect of those theories of harm where it has provisionally found that the Transactions will not give rise to a substantial lessening of competition ("**SLC**"), as noted above at paragraph 1.2.² Accordingly, Bauer does not make any further representations in respect of these issues.

² See Chapter 9, Chapter 10 and Chapter 11 (except paragraphs 11.31 to 11.65 in respect of the supply of local radio advertising in Wolverhampton).



Preliminary remarks

- 2.2 First, the evidence presented by the CMA to support its provisional conclusion that SLCs arise in the supply of representation for national advertising to independent radio stations and in the supply of local radio advertising in Wolverhampton does not meet the standard of proof that must be applied by the CMA.
- 2.3 At Phase 2, section 35(1)(b) of the Enterprise Act 2002 ("**EA02**") requires the CMA to decide whether each Transaction "*has, or may be expected to result*" in an SLC in the relevant market. The CMA must decide on the balance of probabilities whether or not an SLC may be expected to result (i.e. whether an SLC is more likely than not).³ This requires the CMA to weigh the evidence before it and if that evidence demonstrates that it is more likely than not that an SLC will arise, then section 35(1)(b) is satisfied and the CMA can take enforcement action in accordance with the EA02. If section 35(1)(b) is not satisfied, the CMA has no power to take any further action in respect of the transaction in question
- 2.4 Specifically, where there may be some evidence before the CMA which shows that there is some risk of an SLC arising, but, when taken in the round with other evidence, the probability of this coming to pass is below 50%, then the CMA must find that the transaction may not be expected to result in an SLC. The CMA is not required to decide (and it is not incumbent on the parties to show) that there is no risk that an SLC may arise, or that this risk is below a particular threshold, other than the balance of probabilities threshold.
- 2.5 For the reasons set out below, the evidence does not, on the balance of probabilities, support the finding of an SLC in respect of either representation of independent radio stations or sales of local advertising in Wolverhampton.
- 2.6 Second, Bauer's ability to respond fully to the Provisional Findings has been impaired by the CMA's failure to adequately disclose to Bauer the evidence and/or gist of the evidence the CMA relies upon in formulating its conclusions. Bauer has sent a number of reasoned requests to the CMA setting out the material to which it needed access in order to respond fully to the Provisional Findings and the reasons why disclosure was necessary for this purpose.⁴ Bauer highlights below the specific areas where its ability to respond to the Provisional Findings has been materially impaired by the CMA's failure to adequately disclose the gist of the evidence which is referred to in the Provisional Findings. The CMA provided further clarification of its Provisional Findings on 20 December 2019 which Bauer is considering. Whilst some reference to that material is contained in this Response, given the late disclosure Bauer's position on the adequacy of this disclosure is reserved.
- 2.7 Third, Bauer has concerns regarding the CMA's decision to carry out an extensive factual investigation at this late stage in the process by contacting 40 of the Parties' customers in Wolverhampton. As already raised with the CMA, Bauer is concerned that: (1) requesting this evidence over the Christmas period will have an impact on the response rate, the timing of responses and the quality of those responses; (2) there is a material risk those responses will be coloured by the contents of the CMA's Provisional Findings; (3) Bauer has not been given the opportunity to review and comment on the CMA's proposed questionnaires; and (4) Bauer must be given adequate disclosure of those responses and the opportunity to make further representations in respect of that new evidence. Bauer has set out its concerns fully in correspondence with the CMA but to date the CMA has not set out clearly how it proposed to address these issues other than that it will follow-up with recipients in the New Year where they have not responded and acknowledges for that reason it cannot say what will be disclosed to Bauer or when.⁵ Pending that explanation, Bauer's position is reserved.

Structure

³ See CMA Merger Assessment Guidelines ("**CC2**"), paragraph 2.12; *IBA Health Ltd v OFT* [2004] EWCA Civ 12, [46] (that case considered the interpretation of section 36(1)(b) EA02, which applies to anticipated mergers. Section 35(1)(b) applies to completed mergers (such as the Transactions) but is otherwise identical to section 36(1)(b) and therefore the case law applies equally).

⁴ See emails from Herbert Smith Freehills to the CMA: 6 December 2019 at 16:10; 9 December 2019 at 09:45; and 16 December 2019 at 13:02.

⁵ See email from CMA to Herbert Smith Freehills dated 20 December 2019.



- 2.8 The remainder of this response is structured as follows:
- 2.8.1 Section 3 addresses the CMA's provisional finding on the counterfactual to the Transactions;
 - 2.8.2 Section 4 explains why the Transactions do not give rise to an SLC as a result of horizontal unilateral effects in the supply of representation for national advertising to independent radio stations;
 - 2.8.3 Section 5 explains why the Transactions do not give to an SLC as a result of horizontal unilateral effects in the supply of local radio advertising in Wolverhampton; and
 - 2.8.4 Section 6 explains why, if the CMA does find that the Transactions give rise to an SLC, any adverse effect on competition is outweighed by the efficiencies arising from the Transactions. In addition the Transactions give rise to relevant customer benefits which need to be taken into account when considering remedies on the assumption (which Bauer rejects) that the CMA maintains its SLC finding.

2.9 [REDACTED].

3. THE COUNTERFACTUAL

Introduction

- 3.1 The CMA sets out its provisional conclusions on the counterfactual applicable to the Transactions in Chapter 6 of the Provisional Findings. In summary, the CMA provisionally finds:
- 3.1.1 the competitive effects of the Transactions should be assessed against a single counterfactual of none of the Transactions having gone ahead, in particular because the Transactions formed part of Bauer's overall [REDACTED];⁶
 - 3.1.2 in the counterfactual, Bauer would have continued to operate as it did prior to the Transactions, carrying out no additional transactions and not entering into representation agreements with any of the Targets;⁷
 - 3.1.3 each of the Targets would have continued to compete independently, [REDACTED];⁸
 - 3.1.4 [REDACTED];⁹ and
 - 3.1.5 FRS would have continued to operate in the short term, but, over a longer period, it would have failed within at most 10 years.¹⁰
- 3.2 Bauer submits that each of these provisional conclusions is erroneous. However, Bauer does not respond in detail to each, instead it focuses on the key aspects of the CMA's counterfactual analysis which once corrected lead to the conclusion that no SLC arises as result of the Transaction. Specifically, Bauer demonstrates below that:
- 3.2.1 the CMA is required to assess the counterfactual for each Transaction separately, and to do otherwise is an error of law (paragraphs 3.3 to 3.15 below);
 - 3.2.2 Bauer [REDACTED] would likely have entered into the [REDACTED] in the counterfactual, [REDACTED]. In any event, the CMA is required to have regard to [REDACTED] in its competitive assessment as they have in fact taken place (paragraphs 3.16 to 3.24 below);
 - 3.2.3 on the evidence, FRS would have failed in the very near future, and within at most [REDACTED] – none of the evidence set out in the Provisional Findings contradicts this (paragraphs 3.25 to 3.39 below); and

⁶ Paragraphs 6.4 to 6.13.

⁷ Paragraphs 6.14 to 6.16.

⁸ Paragraphs 6.18 to 6.45.

⁹ Paragraphs 6.46 to 6.57.

¹⁰ Paragraphs 6.58 to 6.73 and Appendix C.



3.2.4 as a result, FRS would not have been able to compete to represent independent radio stations.

The CMA is required to assess the counterfactual for each Transaction separately

3.3 The CMA provisionally concludes that it is not required to assess the counterfactual for each Transaction separately because:

3.3.1 first, the Transactions formed part of an overarching commercial strategy; and

3.3.2 second, the CMA's approach is necessary in order to assess the cumulative effects of the Transactions.

The relevance of Bauer's overarching commercial strategy

3.4 Bauer agrees that the Transactions formed part of an overarching commercial strategy aimed at [REDACTED]. However, as Bauer has explained, the Transactions were part of a number of options Bauer was considering to achieve that aim (including other acquisitions which did not go ahead). Bauer would have pursued each Transaction on its own merits in light of its contribution to that overall strategy.¹¹ In particular, and as specified and quantified in Bauer's Submission on Transaction Benefits,¹² each Transaction provides significant revenue and cost synergies and would therefore be justified absent Bauer's overarching commercial strategy. Bauer also notes that the revenue synergies presented in that Submission do not assume that Bauer [REDACTED] – they are standalone benefits that could be realised from any individual acquisition. These synergies are summarised in **Table 3.1** below.

Table 3.1: Synergies arising from the Transactions

Target	National revenue uplift (£m)	Local Revenue Uplift (£m)	Enterprise revenue uplift (£m)	Cost synergies (£m)	Total (£m)
Wireless (local)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Lincs FM	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Celador	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
UKRD	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Source: Bauer Submission on Transaction Benefits, Tables 1-4

3.5 Whilst the CMA does not address this submission directly in the Provisional Findings, its response appears to be:

3.5.1 Bauer could only achieve its overall strategic aim by executing multiple, closely timed transactions;¹³ and

3.5.2 the other strategic options considered by Bauer would not, by themselves, have brought about [REDACTED].¹⁴

3.6 This reveals a fundamental misunderstanding of the drivers of Bauer's strategy.

3.6.1 First, each of the Celador, Lincs and Wireless Transactions completed without any certainty that the respective subsequent Transactions would proceed. None of the Transactions were inter-conditional.

3.6.2 Second, the primary driver for executing the Transactions within a tight timeframe was, as the CMA recognises,¹⁵ [REDACTED].

3.6.3 Third, each of the Transactions made commercial sense on their own due to the synergies they produce; for this reason Bauer could complete Celador without

¹¹ Bauer's Response to the Counterfactual Working Paper, paragraph 2.7 (Document 282, submitted 8 November 2019).

¹² Document 219, submitted 10 October 2019.

¹³ Paragraphs 6.9 to 6.10.

¹⁴ See footnote 77 and paragraph 6.14 in respect of Jack FM, [REDACTED].

¹⁵ Paragraph 6.8.



having any certainty that the other Transactions would be achieved and regardless of whether this contributed to its over-arching strategy.

- 3.6.4 Fourth, Bauer's position is not that the other strategic alternatives it would have considered [redacted] would, by themselves, have delivered the step [redacted]. None of the Transactions, alone, could do so. Bauer therefore considered a range of strategic options which would contribute to this overall goal, and executed all of those that it was able to execute in view of their contribution to this overall aim. This logic would have applied equally to each of the Transactions even if one or more of them did not proceed. As noted above each Transaction also offered synergy benefits. As evidence of these propositions, it is notable that Bauer was still prepared to do the other Transactions notwithstanding [redacted]. The same applies to each of the other Transactions; Bauer would still have pursued them even if it was unable to complete all of them.
- 3.6.5 Finally, the CMA errs in concluding that Bauer would have stood still had the Transactions not proceeded. Bauer would have considered and identified alternative means of delivering the step change required, such as other acquisitions or launches. The CMA itself observes that this is in fact what happened, with Bauer launching Scala, its national DAB classical music station, even though [redacted].¹⁶
- 3.6.6 Importantly, if it had not been possible to acquire all of the Targets then Bauer would have sought to acquire some or parts of the Targets. It was clear from previous transactions that both Wireless and UKRD were prepared to consider sales of individual stations.¹⁷ [redacted].¹⁸ As noted above these would have been attractive to Bauer because of the synergies and additional share of listening that they would have delivered. The CMA's conclusion that Bauer would have stood still absent the Transactions also reveals an inconsistency between the CMA's position as regards the counterfactual and its assessment of the impact of the Transactions on the market for the supply of national advertising representation to third party stations. This is addressed at paragraph 3.23 and in Section 4 below.
- 3.7 Bauer's overall commercial strategy, properly understood, does not therefore support the conclusion that the Transactions should only be analysed against a single counterfactual. Instead, it demonstrates that Bauer would have pursued each Transaction even if some or all of the others would not have proceeded, and therefore necessitates the conclusion that each Transaction should be assessed separately, against its own counterfactual. Acknowledging this commercial reality does not constitute an "*artificial and speculative*" exercise, but is the exercise the CMA is legally required to conduct, as set out below.
- Assessing the cumulative effects of the Transactions
- 3.8 The CMA asserts that adopting a counterfactual other than none of the Transactions going ahead would result in ignoring the cumulative effects of the Transactions on competition. This is not correct.
- 3.9 First, the CMA has erred in law in reaching this provisional conclusion. As the CMA states, each of the Transactions constitutes a separate relevant merger situation for the purposes of section 35(1) of the EA02.¹⁹ As Bauer pointed out in its Response to the Counterfactual Working Paper, the CMA is therefore required to assess separately whether each relevant merger situation gives rise to an SLC under section 35(2) EA02.²⁰ The CMA does not dispute this point in the Provisional Findings.
- 3.10 The CMA asserts that its existing guidance does not include provision for a scenario such as that brought about by the Transactions, and that it must therefore proceed from first principles. Bauer agrees as a matter of principle but submits that the CMA has misdirected

¹⁶ Footnote 79.

¹⁷ See Bauer's Response to the Counterfactual Working Paper, paragraph 3.5.

¹⁸ *Idem.*, paragraphs 4.4 and 4.10.

¹⁹ Paragraph 5.21.

²⁰ Paragraph 2.8.



itself in doing so. The CMA states that: "*the counterfactual is an analytical tool intended to assist the CMA in assessing mergers and determining the effects on competition resulting from mergers. Assessing the Acquisitions together against a counterfactual of none of the Acquisitions having gone ahead achieves that aim. An artificial and speculative assessment of the Acquisitions individually or sequentially does not*".²¹ However, this paraphrases the CMA's own guidance which more accurately summarises the role of the counterfactual. The CMA's guidance states that the counterfactual is "*an analytical tool used in answering the question of whether the merger gives rise to an SLC*" -²² i.e., the counterfactual is an analytical tool to assist the CMA in answering the statutory question posed by section 35(2) EA02.²³ It is required to answer this question separately in respect of each Transaction, and must select the appropriate counterfactual (for each Transaction) appropriately.

- 3.11 Second, the CMA is wrong to state that the approach advocated by Bauer of assessing the relevant counterfactual for each Transaction individually, would lead to it having to "*ignore the cumulative effects on competition*" of the Transactions.²⁴ In its Response to the Counterfactual Working Paper, Bauer explained precisely how the CMA should address this issue:²⁵
- 3.11.1 the CMA could first assess the cumulative effects of the Transactions; and
 - 3.11.2 having found, as it has done so on a provisional basis in the Provisional Findings, that the Transactions as a whole give rise to an SLC because of the combined effect on FRS, it must then assess which Transaction or group of Transactions are problematic from this perspective.
- 3.12 The CMA fails to engage with or even acknowledge this specific submission in the Provisional Findings.
- 3.13 The CMA clearly agrees that it is required to carry out the analysis in this way. In the Remedies Notice the CMA proposes, as a means of addressing the SLC in the market for the supply of representation for national advertising to independent local stations, the divestiture of either all of the Targets (i.e. prohibition) or a divestiture of a "*smaller package of businesses including at least the 50% shareholding and whatever other assets [...] would need to be added to make FRS an effective competitor for the duration of the SLC*".²⁶ The CMA therefore invites views on whether "*the divestiture of a package less than the acquisitions would be effective and what this package would consist of*".²⁷ In other words, the CMA is calling for evidence on which of the Transactions contributes to the failure of FRS (and thereby the SLC) and which do not and therefore can be allowed to proceed unconditionally.
- 3.14 However, a consultation on potential remedies is not the appropriate place for this analysis – it amounts to 'putting the cart before the horse'. The CMA is required to first conduct this analysis as part of its assessment of whether each Transaction gives rise to an SLC.
- 3.15 It is therefore clear that Bauer's proposed approach not only allows the CMA to assess the cumulative effects of the Transactions, but also to fully discharge its statutory obligations by assessing the impact on competition of each of the Transactions independently. In its Response to the Counterfactual Working Paper, Bauer emphasised the importance of this given the CMA's finding in the Annotated Issues Statement that, apart from its contribution to the CMA's FRS-related theories of harm, the Celador Transaction gave rise to no SLC.²⁸ The CMA's Provisional Findings finds only one non-FRS SLC, relating solely to the overlap

²¹ Paragraph 6.11.

²² CC2, paragraph 4.3.1.

²³ See *BSkyB v Competition Commission* [2010] EWCA Civ 2, [54], endorsing the judgment of the Competition Appeal Tribunal ([2008] CAT 25) at [91]. Note that the case referred to section 47 EA02, which applies in the case of public interest cases such as the merger in question, but applies equally as that provision is substantively identical to section 35 for these purposes.

²⁴ Paragraph 6.7.

²⁵ Paragraph 2.9.

²⁶ Paragraph 23(b).

²⁷ Paragraph 30(b).

²⁸ Paragraph 2.10.



between Bauer and Wireless in Wolverhampton. The CMA would wholly fail to discharge its statutory obligations in respect of at least the Celador and Lincs Transactions if it fails to assess the contribution those Transactions have to the sole FRS-related SLC identified in the Provisional Findings.

The [REDACTED] would have been entered into in the counterfactual

3.16 The basis for the CMA provisionally concluding that the [REDACTED] should not form part of the counterfactual appears to be:

3.16.1 [REDACTED].

3.16.2 [REDACTED].

3.16.3 [REDACTED].

3.17 Bauer submits that the CMA's provisional conclusion is flawed, and that Bauer [REDACTED] in the counterfactual.

3.18 First, as Bauer explained in its Response to the Counterfactual Working Paper, [REDACTED].²⁹

3.19 Second, [REDACTED].

3.20 Third, [REDACTED].

3.21 Finally, [REDACTED].

3.22 Even if the CMA does not consider that the [REDACTED] should form part of the counterfactual, it is required to have regard to them in its competitive assessment. In particular, as regards the alleged Representation SLC, [REDACTED].

3.23 Further, the CMA's conclusions on the [REDACTED] reveal a serious and fundamental inconsistency in its Provisional Findings. Having found that Bauer would not have entered into the [REDACTED] in the counterfactual, the CMA then goes on to use those same agreements as evidence to support its provisional conclusion that, absent the Transactions, Bauer was a potential competitor to FRS to represent third party stations.³⁰ This approach is unsustainable. Either:

3.23.1 Bauer would not [REDACTED] in the counterfactual and therefore the basis of the CMA's provisional conclusion that Bauer would have competed with FRS to represent third party stations falls away; or

3.23.2 Bauer would [REDACTED].³¹

3.24 This inconsistency is addressed further in Section 4 below.

FRS would have failed in significantly less than 10 years in the counterfactual

3.25 It is common ground that FRS was strategically challenged and therefore was not viable in the long term. The CMA accepts that FRS' interminable decline is driven by industry specific factors and not by the Transactions (e.g. the decline in local radio, deregulation leading to BCLs/NSA being more viable and the vicious cycle that flows from the link between station exits and decreasing advertising revenues).³² The only issue left between Bauer and the CMA is for how long FRS would have remained viable.

3.26 The CMA's conclusion that FRS would have remained viable for, at most, 10 years, is not evidenced but appears to be based on:

3.26.1 an assumption that none of the Targets would leave within a sufficiently short timeframe to be considered in the counterfactual,³³ with most of FRS' remaining clients being too small to have a substantial impact on FRS' profitability if it left;³⁴ and

²⁹ Paragraph 5.4.

³⁰ See paragraphs 8.21 to 8.23 and 8.33.

³¹ Appendix C, Tables 3 and 5.

³² Paragraph 6.70.

³³ Paragraph 6.73.

³⁴ Paragraph 6.64.



3.26.2 a claimed inability to verify Bauer's calculation that FRS would become loss making within [REDACTED] without any further station departures.

The CMA has failed to have regard to evidence of the FRS stations that would leave in the short term

3.27 As a starting point, Bauer notes that the CMA has failed to have regard to concrete evidence that two substantial FRS clients would have left in the counterfactual:

3.27.1 Celador, [REDACTED];³⁵ and

3.27.2 [REDACTED].

3.28 The CMA's provisional conclusions regarding the period over which FRS would remain viable do not address these likely departures from FRS. These groups accounted for a substantial proportion of FRS' revenues (approx. [REDACTED] of FRS' total commission revenues in the year to March 2019 which equates to [REDACTED]% of its pre-tax profit in FY19 and the commission revenue of each is likely to exceed FRS' budgeted pre-tax profit for FY20),³⁶ [REDACTED].³⁷

3.29 Even if the CMA does not consider that Celador [REDACTED] leaving FRS should form part of the counterfactual, it is required to consider these factors in its competitive assessment, given that: [REDACTED].³⁸

3.30 The CMA has also failed to give adequate weight to and/or summarily dismissed the following evidence which supports the conclusion that a number of station groups would likely have left FRS in the short-to-medium term:

3.30.1 First, the CMA has not addressed the extensive evidence as to the further stations and station groups which could be expected to leave FRS in the counterfactual set out by Bauer in its Response to the Counterfactual Working Paper Bauer.³⁹ In particular, Bauer adduced evidence showing: (1) examples of stations leaving FRS prior to the Transactions, indicating the broader trend towards stations leaving FRS (such as certain UKRD stations withdrawn for strategic reasons, and stations acquired by Global, Communicorp and Bauer); and (2) stations which have taken steps towards obtaining alternative representation or otherwise expressed concerns regarding FRS' ability to represent them that are not tied to the Transactions, namely Celador, Nation, Radio Essex, Quidem and Mi-Soul. Bauer also believes that [REDACTED].

3.30.2 Second, the CMA's own evidence is that "*significant radio stations*" contacted by the CMA expected FRS to struggle to retain clients, as a result of the pre-existing and irremediable challenges faced by FRS.⁴⁰ These stations' concerns about FRS performance are illustrated by the fact that in the past three years listening to commercial radio has grown by 5% while listening to FRS' stations has decreased by c. 20%.⁴¹ The CMA has declined to disclose the responses provided by these stations to Bauer on the grounds that it is required only to disclose the 'gist'. Bauer submits that this is not correct, and in particular the single paragraph of the Provisional Findings dedicated to these responses is insufficient given that the stations in question appear to have adduced evidence which supports Bauer's case and has not been given adequate weight by the CMA. The CMA provided further clarification on 20 December 2019. This underlines the importance of this third party evidence and the need for it to be disclosed to Bauer as it does not support the CMA's assessment of the counterfactual. In particular, based on the additional details provided by the CMA, it appears that this is the view of three significant

³⁵ See Response to the CMA question dated 3 September 2019 (Document 090, submitted 12 September 2019) paragraph 8.

³⁶ Appendix C, Table 3 and Table 5.

³⁷ Bauer's Response to the Vertical Effects Working Paper (Document 286, submitted 8 November 2019), paragraph 3.16.

³⁸ See Bauer's Response to the Counterfactual Working Paper, paragraph 2.5.2.

³⁹ See paragraphs 3.5 to 3.6.

⁴⁰ Paragraph 6.63.

⁴¹ RAJAR (Q2 2015 to Q2 2018). See Annex 2 to Bauer's Submission on Vertical Effects (Document 266, submitted 23 October 2019).



radio stations, it is supported by their internal documents and is based on the reasons that FRS is less effective than Bauer and Global in selling national advertising and an expectation that other stations would leave FRS.

- 3.30.3 Third, as the CMA acknowledges, deregulation creates an environment supporting greater consolidation and/or representation by national station groups. The CMA asserts that there is no evidence that any acquirer of a station currently represented by FRS would withdraw it from FRS.⁴² This is not correct. The most likely purchasers of any station would be the groups with the longest track record of acquisitive activity – i.e. Global, Communicorp, Bauer and, more recently, Nation.
[REDACTED]
- 3.30.4 Fourth, as Bauer has submitted previously, the appropriate counterfactual in respect of each of the Targets is that, if they were not acquired by Bauer, they would have been acquired by one or more alternative station groups (most likely Global/Communicorp) resulting in their withdrawal from FRS.⁴³
- 3.30.5 Fifth, the CMA appears to accept that [REDACTED] was likely to exit and therefore withdraw its [REDACTED] stations from FRS in reasonably short order, [REDACTED].⁴⁴ It is noteworthy that here the CMA appears to endorse the correct position that a station group being acquired would necessarily involve it withdrawing from FRS, despite the position it takes elsewhere as noted above.
- 3.30.6 Finally, confidence in FRS would further decline with each station departure, leading to further stations seeking alternative representation.⁴⁵ For instance, in the counterfactual, [REDACTED] and [REDACTED] exit would have entered the public domain.
- 3.31 Moreover, if the CMA is right in Chapter 8 of the Provisional Findings and Bauer would have competed with FRS to represent third party stations, then Bauer would have been incentivised to target the largest FRS customers (i.e. the Targets [REDACTED]) first in order to achieve the largest contribution towards its share of national listening. If Bauer was successful in representing just one of the larger groups this would immediately cause the collapse of FRS. See further Section 4 below.
- 3.32 The CMA does not need to satisfy itself that any particular station or station group would, on the balance of probabilities, have left FRS in the counterfactual. It only needs to satisfy itself that it is the case, on the balance of probabilities, that FRS would have lost sufficient clients (in fact just one of the larger groups) so as to become unviable in the short to medium term.⁴⁶ The evidence referred to above and previously submitted by Bauer clearly supports this conclusion, which is borne out further on proper analysis of FRS' financial position, as set out below.
- The CMA's financial modelling does not support FRS being viable beyond [REDACTED]
- 3.33 Bauer has submitted evidence that FRS would remain viable until, at the latest, [REDACTED] In Annex 1 to its Submission on Vertical Effects⁴⁷ Bauer demonstrated that this was the case based on the following very conservative assumptions:⁴⁸
- 3.33.1 No stations (including the Targets [REDACTED], and Quidem and Connect FM who have left FRS⁴⁹) leave FRS;
- 3.33.2 FRS' revenue trend ([REDACTED] from FY17 to FY18) would have continued in subsequent years;

⁴² Paragraph 6.66.

⁴³ See Bauer's Response to the Counterfactual Working Paper, section 4.

⁴⁴ Paragraph 6.72.

⁴⁵ The CMA appears to acknowledge this at paragraph 6.70, bullet four, and paragraph 6.73 of the Provisional Findings.

⁴⁶ *BSkyB v Competition Commission*, [69].

⁴⁷ (Document 265, submitted 23 October 2019).

⁴⁸ See paragraphs 10 to 13 and Figure 3.

⁴⁹ See Bauer's Response to the Counterfactual Working Paper, footnote 2.



- 3.33.3 FRS' direct costs would decline in proportion to the decline in revenues. In addition, FRS would be able to reduce [%] of its staff cost in proportion to the decline in revenue. Accounting for inflation this results in a real-terms reduction in staff and staff-related costs of [%] over a [%] year period; and
- 3.33.4 FRS made no investments to seek to remain competitive.
- 3.34 This demonstrates that FRS would become EBITDA negative in FY[%].
- 3.35 The CMA does not engage with this evidence, and instead merely asserts that it has "no way to assess the likelihood of Bauer's forecast occurring with any degree of certainty".⁵⁰
- 3.36 Bauer submits that the CMA's approach is not adequate as this amounts to a dismissal of this evidence in its entirety without any basis and without any evidence to the contrary; the CMA is required to engage with the evidence before it. Indeed, this evidence is consistent with and corroborated by the CMA's own findings as to the financial weakness of FRS and the strategic challenges it faces⁵¹ as well as the evolution of FRS's financial position. Moreover, the evidence presented by the CMA demonstrates that Bauer's assumptions were conservative. In particular, the evidence presented by the CMA in the Provisional Findings shows:
- 3.36.1 Bauer was correct to assume that FRS' revenue trend from FY17 to FY18 would continue. FRS has average annual revenue decline of c. [%] between FY18 and FY20 (budget). Between FY19 and FY20 (budget) the rate of decline is as high as [%];⁵²
- 3.36.2 [%];⁵³ and
- 3.36.3 [%].⁵⁴ This would result in FRS being close to breakeven, with pre-tax profits of less than £[%] based on the FY20 budget.
- 3.37 Not only does the evidence set out by the CMA corroborate Bauer's submission that FRS would cease to be viable beyond [%] at the latest, it demonstrates that Bauer's assumptions were conservative, and that in reality FRS would have declined more rapidly. Indeed, taking account of the increased rate of revenue decline in the most recent year ([%]) and FRS' increased costs, Bauer's calculations (see **Annex 1**) now show that it will have negative pre-tax profits in less than [%] absent any further station losses.
- 3.38 This is exacerbated once reasonably predictable station exits are taken into account, particularly given the significant knock-on effects that would come from [%], exiting, which the CMA appears to consider is likely. Once the departure of [%] is taken into account (and assuming the FY20 budget already takes account of the loss of Quidem and Connect⁵⁵) then FRS [%].
- 3.39 Bauer therefore submits that it is not open to the CMA to conclude that FRS would have remained viable for more than [%], i.e. beyond [%]. In reality FRS would likely have failed within at most [%] absent any further station losses. It would have failed far sooner – if not immediately – in the event of any further station withdrawals, [%]

4. **THE SUPPLY OF REPRESENTATION OF NATIONAL ADVERTISING TO INDEPENDENT RADIO STATIONS**

Introduction

- 4.1 The CMA regards Bauer as an actual or potential competitor to FRS in the supply of representation of national advertising to independent radio stations. In the CMA's view, the Transactions result in a reduction in the number of suppliers of representation of national

⁵⁰ Paragraph 6.72.

⁵¹ See paragraph 3.25 above.

⁵² Appendix C, Table 5.

⁵³ *Ibid.*

⁵⁴ Paragraph 6.72.

⁵⁵ If it does not, the adverse effects on FRS' revenues would be more severe once an appropriate adjustment is made.



advertising from three (FRS, Global and Bauer) to two (Global and Bauer).⁵⁶ The CMA considers that this will result in an SLC in the market for supply of representation for national advertising to independent radio stations in the UK and adverse effects for independent radio stations through higher commission rates and/or the worsening of other terms.⁵⁷ The reasoning for the CMA's provisional finding is, in summary:

- 4.1.1 FRS would have continued as an independent competitor (for, at most, 10 years) in the counterfactual, but will cease to act as a competitor independent from Bauer as a result of the Transactions;⁵⁸
 - 4.1.2 despite not currently representing independent stations, Bauer has the incentive to represent them as a bloc absent the Transactions and therefore would have become a credible and growing competitor to FRS;⁵⁹
 - 4.1.3 Global is only a limited constraint on FRS, in particular because of its requirement for a brand and content licensing agreement as a condition to representation;⁶⁰ and
 - 4.1.4 Wireless, a new FRS-like entrant, self-representation or alternatives such as Digital Audio Exchanges, Radio Trading Desk, GTN and Newslink are not viable alternative sources of national advertising for independent radio stations.⁶¹
- 4.2 Bauer does not dispute that the Transactions will lead to the failure of FRS. However, for the reasons set out in Section 3, Bauer submits that the CMA errs in finding that FRS would have been a viable independent operator in the counterfactual for longer than 2 years at most, and that it is likely that FRS would have failed even sooner than that as a result of station losses.
- 4.3 Bauer also agrees with the CMA's assessment that a new FRS-like entrant is a wholly unviable proposition. Apart from this, Bauer submits that the CMA's provisional conclusions are erroneous. However, Bauer does not respond in detail to each, but rather focuses on the key parts of the CMA's analysis which once corrected lead to the conclusion that no SLC arises in the market for the supply of representation for national advertising to independent radio stations.
- 4.4 Specifically Bauer demonstrates below that:
- 4.4.1 First, there is no basis to conclude that Bauer was an actual or potential competitor in this market absent the Transactions (paragraphs 4.5 to 4.22):
 - (A) the evidence as to Bauer's strategy shows that it was not an actual or potential competitor absent the Transactions;
 - (B) the CMA has adduced no evidence that Bauer constrained the terms offered by FRS prior to the Transactions; and
 - (C) Bauer's commercial objective to represent the Third Party Stations results from the Transactions.
 - 4.4.2 Second, the CMA's finding that Bauer was a potential competitor to FRS is inconsistent with the CMA's findings on the counterfactual (paragraphs 4.23 to 4.28).
 - 4.4.3 Third, the CMA has failed to assess whether FRS would have been viable in the face of competition from Bauer – and the evidence demonstrates that it would not – if Bauer were successfully to attract one sizeable independent radio group for representation [§], then FRS' revenues and financial health would [§] (paragraphs 4.29 to 4.35).

⁵⁶ Provisional Findings Report, paragraph 8.56.

⁵⁷ Provisional Findings Report, paragraph 8.4.

⁵⁸ Paragraphs 8.8 to 8.20.

⁵⁹ Paragraphs 8.21 to 8.33.

⁶⁰ Paragraphs 8.34 to 8.42.

⁶¹ Paragraphs 8.43 to 8.56.



4.4.4 Fourth, the evidence in the Provisional Findings Report, Bauer’s previous submissions and evidence from three third parties is consistent with the Third Party Stations being better off under Bauer representation post-Transactions than under FRS representation in a no-merger counterfactual, and therefore no SLC can arise (paragraphs 4.36 to 4.44).

4.4.5 Fifth, any competition lost as a result of the Transactions is therefore minimal, and is offset by the wider benefits of the Transactions (paragraphs 4.46 to 4.49).

There is no basis for the CMA to conclude that Bauer was an actual or potential competitor to FRS.

The evidence of Bauer’s strategy shows that it was not an actual or potential competitor to FRS

4.5 The CMA states: “We also consider that absent the Acquisitions Bauer would have been a credible and growing competitor to FRS for the supply of representation services”.⁶²

4.6 The CMA has produced no evidence that – absent the Transactions – Bauer would have entered into the market for national sales representation [REDACTED]. This is speculation on the part of the CMA unsupported by evidence. There is, on the contrary, substantial evidence from Bauer’s internal documents and actual behaviour⁶³ that Bauer has been focused on an acquisition strategy and has refused to take on national sales representation while it was focused on making acquisitions. For the reasons set out below, [REDACTED],⁶⁴ and is not evidence of Bauer’s intention to engage in third party representation more broadly absent the Transactions.

4.7 Bauer’s preference has been to grow by acquisition rather than through representation for two primary reasons.

4.8 First, the financial benefits to Bauer from acquisition dwarf those from representation alone. Representation enables Bauer to earn [REDACTED]% commission on only national advertising revenues of local stations. In contrast, acquisition enables Bauer to earn 100% of revenues on both local and national advertising, and local advertising revenues are typically around [REDACTED]% of the local radio stations total revenues.⁶⁵ In addition, when acquiring businesses Bauer can also make substantial cost savings, considerably increasing the value of these local radio station businesses.

4.9 **Table 4.1** below compares the cost synergies to 2020 (i.e. from 2019 and 2020) with one year of representation revenues.

Table 4.1: Comparison of cost synergies and representation revenues

Target	Cost synergies (£m)	FRS representation income (£m, April 2018-March 2019)
Wireless (local)	[REDACTED]	[REDACTED]
Lincs FM	[REDACTED]	[REDACTED]
Celador	[REDACTED]	[REDACTED]
UKRD	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

Sources: Bauer Submission on Transaction Benefits, Table 4; [REDACTED] and Phase 1 UKRD S.109 response Annex 3.

4.10 The cost synergies alone, presented in **Table 4.1** dwarf commission income from representation. The cost synergies from the Wireless Transaction alone exceed FRS’ total annual revenues. These cost synergies understate the financial benefits from acquisition as

⁶² Paragraph 8.56.

⁶³ Paragraph 6.54 and footnotes 94 and 95.

⁶⁴ Paragraph 4.13.

⁶⁵ See response to Question 6 in the Second S.109 Response of Phase 1, submitted 24 April 2019 and in response to Question 11 of the Second S.109 Response of Phase 2 (Document 144), submitted 20 September 2019.



they ignore revenue benefits from retaining 100% rather than approximately [REDACTED]% of the Third Party Station national advertising revenues, and also exclude revenue synergies,⁶⁶ and also exclude any benefits to Bauer [REDACTED].⁶⁷ There is thus a much greater return on an investment of management time from acquisition than from representation.

- 4.11 Second, the increase in share from acquisition rather than representation is permanent not transitory.⁶⁸ It removes the risk that a station could be acquired by a third party (e.g. Global or Communicorp), enter into a BCL with Global or otherwise cease to require representation services from Bauer, e.g. by focussing on local advertising only.
- 4.12 The combination of these two factors means that the expected value for Bauer from acquisitions is much higher than for providing representation services. Accordingly, Bauer has historically focussed its limited management time on acquisitions rather than providing representation services.
- 4.13 Bauer did – prior to the Transactions – [REDACTED].⁶⁹ As noted above, the CMA provisionally concludes that this agreement would not have been entered into in the counterfactual, Bauer disagrees. The CMA is nonetheless required to take account of this agreement in its competitive assessment, in particular as it is part of the factual matrix and relevant to the viability of FRS.⁷⁰ In any event, this agreement is not evidence that Bauer would have become a competitor with FRS in the counterfactual. [REDACTED].

The CMA has adduced no evidence that Bauer constrained the terms offered by FRS pre-Transactions

- 4.14 As a starting point, Bauer notes that the evidence presented by the CMA is consistent with the conclusion that Bauer was not actively competing with FRS prior to the Transactions. In particular, Bauer had only entered into a single representation agreement (with Orion) which was some time ago, and had refused all subsequent approaches from third parties seeking representation [REDACTED].⁷¹
- 4.15 Bauer has seen no evidence that, pre-Transactions, it constrained the terms offered by FRS. The CMA refers to a single firm ([REDACTED]) that served FRS with notice to leave “as it was looking at other options” which FRS “presumed” was Bauer or Global.⁷² It is unclear to Bauer whether the “other options” referenced related specifically to alternative representation (in which case they are potentially relevant), to a potential sale (in which case the example is of no relevance to the SLC being evaluated) or to an alternative strategy, such as focussing solely on local advertising like UKRD has for certain of its stations. In any event, Bauer is aware of two circumstances in which [REDACTED] considered leaving FRS, neither of which provides any evidence that Bauer was a potential competitor to FRS:
- 4.15.1 [REDACTED];⁷³ and
- 4.15.2 [REDACTED].
- 4.16 To Bauer’s knowledge, several stations have left FRS over the past few years.
- 4.16.1 Five acquisitions by Global/Communicorp (in the period 2016-19).⁷⁴
- 4.16.2 Five UKRD stations pulling out to focus on local sales (2017).
- 4.16.3 Celador serving notice (2018) in advance of sale to Bauer or another party.
- 4.16.4 Jack’s national station leaving FRS (2019).

⁶⁶ See Table 3.1 above.

⁶⁷ See paragraph 3.4 above.

⁶⁸ Mark-up of transcript of Main Parties Hearing, P93L4 – 7.

⁶⁹ Paragraph 5.60.

⁷⁰ See paragraph 3.29 above.

⁷¹ Paragraphs 8.21 to 8.25.

⁷² Paragraph 8.26.

⁷³ See Bauer’s Response to question 11 of the CMA’s s.109 request dated 29 August 2019 (Document 144, submitted 20 September 2019).

⁷⁴ Paragraph 6.60.



- 4.16.5 Quidem's national sales representation deal with Global (2019).
- 4.17 In none of these cases has the threat of representation by Bauer arisen. This makes it much more likely that the "other options" being evaluated by the station referenced by the CMA in paragraph 8.26 would have been sale or possibly representation by Global rather than representation by Bauer. Even if the "other option" being evaluated involved representation rather than a sale, the CMA has no evidence that FRS would have offered different terms if the alternative had been representation by Global only (i.e. if Bauer had not been an option).
- 4.18 The CMA makes no reference to UKRD or FRS internal documents to support this and Bauer's advisors have seen nothing in UKRD's or FRS's internal documents to suggest that Bauer constrained the terms offered by FRS pre-Transactions.
- Bauer's commercial objective to represent the Third Party Stations results from the Transactions
- 4.19 Bauer is interested in offering representation to the Third Party Stations as a result of the Transactions. This represents an opportunity to represent the Third Party Stations as a group, as this constitutes a critical mass which furthers Bauer's ambition to [REDACTED] in a way that piecemeal representation of individual stations would not. The Third Party Stations as a group were not sufficient, by themselves, [REDACTED]. However, they would make a material contribution to [REDACTED]. The CMA recognises that it has incentives to offer such representation.⁷⁵
- 4.20 The CMA quotes a station as stating Bauer's view that representing a smaller station [REDACTED].⁷⁶ This is correct. While, in principle, Bauer can make profit from representation, negotiating a representation arrangement would take up management time. This would be a distraction for Bauer, when it could make much more profit from acquisition. Consequently, absent the Transactions, Bauer would have focused on alternative acquisitions or launches, as set out above.
- 4.21 The CMA states that "We consider that while the incentive to gain customers for representation services as a bloc may be greater, Bauer would still have an incentive to gain these customers one by one. This is consistent with Bauer's view that it has a strong incentive to represent independent radio stations".⁷⁷ This is speculation on the CMA's part. The CMA is wrong to extrapolate from Bauer's statement that it would have a strong incentive to represent individual independent radio stations, a statement made in the context of the post-Transactions scenario in which [REDACTED]. In that scenario, the contribution that each incremental increase in share of listening makes towards [REDACTED]. The CMA recognises at the end of paragraph 8.28 that it is applying a statement made in the context of one scenario (assessment of vertical effects post-Transactions) to a different scenario (Bauer's incentives in a no Transaction counterfactual). In Bauer's view it is misleading for the CMA to emphasise the consistency of statements that consider such different scenarios.
- 4.22 The CMA further states that "Absent the Acquisitions, Bauer would appear to still have the incentive to increase its commercial share of listening and if it was not possible to do this through acquisitions, we consider it likely that Bauer would have sought to do so through representing independent radio stations."⁷⁸ There is no evidence that this would lead to sustainable competition between Bauer and a viable FRS.
- 4.22.1 First, the CMA provisionally finds that in the counterfactual Bauer would not represent [REDACTED] any of the Targets.⁷⁹ Bauer has already explained above why it would not be in Bauer's interests to compete with FRS to represent the smaller stations represented by FRS unless it could represent them as a group.
- 4.22.2 Second, if Bauer did successfully compete with FRS for any of its larger clients (the Targets [REDACTED]) or for a group of smaller clients, FRS would be rendered unprofitable and would fail, as set out below.

⁷⁵ Paragraphs 8.28 and 10.89.

⁷⁶ Paragraph 8.25.

⁷⁷ Paragraph 8.28.

⁷⁸ Paragraph 8.28.

⁷⁹ See paragraphs 4.23 to 4.28 below.



The CMA's assessment is inconsistent with its findings on the counterfactual and internally inconsistent

- 4.23 As regards the counterfactual to the Transactions, the CMA finds, *inter alia*, that the [X] would not have been entered into.⁸⁰ Bauer disagrees with this conclusion for the reasons set out in Section 3. However, Bauer submits that the CMA's competition assessment needs to be internally consistent, as well as consistent with its chosen counterfactual and therefore the CMA is required to assess the theories of harm it identifies against the counterfactual it has determined.
- 4.24 The CMA's rationale for concluding that Bauer would not have entered into [X], which applies equally to Bauer representing any other third party in the counterfactual, is as follows:
- 4.24.1 when Bauer was representing Orion, it wanted to focus on delivering high quality service to Orion (as the first third party it had represented), and was not seeking further third party clients at that time;⁸¹
- 4.24.2 Bauer had received a number of approaches from third parties seeking representation in recent years, all of which it had refused;⁸² and
- 4.24.3 [X].
- 4.25 Indeed, the CMA refers to these factors again in Chapter 8 of the Provisional Findings,⁸³ but reaches the conclusion that Bauer "*would have been a credible and growing competitor to FRS*".
- 4.26 The CMA also provisionally concludes that "*there is insufficient evidence to allow us to form an expectation on whether BCLs or NSAs would have been negotiated with the Acquired Businesses absent the Acquisitions*".⁸⁴ As set out further below, this is incompatible with the CMA's theory of harm; if Bauer was competing with FRS it would target its largest clients i.e. the Targets [X], first.
- 4.27 More fundamentally, the CMA's competitive assessment is internally inconsistent. FRS' FY20 budget forecast pre-tax profit of just £[X]. [X].⁸⁵ Despite this, the CMA is of the view that FRS would remain a viable competitor for up to 10 years. This cannot be the case. If Bauer were to compete with FRS the CMA has to assume it would be an effective competitor and therefore would likely win clients from FRS. As set out below, Bauer would pursue the largest clients first in such a scenario (i.e. the Targets [X]) which would effectively cause FRS to fail immediately. Even if Bauer pursued only smaller clients, given FRS' precarious financial position, it would not be able to compete with Bauer on any sustained basis, and certainly not for 10 years.
- 4.28 The CMA does not explain how these findings can be reconciled with its findings on the counterfactual or internally. Bauer submits that they cannot.

If the CMA concludes that Bauer is a potential competitor to FRS, it must then recognise that FRS would become unprofitable and exit this market rapidly

- 4.29 If Bauer were to become a competitor to FRS, then it follows that FRS would lose clients to Bauer. There is no basis to assume that Bauer would not be an effective competitor to FRS (and an ineffective competitor would not be a constraint). For example, it does not suffer from the structural impediments that prevent FRS from competing effectively for national advertising, such as a lack of scale or geographic reach,⁸⁶ Bauer has share and volume

⁸⁰ Paragraphs 6.49 to 6.57.
⁸¹ Paragraph 6.51.
⁸² Paragraph 6.54.
⁸³ Paragraphs 8.21 to 8.33
⁸⁴ Paragraph 6.15.
⁸⁵ Paragraph 6.72.
⁸⁶ Paragraph 6.63.



deals with media buying agencies ([REDACTED]),⁸⁷ and third party evidence suggests that some FRS stations consider it likely that Bauer would be a more effective representative.⁸⁸

- 4.30 **Table A1** in **Annex 1** shows an updated forecast of FRS financials, on the (unrealistic) assumption that neither [REDACTED] any of the Targets would leave FRS. The updated forecast shows that, if revenues decline in FY20 by [REDACTED]%, as assumed in FRS's own FY20 budget, and by the same amount in subsequent years, that, under reasonable assumptions regarding the development of FRS's costs, within [REDACTED] FRS would be loss making, as measured by pre-tax profits.
- 4.31 Paragraph 8.14 sets out why FRS would be unviable following Bauer acquisitions. The same point would apply if Bauer were to represent any of the large firms represented by FRS for national sales (i.e. those Bauer would be most incentivised to pursue if it were a competitor of FRS). Based on FRS' FY20 budget, FRS is forecasting a pre-tax profit of £[REDACTED].⁸⁹ [REDACTED]. Should any of those station groups leave FRS, [REDACTED].
- 4.32 Indeed, even if the CMA does not consider that Bauer would have entered into the [REDACTED] in the counterfactual it is required to take account of those agreements in its competitive assessment.⁹⁰ [REDACTED].
- 4.33 In addition, FRS' profitability is now so marginal that [REDACTED], and would also further decrease FRS' limited scale and reach, reducing its attractiveness as an option for national advertising agencies. This would lead to a reduction in revenues, creating a cyclical effect whereby further stations leave FRS, hastening its decline.
- 4.34 [REDACTED]. This demonstrates that FRS, even with a stable portfolio of clients, was not viable beyond the very short term. It certainly could not have engaged in sustained competition with Bauer or any other third party.
- 4.35 The alleged "*preferred option*" of various stations would therefore have disappeared anyway absent the Transactions.

Bauer representation post-Transactions will make the Third Party Stations better off

- 4.36 The CMA's analysis of foreclosure provisionally concludes that Bauer has incentives to represent the Third Party Stations.⁹¹
- 4.37 The CMA also recognises that Bauer representing the Third Party Stations "*will increase media buying agencies' willingness to advertise on these stations to some extent*".⁹² This will result in the stations receiving greater advertising volumes and revenues than when they were represented by FRS. The increased willingness of media buying agencies to advertise on stations once they are part of Bauer's agency deals is supported by Bauer's experience following its acquisition of Absolute.⁹³
- 4.38 There is therefore evidence that – contrary to experiencing a worsening of terms – the Third Party Stations will be better off being represented by Bauer post-Transactions than they were under FRS representation pre-Transactions.
- 4.39 The CMA mentions a "*possibility*" raised by certain FRS stations (at paragraph 8.5) that Bauer could worsen terms selectively to Third Party Stations that overlap locally with its own stations. Bauer notes that the CMA does not make any findings in respect of this possibility and offers no evidence to support it. It is clear there is no basis for such a claim.
- 4.40 First, there is very limited overlap between the Third Party Stations and Bauer's local stations as evidenced by detailed local area-by-area analysis carried out by Bauer in Phase 2 with

⁸⁷

[REDACTED]

⁸⁸ Paragraph 8.30.

⁸⁹ Appendix C, Table 5.

⁹⁰ See paragraph 3.29 above.

⁹¹ Paragraph 10.89.

⁹² Paragraph 10.43.

⁹³ Document 290, submitted 13 November 2019.



maps, population overlap data and local CSoL⁹⁴ (which has not been referenced in the Provisional Findings – the CMA instead has referred to less comprehensive analysis from Phase 1).

4.41 Second, in those local areas where Bauer stations overlap substantially with Third Party Stations, [REDACTED].⁹⁵

4.41.1 [REDACTED].

4.41.2 [REDACTED].

4.41.3 [REDACTED].

4.41.4 [REDACTED].

4.42 This is powerful market evidence from informed media groups that goes directly against the “possibility” of selective discrimination against locally overlapping stations. It confirms instead that these stations will be better off under Bauer representation than under FRS representation. It is unclear why the CMA has not referred to this evidence in the Provisional Findings and has, instead, referenced only evidence from local radio stations, who may not be well informed about how media buying agencies interact with national sales houses, nor the terms that would be available to them post-Transactions.

4.43 The only evidence of the potential concern that Bauer would favour its own stations is set out at paragraph 8.31 where the CMA states that *"Nine of 17 radio groups expressed concerns that Bauer (and Global) would prioritise their own brands over and above any stations they represent"*. In view of the importance of this evidence to the CMA's provisional findings, and its proposed remedy design,⁹⁶ Bauer requested disclosure of the responses of the FRS station groups referred to here, or alternatively the 'gist' of that evidence. The CMA has refused to grant such disclosure, asserting that the gist of the evidence disclosed in the Provisional Findings is sufficient. Bauer submits that it is not:

4.43.1 First, the CMA states that nine stations held this view, but only cites three examples. Bauer cannot possibly rebut this evidence on the basis of the 'gist' provided by the CMA.

4.43.2 Second, the two named examples given by the CMA do not support this concern at all:

(A) Radio Plymouth⁹⁷ has a very minor overlap with UKRD's Pirate FM. The extent of the population overlap is negligible and Bauer could not expect to make any material financial gain by diverting revenues from Radio Plymouth to Pirate FM even if it were able to do so.⁹⁸ In addition, to the extent this is a valid concern it is not Transaction specific. UKRD, as shareholder in FRS, would have had the same incentives vis-à-vis Pirate FM as it alleges Bauer has.

(B) Time 107.5/Lyca Media⁹⁹ in theory overlaps with part of the broadcast area of Bauer's London stations, but in reality is not a substitute for those stations because of its small broadcast area and vice versa because of the significant degree of wastage a Time 107.5 advertiser would incur in advertising on Bauer's London stations.¹⁰⁰

⁹⁴ Bauer's Submission on Vertical Effects (Document 264, submitted 23 October 2019) paragraph 1.4.10 and Annex 2 to that submission (Document 266, submitted 23 October 2019).

⁹⁵ Bauer's Submission on Vertical Effects, paragraph 1.4.14 and Annex 2 to that submission.

⁹⁶ The CMA's Notice of Possible Remedies, paragraph 26(d), states that any behavioural remedy to address the SLC in respect of representation would need to include *"a mechanism to ensure access for all current FRS stations on a non-discriminatory basis, ie Bauer should not be able to favour its own stations over overlapping stations it represents"*.

⁹⁷ Paragraph 8.31(a).

⁹⁸ Annex 2 to Bauer's Submission on Vertical Effects, section 4.

⁹⁹ Paragraph 8.31(b).

¹⁰⁰ Annex 2 to Bauer's Submission on Vertical Effects, section 9.



- 4.43.3 Third, Bauer cannot respond to the other anonymised submission¹⁰¹ without knowing the identity of the relevant station/station group, as it is otherwise impossible to assess the degree to which that station/station group overlaps with Bauer.¹⁰²
- 4.43.4 On 20 December 2019, the CMA provided a purported clarification of paragraph 8.3 This unfortunately sheds no further light on these issues as the CMA declined to provide either the underlying evidence or the gist of the responses
- 4.44 The CMA also states (at paragraph 8.5) that FRS is “*currently clearly the preferred option of independent radio stations*”. This statement appears to be too broad and at odds with much of the evidence:
- 4.44.1 As noted above, [REDACTED].
- 4.44.2 Footnotes 94 and 95 of the Provisional Findings make clear that several entities approached Bauer for national sales representation and would prefer to be represented by Bauer: Lincs, Nation, Celador, Kingdom FM, Panjab Radio and KMFM.
- 4.44.3 Paragraph 8.30 states that in “many cases” stations are open to Bauer representation. Of the four responses cited, only one contained caveats (Jack FM) – this is not “*often with caveats*” as mis-stated by the CMA at paragraph 8.30. Although the precise nature of Jack FM’s concerns are redacted and have not been disclosed to Bauer despite Bauer’s requests to the CMA, it appears from footnote 158 of the Provisional Findings that Jack FM would not countenance a BCL, which would not be required by Bauer in any event.¹⁰³
- 4.45 In addition, material disclosed by the CMA by email on 20 December 2019 indicated that three parties referred to “*FRS achieving lower national advertising revenues for stations than they believed were achieved by Bauer and Global*”. This shows that these Third Party Stations understand that Bauer would obtain higher national advertising revenues for stations than FRS could.

Any loss of competition is not substantial and is off-set by pro-competitive benefits

- 4.46 Even if, in the face of the overwhelming evidence to the contrary, the CMA finds that there is a lessening of competition in this market as a result of the Transactions, it is not substantial, and is off-set by pro-competitive benefits.
- 4.47 The commission revenue associated with representing the Third Party Stations for national sales was just £[REDACTED] in the period April 2018-March 2019.¹⁰⁴ If Bauer were to hypothetically raise commission charges by 5% across all stations, this would produce a negligible effect of only c.£[REDACTED].
- 4.48 This lessening of competition cannot be substantial:
- 4.48.1 First, the CMA’s primary argument in favour of the loss of competition being substantial is that the Third Party Stations consider national revenues to be very important to their financial health.¹⁰⁵ The CMA has declined Bauer’s request that it disclose the evidence from the Third Party Stations supporting this contention. In any event, Bauer submits that it does not show that the loss of competition is substantial. It is not in dispute that Bauer would represent these stations once the Transactions complete. The entirety of their national revenues are therefore not at risk. As noted above, the effect of a hypothetical 5% increase in commission would

¹⁰¹ Paragraph 8.31(c).

¹⁰² The CMA rightly does not suggest that Bauer would have any incentive to discriminate against a station with which it does not overlap at the local level.

¹⁰³ In its email of 20 December 2019 the CMA refers to concerns about discriminatory terms although it is unclear what is meant by this. Since no reference to these are found in the Provisional Findings, Bauer can only assume that the CMA has given no weight to them in its assessment.

¹⁰⁴ Appendix C, Table 3.

¹⁰⁵ Paragraph 8.60.



be negligible. In any event, Bauer would not be able to increase commissions, for fear of these stations switching to Global.

- 4.48.2 Second, Bauer will provide more effective representation to these stations. It would drive increased revenues through increased sales volumes, improving, not worsening, the financial position of these stations (see paragraph 6.38 below).
- 4.48.3 Third, this theory of harm does not otherwise lead to adverse effects on listeners or advertisers, as the CMA appears to accept.¹⁰⁶
- 4.49 In any event, the Transactions produce substantial benefits in the sector as a whole (see Section 6 below). The negligible hypothetical effect on the Third Party Stations is dwarfed by these benefits, and the net positive impact of the Transactions requires that they be cleared unconditionally.

Conclusion

- 4.50 Bauer disagrees strongly that it would have provided representation to Third Party Stations [§], absent the Transactions. Consequently, in Bauer's view, the evidence is clear that there would have been only two credible options for representation absent the Transactions, and two options post-Transactions. Therefore, there would be no reduction in options for representation.
- 4.51 Bauer recognises that for some Third Party Stations national advertising revenues are important. Following the Transactions, Bauer is offering national sales representation to these stations and the CMA recognises that it has incentives to represent them.¹⁰⁷ The issue is therefore not whether the Third Party Stations will lose these revenues, but rather whether they will be reduced due to a worsening of "terms" such as commission rate. Bauer's evidence is that representation by Bauer would result in the Third Party Stations being better off than under FRS representation in the no-merger counterfactual.
- 4.52 The evidence in the Provisional Findings does not support the CMA's statement that the "*preferred option of suppliers is removed*". The fact that stations have sought representation from Bauer in the past (and not obtained it), [§], strongly suggests that they would like to be represented by Bauer. In any event, even if some stations are represented by their second best option pre-Transactions, the improvement in revenues they will receive post-Transactions should compensate them for this.
- 4.53 If, contrary to the evidence, Bauer were to enter the market for national sales representation this would have a devastating impact on FRS. If Bauer were to represent just one of the Targets [§].
- 4.54 Bauer submits that the CMA should conclude that there is no SLC in this market. In the event that the CMA adduces additional evidence to support a finding of an SLC in this market, then the CMA should find that the duration of any such SLC is short-lived and no longer than [§] at the most.

5. THE SUPPLY OF LOCAL RADIO ADVERTISING IN WOLVERHAMPTON

Introduction

- 5.1 The CMA has provisionally found that the acquisition of Wireless may be expected to result in an SLC in relation to the supply of local radio advertising in the Wolverhampton area.¹⁰⁸ Bauer submits that this provisional finding is not made out on the balance of probabilities.¹⁰⁹

¹⁰⁶ The CMA wrongly rejects this argument as irrelevant, but does not dismiss it on the merits at footnote 166.

¹⁰⁷ Paragraph 10.89.

¹⁰⁸ Competition has been assessed on the basis of the Wolverhampton area (which is narrower than the Parties' TSAs) as the Parties can and do sell advertising that is specific to their respective Wolverhampton transmitters.

¹⁰⁹ Bauer does not seek to address every piece of evidence mentioned above or in the Provisional Findings, nor to repeat the substance of previous submissions (such as the Response to the SLC Decision (Document 084) and the Submission on Local Overlaps (Document 269)). Rather, it focuses on what Bauer sees as the key pieces of evidence relevant to the CMA's provisional conclusion.



- 5.2 In summary, the CMA reaches this finding on the basis that, first, Bauer and Wireless are the only radio options for local advertisers seeking to target the Wolverhampton area (even though the geographic areas covered by the Parties' transmitters are different, and the constraint that they impose on each other is limited) and, second, Bauer and Wireless are not constrained by non-radio alternatives.¹¹⁰ In reaching this finding the CMA appears to put significant weight on the existence of concerns raised by one advertiser which, as explained below, is difficult to interpret without further context which the CMA has not disclosed to Bauer. The CMA also seeks to dismiss or downplay evidence submitted by Bauer on the basis of speculation rather than evidence.
- 5.3 The evidence before the CMA from Bauer shows the following:
- 5.3.1 in terms of broadcast area:
- (A) Signal 107 Wolverhampton's transmitter covers only about half of the area covered by Free Radio Wolverhampton's FM transmitter (and, as explained below, less than half the population); and
- (B) Free Radio's DAB signal (which represents more than half of listening) covers Shropshire and Wolverhampton and cannot be split to cover just Wolverhampton only. Therefore Signal 107's Wolverhampton transmitter covers an even smaller part of Free Radio's DAB coverage area;¹¹¹
- 5.3.2 Signal 107 has a limited share of listening (in its own TSA);¹¹²
- 5.3.3 the Parties' transmitters charge materially different prices for advertising;¹¹³
- 5.3.4 there is a very limited overlap in terms of listeners and advertisers between the Parties' transmitters;¹¹⁴
- 5.3.5 among advertisers, there is very limited switching between the Parties' transmitters;¹¹⁵ and
- 5.3.6 in the internal documents relating to the Parties' monitoring of competitors' prices that were previously submitted to the CMA¹¹⁶ there is no suggestion that Signal 107 Wolverhampton presents a competitive constraint on Free Radio Wolverhampton (and vice versa) in the manner suggested by the CMA.
- 5.4 The third party evidence is the following:
- 5.4.1 only one advertiser raised what may be relevant competition concerns;¹¹⁷
- 5.4.2 advertisers did not consider the stations to be close alternatives;¹¹⁸
- 5.4.3 advertisers consider the stations to be relatively dissimilar;¹¹⁹
- 5.4.4 half of advertisers on the Parties' transmitters said that in the event of unavailability of their transmitter most of their diverted spend would go to non-radio media;¹²⁰ and
- 5.4.5 all advertisers said that in the event of unavailability of their station they would switch some of their spend to non-radio media.¹²¹

¹¹⁰ Paragraphs 11.60 to 11.65.

¹¹¹ Paragraph 11.33.

¹¹² Paragraph 11.37.

¹¹³ Paragraph 11.42.

¹¹⁴ Paragraph 11.39.

¹¹⁵ Paragraphs 11.46 to 11.47.

¹¹⁶ As submitted in response to a Section 109 Notice on 20 September 2019 (Document 144). In order to produce this evidence, the Parties were required to conduct a document search over a period in excess of three years (2016 – 2019) using the Parties' names (and those of their stations) and keywords related to price.

¹¹⁷ Paragraph 11.24.

¹¹⁸ Paragraph 11.26.

¹¹⁹ Paragraph 11.48.

¹²⁰ Paragraph 11.58.

¹²¹ Local Overlaps Working Paper (25 October 2019), paragraph 69(b).



- 5.5 The overwhelming weight of this evidence does not support the conclusion that the Transaction would give rise to an SLC on the balance of probabilities. In particular it demonstrates that any competitive interaction is limited and that non-radio options are a closer constraint on each of the Parties than the other Party.
- 5.6 Alternatively, even if the above evidence suggests the possibility of an SLC – which does not seem credible – there are significant efficiencies associated with acquisition of Signal 107 such that an SLC is, on the balance of probabilities, unlikely to arise.

Evidence does not support the existence of a SLC

Signal 107 has a very limited share of listening

- 5.7 In the Phase 1 SLC Decision, the CMA stated that stations with a share of listening in their own TSA exceeding 5% may exert a material competitive constraint on competitors present in their TSAs.¹²² Signal 107 has a share of listening of 7% within its own TSA. While this exceeds the CMA's threshold, it is still low. As such, it is unlikely to exert a particularly strong competitive constraint within its broader TSA, particularly considering the double-digit shares of listening of three separate Global stations.¹²³
- 5.8 Consideration of shares of listening has always been a central part of the CMA's analysis in previous commercial radio mergers.¹²⁴ Yet the Provisional Findings place very little weight on Signal 107's low share of listening other than to say Signal 107 "*has been less successful at attracting listeners*".¹²⁵
- 5.9 The CMA suggests that the similar revenue levels achieved by each transmitter provide evidence of both options being used by local advertisers to a significant extent.¹²⁶ Bauer accepts that each transmitter is used by local advertisers but submits that the evidence shows that there is limited competitive interaction between them and that each is used by different sets of local advertisers. It does not demonstrate that they are credible alternatives for the same advertisers as the CMA seems to suggest.¹²⁷ This is discussed below under Lack of competitive interaction.¹²⁸

Third party evidence suggests that the transmitters are not close alternatives

- 5.10 *Local advertisers are not concerned about the Transactions.* Four out of seven advertisers who responded expressed no concerns. Two that expressed views were not commenting on points relating to competition in the local area, as the CMA acknowledges.¹²⁹ The seventh advertiser was concerned about "*price control over the broadcast area*".¹³⁰ It is unclear precisely what this statement means. The CMA appears to attach significant weight to this concern but neither it nor the other responses have been disclosed to Bauer despite repeated requests. As such, Bauer is unable to properly respond to this concern or make submissions regarding the weight that should be given to it.¹³¹
- 5.11 The Provisional Findings note that of the four advertisers who expressed no concerns only one appears to have operations in Wolverhampton. Even if that is the case, it is not relevant: the question is where those advertisers have customers in Wolverhampton. Three advertisers that are not themselves present in Wolverhampton may still have a need to advertise there. Similarly, the comment of one of the advertisers not present in Wolverhampton that Signal 107 "*didn't cover the geographical area and therefore audience we were looking to target for our specific campaign*" does not mean that the advertiser's

¹²² Paragraph 260.

¹²³ Shares of listening in Signal 107's TSA: Heart (27%), Smooth (25%) and Capital (15%). These stations are receivable on DAB and IP (but not FM) in Wolverhampton.

¹²⁴ See, for example: *Global/Juice Liverpool* (ME/6546/15), paragraphs 50 – 54; *Global/GMG* (ME/5561/12) pages 59 – 75.

¹²⁵ Provisional Findings., paragraph 11.38.

¹²⁶ *Ibid.*

¹²⁷ Paragraph 11.29.

¹²⁸ Paragraph 5.27 to 5.32.

¹²⁹ Paragraph 11.24.

¹³⁰ *Ibid.*

¹³¹ For example, it would be relevant to know the identity of the advertiser so that the materiality of their advertising spend could be taken into account as well as the other options available to them when assessing this comment.



views can be dismissed as unrepresentative – rather its comment is an important insight as to the lack of substitutability as between the two stations.

- 5.12 *Local advertisers do not view the Bauer and Wireless stations as close substitutes.* The three Free Radio advertisers who responded to the CMA's question asking them to rate how close an alternative Signal 107 was placed it at or just above the bottom of the scale. Similarly, the two Signal 107 advertisers asked to rate Free Radio placed it at just above the bottom of the scale.¹³²
- 5.13 This, together with the advertisers' comments regarding Signal 107 being "*more local*" and Free Radio "*more regional*"¹³³ are consistent with Bauer's previous submissions regarding the different focus of Signal 107 and Free Radio.¹³⁴ This is also supported by evidence that at least some local advertisers place value on the local content offered by Signal 107, with Free Radio having a more regional offering. This places a further limit on the substitutability between Signal 107 and Free Radio.
- 5.14 Local advertisers view non-radio alternatives as closer substitutes than the Parties' stations: half of the advertisers who responded to the CMA's question said that if the Parties' stations were unavailable they would move most of their spending to non-radio alternatives¹³⁵ and all advertisers said they would move some of their spend.¹³⁶ This is explained in greater detail below under Non-radio advertising is a strong constraint.¹³⁷

There is a difference in coverage areas that is more significant than the CMA's estimate

- 5.15 As explained in greater detail in response to question 3 in the RFI response submitted on 19 December 2019,¹³⁸ the overlap between the Parties' Wolverhampton transmitters is less than the 61% suggested by the Provisional Findings.
- 5.16 **Figure 5.1** below shows that the broadcast area of the Signal 107 Wolverhampton transmitter fits entirely within the broadcast area of the Free Radio Wolverhampton transmitter. The population in the intersecting area is therefore the entire population of the Signal 107 Wolverhampton transmitter (465,770). The population in the Free Radio Wolverhampton transmission area is 1,156,000. The population overlap is therefore c.40%. This means that Signal 107 is not an option for an advertiser seeking to target areas adjacent to Wolverhampton (e.g. Stafford) and that an advertiser seeking to target Wolverhampton precisely may experience wastage in advertising on Free Radio (Black Country) rather than Signal 107. A population overlap of less than half (such as here) is indicative of the stations not being particularly close competitors geographically.

¹³² Paragraph 11.26(a).

¹³³ *Ibid.*

¹³⁴ Including its First RFI Response (Document 087), paragraph 7.4

¹³⁵ And all of those that would mentioned Wolverhampton/Black Country in their response, see Provisional Findings, paragraph 11.58.

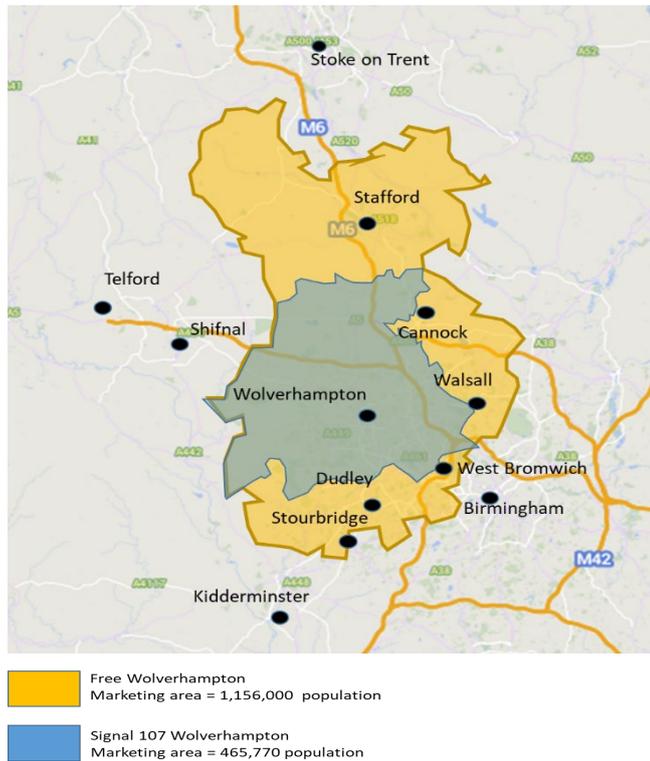
¹³⁶ Local Advertising Working Paper, paragraph 69(b).

¹³⁷ Paragraph 5.33 to 5.36.

¹³⁸ Document 305.



Figure 5.1: Coverage areas of Signal 107 Wolverhampton and Free Radio (Black Country)



Source: Bauer

There is a material difference in price as between the Parties' transmitters

- 5.17 Advertising on Free Radio (Black Country) is [~~3~~] more expensive than advertising on Signal 107 Wolverhampton. The Provisional Findings correctly acknowledge that this price difference is "large".¹³⁹
- 5.18 Bauer submits that – taken in conjunction with other evidence – this large price difference supports that fact that Signal 107 and Free Radio are not close substitutes for advertisers wishing to target listeners in Wolverhampton.
- 5.19 Instead of reviewing the pricing evidence in the round and reaching an evidence-based conclusion regarding the interpretation of the pricing difference, the Provisional Findings state that *"the pricing data cannot be interpreted as implying the Parties' transmitters are not substitutes"* because (i) *"[s]ome of this price difference may be explained by Free Radio having more listeners"*; and (ii) speculating (contrary to submissions on how advertisers buy radio advertising) that the *"difference in the level of financial commitment required could be partially offset by advertisers buying fewer adverts, given that each would be heard by more listeners"*.¹⁴⁰
- 5.20 As noted above, Free Radio's Black Country transmitter covers a larger population than Signal 107's Wolverhampton transmitter (it covers population centres including Walsall and Dudley), it reaches more listeners, and it reaches different listeners. Taken together, the higher price for Free Radio's Black Country transmitter may reflect this greater coverage and represent a quality difference. The question before the CMA is not whether the price difference may be "explained" in part by differences in quality, but whether the difference in prices (and quality) are such that the products offered by the merging parties are not close substitutes. Bauer submits that the evidence is consistent with the transmitters *not* being viewed by advertisers as close substitutes.

¹³⁹ Paragraph 11.42.

¹⁴⁰ Paragraph 11.44.



5.21 The CMA speculates that advertisers could trade up from the cheaper Signal 107 Wolverhampton transmitters to the substantially more expensive Free Radio Black Country transmitter and limit their increase in spend by reducing the “number of adverts” purchased. This ignores the reality of how radio campaigns are purchased: as Bauer explained in a previous RFI response,¹⁴¹ an effective radio campaign needs to ensure that listeners hear the campaign a certain number of times – an “opportunity to hear” (“OTH”) of at least 3 is advisable with 4 being optimal for most advertisers.¹⁴² Buying more “impacts” by buying a station with more listeners and cutting back on the number of adverts and hence reducing the OTH will – all else equal – result in a less effective campaign and a lower return on investment. If an advertiser does not have the budget to run an effective campaign on a larger and more expensive station, the advertiser would be more likely (and better advised) to use alternative media to achieve their advertising goals.

5.22 Bauer submits that a price difference such as this, combined with evidence on advertiser purchasing behaviour and the other evidence gathered by the CMA, indicates that Free Radio (Black Country) is unlikely to be a close substitute for advertisers on Signal 107 Wolverhampton.

Simple summary statistics support the high degree of differentiation between the Parties’ stations and transmitters

5.23 **Table 5.1** below presents simply summary statistics on local advertisers on Free Radio¹⁴³ and Signal 107 showing the number of advertisers, their total spend in 2018, and the average spend per advertiser.

Table 5.1: Free Radio and Signal 107 local advertisers and spend in 2018

	Free Radio	Signal 107
Number of advertisers	[REDACTED]	[REDACTED]
Total spend by these advertisers, £	[REDACTED]	[REDACTED]
Average spend per advertiser, £	[REDACTED]	[REDACTED]
Difference (Free Radio – Signal 107), £	[REDACTED]	
Difference as % of Signal 107 average spend	[REDACTED]	

Source: Bauer and Wireless data.

5.24 **Table 5.1** shows that Free Radio advertisers spend [REDACTED] on average as Signal 107 advertisers ([REDACTED] vs [REDACTED]). This is consistent with Bauer’s previous submissions that Free Radio targets larger advertisers across the West Midlands.¹⁴⁴

5.25 **Table 5.2** presents equivalent data, focusing on advertisers who purchased advertising on the Parties’ Wolverhampton transmitters only in 2018.

Table 5.2: Free Radio Black Country only and Signal 107 Wolverhampton only local advertisers and spend in 2018

	Free Radio Black Country only	Signal 107 Wolverhampton transmitter only
Number of advertisers	[REDACTED]	[REDACTED]
Total spend by these advertisers, £	[REDACTED]	[REDACTED]
Average spend per advertiser, £	[REDACTED]	[REDACTED]
Difference (Free Radio – Signal 107), £	[REDACTED]	
Difference as % of Signal 107 average spend	[REDACTED]	

Source: Bauer and Wireless data.

¹⁴¹ Response to RFI dated 29 August 2019 (Document 102, submitted 13 September 2019), paragraph 3.7.

¹⁴² *Idem.*, paragraphs 3.7 and 19.1.

¹⁴³ Covering all the transmitters investigated by the CMA at Phase 2: Birmingham & Black Country, Herefordshire, Worcestershire and Shropshire.

¹⁴⁴ Response to RFI dated 29 August 2019 paragraphs 6.10 and 7.4.



5.26 Table 5.2 shows that the limited number of advertisers who targeted the Wolverhampton area only in 2018 spent more than [§] on Free Radio Black Country as on Signal 107 Wolverhampton, spending on average [§] compared with [§]. This is consistent with the existence of a high degree of differentiation between the transmitters, reflected in the substantial pricing differences discussed above.

Lack of competitive interaction

5.27 In view of the above, it is not surprising that there is very limited competitive interaction between the Parties' stations in general, or transmitters that cover Wolverhampton.

5.28 The Provisional Findings state that "*if customers regularly switch between firms this would suggest that they are close competitors*".¹⁴⁵ Bauer agrees with this statement which accords with the approach set out in the Merger Assessment Guidelines.¹⁴⁶

5.29 The Provisional Findings continue by warning that "*low levels of switching need to be interpreted with caution as they could be a result of lack of competition or other factors such as infrequent purchasers or a high level of churn amongst customers*".¹⁴⁷ The Parties have provided evidence that local advertising in Wolverhampton is characterised by a high level of churn among advertisers who advertise on the Parties' Wolverhampton transmitters only – more than 55% of such advertisers (35% by revenue) stop advertising on the transmitter each year.¹⁴⁸

5.30 However, despite a high level of churn, customers are not switching between the Parties' transmitters: of those that do churn, less than [§] (less than [§] by revenue) start or continue advertising on the other Party's Wolverhampton transmitter only the following year.¹⁴⁹ This appears to demonstrate that in practice there is limited competitive interaction between the Parties' Wolverhampton transmitters – a fact that is acknowledged by the CMA (in paragraph 11.47).

5.31 The CMA then proceeds to speculate that this lack of switching reflects the nature of demand rather than the degree of competition, e.g. advertisers may stop advertising because they had a one-off need or because they went out of business, giving a hypothetical example of a customer opening a new store.¹⁵⁰ This is pure speculation unsupported by any actual evidence and cannot be the basis upon which to disregard the weight of evidence showing a lack of competitive interaction between the Parties' transmitters.

5.32 The above switching evidence, taken together with the responses of third parties and the price difference between transmitters and different coverage areas suggests that a more plausible explanation is that the Parties' transmitters serve different sets of customers. This would also explain the lack of common advertisers: in 2018 only Wolverhampton City Council advertised on both Signal 107 Wolverhampton only and Free Radio Wolverhampton only (there were two such advertisers in 2017 – Barlow Motors and Tatton Hall Homes). In these circumstances it is not realistic to suggest that the stations exert a competitive constraint on one another and certainly not a material constraint.

Non-radio advertising is a strong constraint

5.33 The Parties have provided evidence of advertisers shifting spend to digital advertising. The Provisional Findings concluded that it is not clear whether these customers switched spend as a result of changes in the Parties' competitive offering or for other reasons that the Parties could not affect. Bauer has also provided additional evidence that directly addresses the CMA's concern: evidence of advertisers reducing their digital spend and switching spend back to Bauer in response to Free Radio offering reduced prices.¹⁵¹ The Provisional Findings do not engage with this evidence.

¹⁴⁵ Paragraph 11.45.

¹⁴⁶ CC2, paragraph 5.4.9(a)

¹⁴⁷ Paragraph 11.45.

¹⁴⁸ Paragraph 11.46.

¹⁴⁹ *Ibid.*

¹⁵⁰ Paragraph 11.47.

¹⁵¹ Response to Non-Radio Advertising Working Paper (Document 277, submitted 6 November 2019), paragraph 3.17.



- 5.34 The Parties' evidence in this regard is consistent with that provided by third parties: two out of four local advertisers and one media buying agency who responded to the CMA's question indicated that if either of the Parties' stations were unavailable they would move most of their spend to non-radio advertising. The Provisional Findings state that both of these advertisers mentioned Wolverhampton or Black Country in their responses.¹⁵² In addition to the half of advertisers that would move most of their spend, the CMA's local overlaps working paper states that "all of the local advertisers who completed the relevant question would move at least some of their spending to non-radio advertising" (emphasis added) in the event that the Parties' stations were unavailable.¹⁵³ It can therefore be inferred that the remaining two advertisers would move some of this spend to non-radio advertising. In its clarificatory email of 20 December 2019 the CMA indicated that these same two advertisers would also "*in part look to other radio stations, e.g. Global's West Midlands stations*". In summary, on the third party evidence there is no basis to conclude that post-Transaction there would be insufficient constraints on Bauer.
- 5.35 The section of the Provisional Findings summarising the strength of the non-radio constraint in Wolverhampton (paragraph 11.59) states that there has been limited evidence on this point (which Bauer disagrees with) and that the CMA has therefore applied the "*general view of local non-radio constraints set out in paragraph 7.29*". Paragraph 7.29 states that "*local advertisers do not appear to consider forms of non-radio advertising to be very close alternatives to radio*" – plainly that is at odds with the evidence of advertisers in Wolverhampton (set out above) and so cannot be the appropriate conclusion to reach.
- 5.36 Moreover, as explained in Bauer's response to the Non-Radio Advertising Working Paper,¹⁵⁴ the threshold of a "*very close alternative*", also expressed as perfect substitutability, is a very high standard. It is not Bauer's case that these forms of media are perfect substitutes – it is enough that they constrain Bauer in practice. Important competitive constraints can exist between sets of products or services that are not perfectly substitutable. The third party evidence clearly indicates that this is the case here. It is also notable that the survey responses discussed above mirror the comments of media buying agencies such as "*micro targeting through digital audio and other forms of advertising choices render the acquisitions completely unthreatening*"¹⁵⁵ and competitors such as Quidem (present in the West Midlands) who stated that "*most of our customers use some form of online advertising*" and "*[when business is lost it] was not to another radio station but due to budget constraints or social media advertising*".¹⁵⁶

Efficiencies

- 5.37 If, even in the face of the compelling evidence to the contrary, the CMA finds that there is a lessening of competition in this market as a result of the Transaction, it is not substantial and is off-set by pro-competitive benefits. Acquisition by Bauer will result in a product that is more appealing to listeners, distributed in innovative ways. In turn this will mean that the station will attract more listeners which will deliver greater reach and overall listening hours to advertisers' campaigns. This will make campaigns more effective and is the key efficiency associated with the acquisition in the local advertising market. This is directly beneficial to advertisers. Moreover, this strengthening will allow Signal 107 to compete more effectively with non-radio media (which poses a strong constraint) and local advertisers can also be expected to benefit from this rivalry. For further detail on these efficiencies, see Section 6 below.

¹⁵² Paragraphs 11.48 and 11.58 as well footnote 234. Paragraph 11.58 also states that they were both concerned about the Wireless Acquisition but this is not consistent with paragraph 11.24 where it is noted that only one advertiser (not two) had competition concerns about the Transaction. Again, this is why it is important that Bauer be provided with information about concerns expressed by any advertiser. The CMA has confirmed by email of 20 December 2019 that there is in effect only one concern as set out in paragraph 11.24. It is not evident absent disclosure of this material why the CMA has placed any weight on one concern which is hard to understand (see paragraph 5.10 above) and one concern unrelated to competition.

¹⁵³ Local Overlaps Working Paper (25 October 2019), paragraph 69(b).

¹⁵⁴ Paragraphs 3.10 to 3.11.

¹⁵⁵ National Advertising Working Paper, paragraph 10.

¹⁵⁶ Non-Radio Advertising Working Paper, paragraph 56.



Conclusion

- 5.38 The consistent and mutually corroborative evidence demonstrates that the Parties' transmitters pose a limited competitive constraint on one another. This is supported by the fact that:
- 5.38.1 all advertisers (on both stations) who responded to the CMA's question placed the other station at or just above the bottom of the scale when asked how close an alternative the other station is – the CMA's provisional conclusion that the stations are close competitors in light of this evidence is in stark contrast with its view that non-radio advertising does not reach the erroneously high standard of being a "*very close substitute*" or "*perfect substitution*";
 - 5.38.2 the transmitters have very few advertisers in common – indeed in 2018 only one advertiser advertised on both of the Parties' Wolverhampton transmitters only; and
 - 5.38.3 switching evidence shows that while there is high churn among advertisers who advertise on either Wolverhampton transmitter only, very few of the churning advertisers switch to the other Party's Wolverhampton transmitter.
- 5.39 Although there are no other local radio stations specifically targeting the area, non-radio advertising (and Global's DAX) poses a strong constraint in view of:
- 5.39.1 third party evidence showing that, in the event that if either of the Parties' stations were unavailable, all local advertisers would shift at least some of their spend to non-radio options and half of them would move most of their spend; and
 - 5.39.2 evidence from Bauer showing the strength of this constraint and how it has already led Bauer to reduce its prices for certain customers.
- 5.40 Only one advertiser (of seven respondents) expressed relevant competition concerns¹⁵⁷ about the Transaction.¹⁵⁸ The concluding paragraph where the Provisional Findings make its overall competition assessment states "*a small number of advertisers expressed concern*"¹⁵⁹ – to avoid any misapprehension, it would appear that the "*small number*" is in fact just one. The CMA has subsequently confirmed by email of 20 December 2019 that two of these were not related to competition issues. It is not evident (absent disclosure) why the CMA placed any weight on one concern which is hard to understand (see paragraph 5.10 above) and two concerns which are unrelated to competition.
- 5.41 The Transactions produce benefits for listeners in terms of improved content and distribution. The expected increase in reach and listening hours will make advertisers' campaigns more effective and a better alternative to the non-radio options which represents a material efficiency gain for local advertisers.
- 5.42 On the balance of probabilities the evidence supports the conclusion that Signal 107 Wolverhampton and Free Radio Wolverhampton do not compete closely with one another and that non-radio options are a sufficient constraint. Finding an SLC on the basis of a single advertiser's concern (the nature of which has not been disclosed to Bauer) in circumstances where all of the evidence supports the contrary conclusion cannot be justified.
6. **THE TRANSACTION PRODUCES SIGNIFICANT EFFICIENCIES AND RELEVANT CUSTOMER BENEFITS**
- Overview of benefits**
- 6.1 As detailed more fully in Bauer's Submission on Transaction Benefits (and in paragraphs 6.8 to 6.17 below), the Transactions are taking place at a time where the commercial radio sector is undergoing a fundamental structural shift. Radio faces increasingly strong competition from other forms of media and needs to innovate in order to remain competitive. In this regard the Transactions will generate a number of benefits which are necessary in order to

¹⁵⁷ And even then the nature of that concern, which related to "*price control over the broadcast area*" is unclear.

¹⁵⁸ Paragraph 11.24.

¹⁵⁹ Paragraph 11.63.



safeguard the Targets' continuing commercial viability. These benefits – which will accrue to the Targets, their listeners and advertisers – include the following:

- 6.1.1 enhanced digital distribution and innovation;
 - 6.1.2 maximising the benefits of deregulation which include higher quality content and investment in local news;
 - 6.1.3 growth of multiple revenue streams; and
 - 6.1.4 scope for substantial cost savings.
- 6.2 Bauer's national sales representation of the Third Party Stations will also give rise to a number of benefits for the Third Party Stations and advertisers on those stations. Those benefits include most particularly:
- 6.2.1 more effective national sales representation; and
 - 6.2.2 inclusion in share and volume deals with media buying agencies; leading to
 - 6.2.3 a wider range of advertisers and increased volume of sales; and
 - 6.2.4 increased national advertising revenues.
- 6.3 Bauer's representation of the Third Party Stations following the acquisitions will, through competition with Global for national advertising sales, further enhance the rivalry between Bauer and Global to represent the stations. Moreover, acquisition of the Targets and representation of the Third Party Stations, will lead to a material enhancement in competition between Global and Bauer in relation to sales of national advertising as Bauer seeks to win share of national advertising away from Global. The acquisition and representation arrangements are a step-change that will allow this to occur more rapidly than through organic growth.

Legal framework

- 6.4 As explained in the Merger Assessment Guidelines, the EA02 requires the CMA to take efficiency gains from a merger into account at two separate points in the analytical framework. First, as part of the competitive assessment: a merger, by enhancing rivalry, may not give rise to an SLC ("**rivalry enhancing efficiencies**").¹⁶⁰ Second, as part of the assessment of remedies in the form of benefits to existing and future customers in any market (i.e. not limited to a market in which an SLC has been found) ("**relevant customer benefits**").¹⁶¹
- 6.5 The Provisional Findings note that many of the benefits summarised above in relate to the market for national advertising and that this is not a market where the CMA has provisionally found an SLC.¹⁶² While that is correct, the EA02 makes clear that relevant customer benefits take the form of "*lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom (whether or not the market or markets in which the **substantial lessening of competition concerned has, or may have occurred** [...]); or greater innovation in relation to such goods and services*"¹⁶³ (emphasis added) and that in its Phase 2 assessment the CMA may have regard to the effect of remedial action on such relevant customer benefits.¹⁶⁴
- 6.6 This section explains that the Transactions give rise to efficiencies that are demonstrable, merger-specific, and likely to be passed on to customers.
- 6.7 Certain of these benefits occur in relation to the provision of representation and/or local advertising in Wolverhampton and are rivalry enhancing efficiencies, while others occur in adjacent markets and are relevant customer benefits. How these benefits arise is set out below.

¹⁶⁰ CC2, paragraph 5.7.2.

¹⁶¹ *Idem.*, paragraph 5.7.3

¹⁶² Paragraph 12.34.

¹⁶³ EA02, section 30(1)(a).

¹⁶⁴ *Idem.*, section 35(5).



Explanation of benefits

Enhanced digital distribution and innovation

- 6.8 Commercial radio must now vie with varied audio listening services for a share of overall listening (a "share of ear") and indeed with other forms of media for a share of customers' attention. Listening audiences (and advertisers) may choose from a diverse range of digital services, including IP music streaming services from the likes of Spotify, Amazon, Apple and YouTube. These services increasingly have features such as curated playlists, live broadcasts and speech content which mimic the live radio experience and have seen them attract ever greater audiences. Investment in digital distribution and innovation, in particular ensuring that the Targets' services are available as widely as possible will improve the Targets' reach and listening hours. This is necessary in order to compete effectively with these forms of non-radio media.
- 6.9 All Target Stations will be simulcast on DAB which allow the Targets to reach wider audiences and grow their revenues. At present, most Target Stations are not broadcast on DAB: 4 of Celador's 22 licences are DAB (18%); 3 of Lincs 8 licences are on DAB (38%); 6 of Wireless's 15 licences are on DAB (40%); 5 of UKRD's 11 licences are on DAB (45%). This is because DAB distribution is a significant expense. Given that the majority of listening in the UK is now via digital platforms, and digital listening continues to grow, digital distribution is essential to the long-term success of any local commercial radio station. Digital distribution under Bauer's ownership will deliver substantial benefits to the Target stations, providing a means to materially increase listening hours and reach.
- 6.10 Improving IP distribution will allow the Targets to reach wider audiences and grow their revenues. Although the Target stations are currently broadcast on IP, Bauer's expertise in this space and ability to fund further investment will allow the Target stations to provide a better offering to listeners. This could include spin-off IP stations, inclusion on Planet Radio, smart speaker innovation and targeted IP advertising.

Maximising the benefits of deregulation

- 6.11 Deregulation permits local commercial radio stations to reduce the minimum amount of locally-made programming during daytime hours from seven hours a day to three hours. It also permits local content to be produced in broader regions than was previously the case (the UK is divided into twelve regions). This change is beneficial for radio stations however to realise its full benefits requires an operator to have scale within a region and across multiple regions.
- 6.12 Ofcom, in its hearing with the CMA on 11 September 2019 recognised that "*bigger companies*" (such as Bauer) are likely to be best placed to realise the benefits of deregulation.¹⁶⁵ Ofcom noted in a February 2016 report to the Government that deregulation could be expected to make stations more economically viable because they would incur lower costs and that the costs of maintaining separate studios and presenters could be spent instead on producing high quality local content.¹⁶⁶
- 6.13 Following the Transactions, Bauer can assist the Targets to realise the benefits of deregulation and in doing so to improve their offering to listeners and advertisers. This will benefit listeners in that the Targets will be able to access high-quality national networked content produced by Bauer. The Targets are not currently able to access such content, meaning that they must invest heavily in developing their own content, which is often of a lower quality.

Growth of multiple revenue streams

- 6.14 The Transactions will generate, for the Targets:
- 6.14.1 Enhanced national revenues. Inclusion in Bauer's Hits Radio Network will allow the Targets to increase their sales of national airtime. While the Targets do carry

¹⁶⁵ Summary of CMA hearing with Ofcom held on 11 September (published 4 October 2019), paragraph 7.

¹⁶⁶ Letter from Ofcom CEO to Minister for Culture, Communications and Creative Industries, 23 February 2016, page 4 (https://www.ofcom.org.uk/data/assets/pdf_file/0030/76908/letter_to_ed_vaizey_mp_230216.pdf).



national advertising (sold by FRS), less revenue is generated than would be the case within Bauer's Hits Network given FRS' narrower geographic coverage and lack of scale which results in them generating lower national revenues than would be expected given their share of the national commercial audience. Representation by Bauer will allow the stations to deliver higher volumes of advertising and achieve higher capacity utilisation. This will have the effect of increasing the Target's national advertising revenues, as quantified in the Submission on Transaction Benefits.¹⁶⁷ This is supported by Bauer's experience following its acquisition of Absolute which resulted in an increase in advertising volumes on Absolute, improved capacity utilisation for Absolute, increased revenues and no increase in prices.¹⁶⁸

- 6.14.2 Enhanced local revenues. It is anticipated that Bauer's investment in programming and branding will increase audiences which will make the Target stations more attractive to local advertisers and lead to an increase in local airtime and S&P revenues. In addition in areas where Bauer has adjacent stations (such as Signal 107) there is scope to cross-sell advertising to customers advertising on its existing stations who have an interest in reaching customers covered by the neighbouring stations. These features give rise to substantial expected revenue synergies which are quantified in the Submission on Transaction Benefits, and which do not arise from price increases.¹⁶⁹
- 6.14.3 Enhanced enterprise revenues. Bauer has significant experience in generating enterprise (non-advertising) revenue from its stations. This is primarily derived directly from listeners. Bauer's expertise in this field will generate additional revenues for the Targets as quantified in the Submission on Transaction Benefits.¹⁷⁰

Scope for substantial cost savings

- 6.15 The Transactions will permit Bauer to [X], delivering sizeable cost savings. These savings are not available to the Targets now, nor would they be available to any other purchaser who lacked an existing radio platform of Bauer's scale.
- 6.16 These savings are principally through [X]. Bauer's intention is to make savings by removing duplicative costs that are not important to listeners and to use these savings to invest in stations' production of high quality local and improve their distribution platforms. This will benefit listeners and advertisers.
- 6.17 Total cost savings are estimated at [X] of which relates to Wireless. Realising these cost savings will preserve the financial viability of the Targets and allow for the necessary investment that is required in order to preserve the long term viability of the stations.

Analysis of benefits in the context of the Wolverhampton SLC

Efficiencies

- 6.18 As explained above, acquisition by Bauer will give Signal 107 access to Bauer's high quality networked content. This will deliver significant savings (in terms of saved production costs) which, as explained below, will allow Bauer to invest in producing more relevant local content (in particular news). This will result in a product that is more appealing to listeners. This, in turn, is expected to lead to increases in national, local and enterprise revenue streams, as set out above.
- 6.19 Together with improvements in distribution (on DAB and IP), this will mean that the stations attract more listeners which will deliver greater reach and overall listening hours. This is a material benefit to advertisers as it will make their campaigns more effective.

¹⁶⁷ Submission on Transaction Benefits (Document 219, submitted 10 October 2019), Table 1.

¹⁶⁸ Response to CMA Questions dated 8 November 2019, (Document 290, submitted 13 November 2019), section 2.

¹⁶⁹ Submission on Transaction Benefits, Table 2.

¹⁷⁰ *Idem.*, Table 3.



- 6.20 Investing in improved content and digital distribution has not been possible under present ownership. This is primarily because Signal 107 is currently operating on an approximately break-even basis: it does not generate sufficient profits that can be invested in these improvements and it is currently owned by a firm (News UK) who is seeking to exit local radio and is therefore reluctant to make these investments.
- 6.21 This strengthening of Signal 107's local radio offering (and indeed Wireless' more generally) will allow it to compete more effectively with non-radio media. As explained above in Section 5 advertising is lost to digital and social media rather than to radio competitors and all advertisers (who responded to the CMA's question) consider non-radio advertising to be substitutable.¹⁷¹
- 6.22 Strengthening the proposition of local radio will lead to increased rivalry between it and non-radio advertising which will be of real benefit to local advertisers. This benefit is therefore a rivalry enhancing efficiency preventing an SLC from arising in Wolverhampton.
- 6.23 This benefit is demonstrable: Combining the stations under single ownership and improving digital distribution will allow advertisers to easily access greater audiences which will make their campaigns more effective. It is also merger-specific: but for the Transactions, the improvements set out above would not be possible due to the budgetary constraints faced by Signal 107. Finally, these efficiencies directly benefit local advertisers because they deliver more effective campaigns.

Relevant customer benefits

Improved content for listeners

- 6.24 As explained above, acquisition by Bauer gives Wireless access to improved content from across its national network. Access to Bauer's content will greatly benefit local listeners by providing them with a higher quality radio product. In this regard it should be noted that listeners are typically more concerned with quality than localness: respondents to an Ofcom listener survey have identified that a station having "witty and entertaining presenters" is more important than "local presenters".¹⁷²
- 6.25 Proposed improvements in digital distribution also stand to benefit listeners as they will be able to access the station in more convenient ways, such as through a better interface with their smart speaker and through the Planet Radio service. Listeners may also be able to benefit from IP-only spin-off stations and as such may benefit from a wider range of listening options.
- 6.26 It is expected that the improved content and distribution will lead to larger audiences. In addition to making advertisers' campaigns more effective this will lead to enhanced competition for advertisers at the local level, including with Global who (through its West Midlands stations) currently deliver much larger audiences. Increasing Signal 107's listenership also contributes to [X] in terms of share of national commercial listening which will enhance competition between Global and Bauer in relation to national advertising.

Cost savings

- 6.27 As explained above, the Transactions will deliver material cost savings across all Targets, including Wireless. These savings are estimated at [X] in relation to Wireless. Achieving these savings is necessary, in particular in relation to Signal 107, [X]. These savings are principally derived from areas such as [X]. As explained above, Bauer's intention is to make savings by removing duplicative costs that are not important to listeners and to use these savings to invest in the production of high quality content.
- 6.28 Achieving these savings will preserve the long term financial viability of Signal 107 and the other Wireless stations – this will benefit listeners and advertisers.

¹⁷¹ In the sense that they would shift some of their radio spend to non-radio media in the event that their station was unavailable. See Local Overlaps Working Paper, paragraph 69(b).

¹⁷² *Radio: The Listeners' Perspective – A research report for Ofcom* (April 2013), page 39 (https://www.ofcom.org.uk/data/assets/pdf_file/0021/74712/listeners-perspective.pdf).



Revenue synergies

- 6.29 The national revenue synergies discussed above in the context of the Representation SLC are also applicable to Wireless. Including its stations in Bauer's Hits Radio Network will deliver significant improvements in the network's reach and listening hours which will lead to increased national advertising revenues.
- 6.30 In addition, there are local revenue synergies available from the Transaction, in particular from an adjacent market uplift. This refers to the ability of Bauer to cross-sell advertising to its existing regional advertisers who may have a desire to advertise in the area covered by Wireless (but not covered by existing Bauer stations), and vice versa in relation to Wireless' existing customers. Bauer estimates that this benefit is likely to be in the order of [REDACTED].¹⁷³
- 6.31 Finally, it is expected that there will be opportunities for increased enterprise revenues – Wireless does not currently generate any such revenues.¹⁷⁴
- 6.32 Total expected revenue synergies (national, local and enterprise) in relation to Wireless are estimated to be [REDACTED] in the first year after integration.¹⁷⁵ This will release funding for investment in delivering an improved service for listeners and advertisers.

Implications for possible remedies if an SLC finding is maintained

- 6.33 If, despite the above evidence, the CMA maintains an SLC finding in respect of Wolverhampton then it will need to consider remedies. If this is required the following observations are salient:
- 6.33.1 Requiring the divestment of Wireless risks losing all the efficiencies and relevant customer benefits discussed above. It is also disproportionate in view of the fact that Wireless comprises 12 local radio stations (and a further six DAB-only stations) covering a much broader area across England and Wales where no SLCs have been found.
- 6.33.2 Requiring the divestment of Signal 107 also risks losing all of the benefits in its three licence areas outside Wolverhampton. This would also be disproportionate as the three licences cover a much broader area than Wolverhampton where the CMA has found an SLC.
- 6.34 Bauer has made further submissions on this issue in its Response to the Notice of Possible Remedies. In short, Bauer's submission is that if a remedy is required an appropriate remedy would be divestment of the business of managing and operating the radio station associated with the Signal 107 Wolverhampton licence (AL100766BA/2) as a going concern. Bauer notes that this licence was a standalone radio station (107.7 The Wolf) until 2012. Bauer submits that this would be an effective and proportionate remedy that would cure the SLC while preserving the relevant customer benefits described above.

Analysis of benefits in the context of the Representation SLC

Efficiencies

Tangible benefits for the Third Party Stations of better representation

- 6.35 As explained previously, FRS has done a poor job of representing Third Party Stations. It has not been able to negotiate share or volume commitments with national advertising agencies and it has struggled to attract significant campaigns from these agencies.¹⁷⁶ This, coupled with the decline in listening experienced by many Third Party Stations, has seen these stations' national advertising revenues decline year-on-year.
- 6.36 Over the past three years (2015-2018), there has been a decrease of [REDACTED]% in FRS' commission revenue.¹⁷⁷ This decrease is despite the national advertising market as a whole growing by 16% during the period. Bauer has managed to grow its national advertising

¹⁷³ Submission on Transaction Benefits, paragraph 5.7.

¹⁷⁴ *Idem.*, Table 3.

¹⁷⁵ *Idem.*, Tables 2-4.

¹⁷⁶ See, for example, Submission on National Advertising (Document 221, submitted 17 October 2019).

¹⁷⁷ Bauer understands that FRS' commission rates have [REDACTED]



revenues on its existing stations in line with growth in the national market [X] and, if its acquisitions during the period are factored in, at a rate exceeding this [X].

- 6.37 FRS is struggling to win national advertising sales for the stations it represents, and even absent the Transactions, it envisaged this continuing to be case. Its revised budget for 2019/20 (a budget which includes the Targets and Nation), forecasts commission revenues of £[X]¹⁷⁸ which would represent a decrease of [X]% from 2015 levels.
- 6.38 If the Third Party Stations were represented by Bauer then they would (if they agreed) be included within Bauer's share and volume deals with agencies. As the vast majority of Bauer's increase in national revenues is attributable to these deals, the Third Party Stations' inclusion in them would give them access to a significant amount of revenue that they are currently missing out on. It would also allow them to more fully utilise their advertising inventory. Providing the Third Party Stations with access to such revenue would clearly benefit them. Bauer has modelled the extent of this uplift and estimates that representation by Bauer would produce for the Third Party Stations an additional [X] in national advertising revenues (gross).¹⁷⁹

Benefits for the Third Party Stations of increased rivalry between Global and Bauer

- 6.39 At present on the national advertising market Global achieves a share of national advertising revenues well in excess of its share of national listening. Despite Bauer increasing its share of national listening (in connection with station launches (such as Scala) and previous acquisitions (such as Jazz FM)), [X].
- 6.40 Bauer believes that the Transactions [X]. Although this change takes place in a different market to the market in which the Representation SLC arises, its beneficial effect is felt in the representation market. This is because enhanced rivalry between Global and Bauer for national advertising sales contributes to better representation of each company's respective represented stations.
- 6.41 Because the Third Party Stations' share of listening contributes to Bauer's ability [X], it is very important to Bauer following the Transactions to continue representing the Third Party Stations. As such, Bauer would be incentivised to maintain or offer better terms to the Third Party Stations and ensures that it performs as well as if not better than FRS as a representative. Bauer also expects that [X] some of the Third Party Stations that went to Bauer into representation arrangements with it. Global's evidence is that it is not currently interested in representing the Third Party Stations (save as part of brand and content licence arrangements)¹⁸⁰ however this does not mean that those stations may not come to be represented by Global because: (1) brand and content licence arrangements may be attractive to certain Third Party Stations (e.g. Quidem) and (2) [X]. This enhanced rivalry can only benefit the Third Party Stations.

Conclusion

- 6.42 Representation by Bauer gives rise to two key efficiencies that benefit the Third Party Stations: (1) increased national revenue and (2) the rivalry with Global to represent them which is more intense than any potential competition which Bauer may have offered FRS pre-Transactions.
- 6.43 Both of these benefits are demonstrable: Third Party Stations represented by Bauer can expect increased national advertising revenues. This is reflected in Bauer's modelling of increased share of national advertising revenue given representation of the Third Party Stations. Similarly, Bauer representing the Third Party Stations would give Global an incentive to improve its representation offer and Bauer would have every incentive to seek to retain that representation.
- 6.44 These benefits are merger-specific, i.e. they would not arise but for Bauer representing the Third Party Stations and, as explained above in paragraphs 4.5 – 4.19, Bauer is unlikely to

¹⁷⁸ Appendix C, Table 5.

¹⁷⁹ Annex 3 to Bauer's Submission on Vertical Effects (Document 267, submitted 23 October 2019), Table 3.4 column [5].

¹⁸⁰ Paragraph 8.37.



have represented the Third Party Stations absent the Transactions and on any view the potential competition it may have offered pre-Transactions (which is disputed) is, on the evidence, very weak indeed.

6.45 These benefits are likely to be passed onto customers. The benefit of better representation naturally accrues to the Third Party Stations because Bauer is selling advertising on their behalf. Inclusion within share and volume deals will result in a revenue increase that goes directly to the Third Party Stations. Similarly, it is the Third Party Stations themselves who benefit directly from increased competition between Global and Bauer to represent other stations.

6.46 Bauer submits that the Transactions are rivalry enhancing and that this outweighs the effects of any possible lessening of competition in the market for the national sales representation. As explained above in paragraphs 4.46 – 4.48 any such lessening of competition would be small and short lived.

Relevant Customer Benefits

Lower prices for advertisers

6.47 As explained previously,¹⁸¹ the increase in Third Party Stations' national revenues would not be the result of increased prices to national advertisers, rather it would be due to selling increased volumes (impacts). The CMA has accepted that FRS is not a constraint on Bauer's pricing¹⁸² and so the loss of it as an alternative national sales house will not have any adverse impact upon prices for national advertising.

6.48 [REDACTED].

More efficient purchasing for advertisers

6.49 In addition, the Transactions will provide national advertisers with easier access to a greater range of stations. As explained above, the Third Party Stations are represented by an ineffective sales house which does not have share or volume deals with agencies. Bringing the Third Party Stations within Bauer's sales operation (and including them within the Hits Radio Network) will allow national advertisers easier access to these stations. Giving easier access to the Third Party Stations' inventory is pro-competitive and can only benefit advertisers.

Implication for possible remedies if an SLC finding is maintained

6.50 The relevant customer benefits described above (improved content for listeners, cost savings, revenue synergies) are derived from Bauer's acquisition of the Targets. It follows from the above that if the acquisitions of the Targets were subject to a divestment remedy (to cure the Representation SLC), all of the relevant customer benefits would be lost. As Bauer has explained above (in paragraphs 4.46 to 4.48) any lessening of competition in relation to national advertising sales representation is not likely to be substantial. In view of the substantial and wide-ranging nature of the efficiencies and relevant customer benefits discussed above, Bauer submits that it would be wholly disproportionate for the CMA to prohibit the Transactions or to impose substantial structural remedies.

6.51 Bauer's submission is that an effective and straightforward behavioural remedy exists which will cure the short-lived SLC while retaining all of the benefits discussed above. That proposal is set out in Bauer's Response to the Notice of Possible Remedies.

Herbert Smith Freehills LLP

¹⁸¹ National Advertising Submission, section 4.

¹⁸² Paragraph 9.25.



ANNEX 1

1. **Table A1** below sets out revised conservative calculations regarding FRS' financials in the no-Transactions counterfactual, taking account of updated FRS financial information contained in Appendix C of the Provisional Findings. This updates Annex 1 to Bauer's submission on Vertical Effects, which contained the figures reproduced as Table 6 in Appendix C.
2. FY19 figures have now been replaced with FRS actual figures from Table 5, and FY20 forecasts have been replaced with 2019/20 Budget figures from Table 5.¹⁸³ These figures include [X] the Targets. In Bauer's view this is a highly conservative and unrealistic scenario as it is likely that [X] some of the Targets would leave FRS absent the Transactions.

Table A1: FRS updated profitability forecast (£000)

	Assumed growth / decline after FY20	FY 19 (Actual)	FY20 (Budget)	FY21 (Forecast)	FY22 (Forecast)
Revenue	[X]	[X]	[X]	[X]	[X]
Costs					
Direct Costs	[X]	[X]	[X]	[X]	[X]
Overheads	[X]	[X]	[X]	[X]	[X]
Other costs	[X]	[X]	[X]	[X]	[X]
Pre-tax profits	[X]	[X]	[X]	[X]	[X]

Source: Appendix C - FRS viability post-Acquisitions - unredacted version, Table 5 and AlixPartners calculations

3. **Table A1** assumes that:
 - 3.1 FRS's revenue decline of [X] (based on the decline from FY19 to FY20) would have continued in subsequent years;
 - 3.2 direct costs decline in proportion to revenues;¹⁸⁴
 - 3.3 staff costs remain a constant proportion of overhead costs [X] based on FY18 figures as Bauer's advisors do not have an equivalent breakdown for 2019); [X]% of staff costs decline in proportion to revenue¹⁸⁵; which together means that [X]%¹⁸⁶ of overhead costs decline in proportion to revenue; and
 - 3.4 other costs remain unchanged.¹⁸⁷
4. On these assumptions, **Table A1** shows that FRS's pre-tax profits would have turned negative [X], assuming no further loss of stations.

¹⁸³ FRS' financial year ends in September. FY19 is thus the year from October 2018 to September 2019.

¹⁸⁴ In line with Bauer's previous submission. See Annex 1 to Bauer's Submission on Vertical Effects, paragraph 11.

¹⁸⁵ In line with Bauer's previous submission.

¹⁸⁶ = [X]*25%

¹⁸⁷ In line with Bauer's previous submission.