Neutral citation [2007] CAT 29

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1087/2/3/07

Victoria House
Bloomsbury Place
London WC1A 2EB

31 October 2007

Before:

VIVIEN ROSE
(Chairman)
MICHAEL BLAIR QC
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

INDEPENDENT MEDIA SUPPORT LIMITED

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

and

RED BEE MEDIA LIMITED

First Intervener

BRITISH BROADCASTING CORPORATION

Second Intervener

JUDGMENT ON THE PRELIMINARY ISSUE

APPEARANCES

Mr. Stephen Hornsby (Solicitor, Michael Simkins LLP) appeared for the Appellant.

Mr. Rupert Anderson QC and Mr. Alan Bates (instructed by the Legal Director, Office of Communications) appeared for the Respondent.

Miss Jemima Stratford (instructed by Travers Smith) appeared for the First Intervener.

Miss Lesley Farrell (Solicitor, S J Berwin LLP) appeared for the Second Intervener.

I INTRODUCTION

1. This appeal arises from two decisions issued by the Office of Communications ("Ofcom") on 30 May 2007. Both decisions concern contracts entered into by the First Intervener, Red Bee Media Ltd, for the supply of access services to broadcasters. Under Ofcom's Code on Television Access Services, licensed public service television broadcasters such as the BBC and Channel 4 are required to address the needs of the deaf, hard of hearing, blind and visually impaired communities by providing access services in the form of subtitling, signing and audio description. Broadcasters can fulfil this obligation either by providing the service in house or by contracting with an access services provider. The two contracts which are the subject of this appeal are contracts between Red Bee Media Ltd and the Second Intervener ("the BBC") and between Red Bee Media Ltd and Channel 4 for exclusive provision of access services. At the time the contracts were concluded, Red Bee Media Ltd was called BBC Broadcast, which was a wholly-owned subsidiary of the BBC, and since the two Ofcom decisions refer to the First Intervener by that name, the Tribunal will refer to them as "BBCB" in this judgment. The appellant, Independent Media Support Ltd, ("IMS") is a competing provider of access services.

2. The agreement between BBCB and Channel 4 ("the Channel 4 Contract") was concluded in July 2004 following an invitation to tender issued by Channel 4 to certain providers in January of that year. The Channel 4 Contract confers on BBCB the exclusive right to provide access services to Channel 4 from 1 December 2004 for a period of five years. There is an option to renew the contract for a further three years.

3. In a decision entitled "Complaint from Independent Media Support Limited about BBC Broadcast's provision of television access services to Channel 4" ("the Channel 4 decision"), Ofcom rejected IMS' complaint that the Channel 4 Contract infringed the Chapter II prohibition in section 18 of the Competition Act 1998 ("the 1998 Act") and Article 82 of the EC Treaty on the ground that,

in the first part of 2004, BBCB was not dominant in the market for the provision of access services to United Kingdom TV broadcasters. As regards the application of the Chapter I prohibition in section 2 of the 1998 Act and Article 81 EC, Ofcom found that at the time the Channel 4 Contract was concluded, it fell within the terms of the block exemption regulation on vertical agreements (Commission Regulation (EC) No 2790/1999, 1999 OJ L 336, p. 21, hereafter "the Vertical Agreements Block Exemption"). This meant that it was to be treated as exempt from the prohibition both in Article 81(1) and in Chapter I of the 1998 Act. BBCB's market share subsequently rose above 30 per cent so that the last three years of the exclusivity term in that Contract did not benefit from block exemption. Nevertheless, Ofcom also found that the Channel 4 Contract did not, during the period when it was not exempt, have a sufficient foreclosure effect, whether taken alone or in conjunction with other contracts, to fall within the prohibitions in Chapter I or Article 81(1) EC. It is common ground that the Channel 4 Decision comprises a non-infringement decision which is capable of being appealed to the Tribunal under sections 46 and 47 of the 1998 Act.

4. Also on 30 May 2007, Ofcom issued a case closure decision in relation to the BBC Contract ("the Case Closure Decision"). There is no doubt that this was a formal decision taken by Ofcom. Following a case management conference in this appeal on 14 August 2007, the Tribunal ordered the hearing of a preliminary issue namely whether the Case Closure Decision is a decision falling within section 46(3) of the 1998 Act.

II BACKGROUND TO THE BBC CONTRACT

5. BBCB was originally an in-house division of the BBC. In April 2002 that department was incorporated as a wholly-owned subsidiary of the BBC and was called BBCB. At that time a Framework Agreement was put in place to govern the provision of various broadcasting services by BBCB to the BBC. Part of that Framework Agreement was a service level agreement for the exclusive supply of access services. That original agreement was due to expire on 31

December 2006. On 11 May 2005 that agreement was replaced by a further Framework Agreement with a longer term expiring on 31 December 2012.

6. In June 2005 it was announced that BBCB was going to be sold to Creative Broadcast Services Limited ("CBSL"). On 31 July 2005 the Framework Agreement, including the exclusive term for the supply of access services, was extended until 31 December 2015. CBSL acquired sole control of BBCB on 1 August 2005. BBCB was renamed Red Bee Media Ltd on 1 November 2005.

7. In June 2005, IMS submitted a complaint to Ofcom alleging that BBCB had infringed the Chapter I and Chapter II prohibitions in respect of the duration and pricing of the Channel 4 Contract and also in respect of the duration and exclusivity of the BBC Contract.

8. In July 2005, Ofcom opened an investigation to consider whether the Channel 4 Contract infringed the Chapter I prohibition and/or Article 81(1) EC and the Chapter II prohibition and/or Article 82 EC. Ofcom initially excluded from its investigation IMS' allegations in relation to the BBC Contract because the Office of Fair Trading ("the OFT") was considering whether the broader Framework Agreement of which the access services formed a part was an ancillary restraint which was directly related and necessary to implement the merger of BBCB and CBSL. Had it been found to be so, then the Framework Agreement (including the BBC Contract) would have fallen to be assessed as part of that merger rather than by Ofcom under the 1998 Act. On 11 November 2005, the OFT published its decision on the merger, clearing the transaction but finding that the BBC Contract was not an ancillary restraint to the merger[1]. On 15 December 2005 Ofcom widened the scope of its investigation to include the BBC Contract. That investigation was, however, limited to the allegations relating to the Chapter I prohibition and Article 81(1) infringements and did not extend to investigating the alleged infringement of the Chapter II prohibition or Article 82.

[1] http://www.oft.gov.uk/advice_and_resources/resource_base/Mergers_home/decisions/2005/creative

9. In June 2005, whilst the Ofcom investigation was still underway, BBCB and BBC entered into a Second Framework Amendment Agreement under which the length of the exclusivity term was reduced from 10 years 5 months to 7 years 5 months, in effect reverting to the situation that had existed prior to the sale of BBCB to CBSL. The circumstances in which this amendment to the BBC Contract came about and the nature of Ofcom's reaction to the amendments are central to the determination of the preliminary issue.

10. In December 2006 Ofcom issued a draft non-infringement decision in respect of the Channel 4 Decision and a draft case closure document in respect of the BBC Contract. The investigations were concluded in May 2007 with the publication of the two decisions described earlier.

III THE PROCEEDINGS BEFORE THE TRIBUNAL

11. IMS served its Notice of Appeal on 29 June 2007. The second section of that Notice sets out IMS' arguments to the effect that the Case Closure Decision amounts to a non-infringement decision over which this Tribunal has jurisdiction. The Notice then sets out the arguments in support of IMS' contention concerning the application of Article 81(1) and 81(3) to that agreement. The Notice also sets out IMS' case in relation to the Channel 4 Contract, contending both that that agreement infringes the Chapter I prohibition and Article 81(1) and that Ofcom was wrong to conclude in the Channel 4 Decision that BBCB does not enjoy a dominant position on the relevant market.

12. Following a case management conference, Ofcom served a Defence to the Notice, dealing, in accordance with the Tribunal's Order made on 14 August 2007, with the substance of the case in relation to the Channel 4 Decision and with the jurisdiction point only in relation to the Case Closure Decision. Ofcom also served a witness statement by Mr David Stewart who is Director of Investigations at Ofcom and is the person within Ofcom who took the decision to close the file on the BBC Contract. IMS did not apply to cross-examine Mr Stewart and did not serve any evidence of its own although it provided the

Tribunal with some additional documents relating to a meeting on 4 May 2006 between Ofcom officials and representatives from IMS.

IV THE TEST TO BE APPLIED

13. The relevant sections of the 1998 Act, as amended by the Enterprise Act 2002 and by the Competition Act 1998 and Other Enactments (Amendments) Regulations 2004 (S.I. 2004/1261) ("the 2004 Regulations") provide as follows:

> "**46 Appealable decisions**
>
> (1) Any party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> (2) Any person in respect of whose conduct the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> (3) In this section "decision" means a decision of the OFT—
>
> (a) as to whether the Chapter I prohibition has been infringed,
>
> (b) as to whether the prohibition in Article 81(1) has been infringed,
>
> (c) as to whether the Chapter II prohibition has been infringed,
>
> (d) as to whether the prohibition in Article 82 has been infringed,
>
> …
>
> (g) not releasing commitments pursuant to a request made under section 31A(4)(b)(i),
>
> (h) releasing commitments under section 31A(4)(b)(ii),
>
> ….
>
> and includes a direction under section 32, 33 or 35 and such other decisions under this Part as may be prescribed.
>
> **47 Third party appeals**
>
> (1) A person who does not fall within section 46(1) or (2) may appeal to the Tribunal with respect to—
>
> (a) a decision falling within paragraphs (a) to (f) of section 46(3);
>
> …
>
> (2) A person may make an appeal under subsection (1) only if the Tribunal considers that he has a sufficient interest in the decision with respect to which the appeal is made, or that he represents persons who have such an interest.

(3) The making of an appeal under this section does not suspend the effect of the decision to which the appeal relates".

14. The reference to commitments in sections 46(3)(g) and (h) is a reference to a procedure which was introduced into the 1998 Act by the 2004 Regulations to empower the regulator to accept binding commitments from parties under investigation in order to bring an investigation to a close. Section 31A of the 1998 Act provides:

"**31A Commitments**

(1) Subsection (2) applies in a case where the OFT has begun an investigation under section 25 but has not made a decision (within the meaning given by section 31(2)).

(2) For the purposes of addressing the competition concerns it has identified, the OFT may accept from such person (or persons) concerned as it considers appropriate commitments to take such action (or refrain from taking such action) as it considers appropriate.

…"

15. The OFT has issued guidance on the circumstances in which it will accept commitments as part of its guidance on the enforcement of the 1998 Act (see OFT Publication 407 Enforcement (December 2004) ("the Commitments Guidance")). Ofcom abides by that guidance in its own application of the 1998 Act.

16. Ofcom is empowered to enforce the 1998 Act prohibitions and Articles 81 and 82 of the EC Treaty concurrently with the OFT in relation to commercial activities connected with communications: see section 54 of the 1998 Act (as amended), read with section 371 of the Communications Act 2003.

17. The principles to be applied in determining whether a decision taken by the regulator is an appealable decision or not have been considered by the Tribunal on a number of occasions. The main cases are *BetterCare Group Ltd v Director General of Fair Trading* [2002] CAT 6, *Freeserve.com v Director General of Fair Trading* [2002] CAT 8; *Claymore Dairies v Director General of Fair Trading* [2003] CAT 3, *Aquavitae (UK) Limited v Director General of Water Services* [2003] CAT 17, *Pernod Ricard v Office of Fair Trading* [2004] CAT

10, and most recently in *Cityhook v Office of Fair Trading* [2007] CAT 18. The relevant passages from the earlier decisions are set out in the Tribunal's judgment in the *Cityhook* case. The principles derived from those authorities were not in dispute between the parties and can be summarised as follows:

(a) the Tribunal's jurisdiction under sections 46 and 47 includes appeals against decisions that a prohibition *has* been infringed and against a decision that a prohibition *has not* been infringed;

(b) the question of whether there is an 'appealable decision' must be decided as a matter of substance, not form, taking into account all the circumstances of the particular case;

(c) the test to be applied is whether Ofcom took a decision as to whether a prohibition has been infringed, either expressly or by necessary implication, on the material before it;

(d) if Ofcom genuinely abstained from expressing a firm view, one way or the other, on the question of infringement, then its decision is not appealable.

18. It is accepted by Ofcom that, at least in a case where Ofcom has completed its investigation into an alleged infringement, a decision to the effect that there is insufficient evidence to justify a finding of infringement amounts to a non-infringement decision which is subject to appeal to the Tribunal. But a decision that Ofcom has closed its file as an administrative action without coming to a conclusion as to whether or not there is sufficient evidence to justify a finding of infringement is not an appealable decision.

19. The *Cityhook* judgment recognised that an assessment of the likelihood of the regulator being able, at the end of the day, to prove an infringement to the necessary standard forms part of that regulator's consideration as to whether further resources should be devoted to the case. In argument Ofcom accepted that it wishes to focus its resources on "promising" cases, that is cases where there is a more realistic prospect of being in a position to be able to issue a

statement of objections or an infringement decision and where the consumer benefit from the regulator's intervention can be readily identified. That does not detract, however, from the fact that there is a distinction which must be drawn between a decision that there has been no infringement of the competition rules and a decision that the regulator does not wish to devote the resources needed to pursue its investigation in order to put itself in a position where it can conclude whether there has been an infringement or not.

20. The question the Tribunal must determine is whether what happened in this case was in reality that Ofcom decided that the BBC Contract with an exclusive term of seven years and five months did not have an anti-competitive effect or whether Ofcom decided to close the file without having come to any conclusion as to whether the BBC Contract infringes the Chapter I and Article 81 prohibitions.

21. With regard to the test that the Tribunal should apply, IMS sought to distinguish a case where the regulator's decision to close the file followed a change in behaviour by the parties under investigation and a case where there had been no change of behaviour. An example of the former case is *Pernod Ricard v Office of Fair Trading* [2004] CAT 10. In *Pernod* the appellant had lodged a complaint alleging that the exclusive agreements entered into by Bacardi with on-licence retailers for the sale of white rum constituted an abuse of Bacardi's dominant position. The OFT accepted formal assurances from Bacardi that it would no longer enter into or maintain such agreements. The OFT closed its investigation into Bacardi, announcing in its Press Release that the assurances "removed the competition problem" and that it would not be appropriate, in the circumstances of the case, for the OFT to devote more resources to it. The Tribunal held, on appeal by Pernod, that the change of behaviour had had the effect of removing the regulator's competition concerns and, accordingly, held that the OFT had concluded that there had been no infringement of the competition rules. The decision arrived at was therefore an appealable decision. This was contrasted with a case such as *Cityhook Limited v Office of Fair Trading* [2007] CAT 18 in which the case closure decision did not follow on from any particular change in behaviour by the undertakings under investigation

and where the Tribunal held that the appeal was inadmissible. IMS submitted that these cases supported the contention that where case closure follows a change of behaviour, the Tribunal should in general infer that the change has had the effect of removing the regulator's competition concerns so that the resulting decision is in fact a non-infringement decision and subject to appeal.

22. The Tribunal does not accept that there is such an inference to be drawn. The fact that the closure of the investigation follows promptly on a change of behaviour is, of course, a material consideration and in this case Ofcom did not deny that its decision to close the file was a direct result of the reduction of the exclusivity term of the BBC Contract. But the Tribunal does not accept that the fact that file closure occurs after an amendment of an agreement or other change in conduct means that the regulator has necessarily concluded that the change has removed its competition concerns so that the resulting decision is a non-infringement decision. It is necessary in such a case to consider what the effect of the change of conduct was on the course of the investigation and hence what conclusions can properly be drawn about the nature of the decision taken.

V THE CHAPTER II AND ARTICLE 82 PROHIBITIONS

23. In the Channel 4 Decision, Ofcom found that at the time when BBCB entered into the Channel 4 contract in the first part of 2004, BBCB did not hold a dominant position in the market for the provision of access services to UK television broadcasters. IMS points to a footnote to a paragraph in the Case Closure Decision which cross refers to the relevant section in the Channel 4 Decision for Ofcom's assessment of the relevant market. For the sake of clarity and consistency, IMS argues, the Tribunal should consider the reasoning in the Channel 4 decision as being contained in the Case Closure Decision. IMS describes this as "necessary 'gap filling'" and argues that it is immaterial that the express decision on one element of IMS' complaint about the BBC Contract is not contained in the Case Closure Decision. The Case Closure Decision should therefore be regarded as containing an express finding of lack of dominance.

24. The Tribunal rejects this submission. It is certainly the case that IMS' complaint to Ofcom in June 2005 alleged that the BBC Contract infringed both the Chapter I and Chapter II prohibitions. However, in its letter to IMS of 14 December 2005 (once it became clear that the legality of the Framework Agreement did not fall to be assessed as ancillary to the sale of the BBCB business) Ofcom stated as follows:

> "Following confirmation from IMS via Michael Simkins LLP [IMS' solicitors] on 18 November that IMS wishes Ofcom to extend the scope of its investigation to include the original allegations made relating to the 10 year exclusive contract, Ofcom has opened an investigation to examine this aspect of the Framework Agreement. The legal instrument for the investigation is Chapter I of the Competition Act 1998 ("the Act") and/or Article 81 of the EC Treaty. Ofcom is not satisfied, at this time, that it has reasonable grounds for suspecting that a breach of the Chapter II prohibition has occurred and its case will therefore be confined to Chapter I/Article 81 at this stage".

25. In relation to the BBC Contract, Ofcom thus made it clear that it was opening an investigation only into the alleged infringement of the Chapter I and Article 81 prohibitions. Any challenge to Ofcom's rejection of the complaint in so far as it related to Chapter II or Article 82 should have been brought in response to that letter. There is no "gap" in Ofcom's disposal of the complaint and therefore no grounds for implying into the Case Closure Decision any findings in relation to Chapter II or Article 82.

VI THE CHAPTER I AND ARTICLE 81 PROHIBITIONS

(a) The evidence of the course of the investigation

26. The issue whether Ofcom in fact took a non-infringement decision turns on an understanding of the course of the investigation carried out by Ofcom and in particular its discussions with BBCB and the BBC during May and June 2006.

27. IMS' case is that:

(a) as a result of the analysis of the market for access services carried out by Ofcom in relation to the Channel 4 Contract, Ofcom had concluded that

the nature of this market was such that it was not possible for suppliers of these services to exercise market power;

(b) that made it very difficult for Ofcom to conclude that even a 10 year 5 month exclusive term in the BBC Contract had a significant foreclosure effect;

(c) this difficulty was illustrated by the inability of Ofcom to issue a statement of objections in relation to the BBC Contract;

(d) by the time the BBC Contract was amended in July 2006, Ofcom's investigation of the market was complete and it had all the information it needed to be able to take decisions in relation to both the Channel 4 and the BBC Contracts;

(e) in discussions between Ofcom and the parties to the BBC Contract in June 2006 informal assurances were given by Ofcom that if the exclusivity term was reduced to 7 years and 5 months, then that would allay Ofcom's competition concerns with regard to the BBC Contract and would result in the investigation being halted;

(f) further, Ofcom was prepared to regard the offer of a reduction in the term of the BBC Contract as an offer of commitments under section 31A of the 1998 Act, indicating that Ofcom believed that such a reduction addressed its competition concerns.

28. Ofcom's account of the events can be summarised as follows:

(a) Ofcom had serious concerns about the foreclosure effect of a term of 10 years and 5 months in the BBC Contract and made this clear to the parties;

(b) there were significant differences between the circumstances surrounding the Channel 4 Contract and the BBC Contract which meant that, although analysis of the BBC Contract could draw on some of the conclusions

arrived at in relation to the Channel 4 Contract, there was no complete read across from the Channel 4 Contract to the BBC Contract;

(c) in the discussions between Ofcom, BBCB and the BBC, Ofcom made it clear that any term longer than five years was problematic particularly since Ofcom's assessment of the market shares of the supplier meant that the agreement could not benefit from the Vertical Agreements Block Exemption;

(d) BBCB and the BBC asked Ofcom how it would respond to a reduction of the term of the contract to 7 years 5 months; Ofcom declined to give any definite guidance as to what its stance following such a reduction would be;

(e) BBCB and the BBC refused to offer formal commitments to enable the case to be closed and instead informed Ofcom that they had amended the contract to reduce the term to 7 years 5 months;

(f) this was a material change of circumstances which would require Ofcom to revisit much of the competition analysis that it had undertaken before it would be able to come to a conclusion as to whether the Contract infringed the Chapter I and Article 81 prohibitions;

(g) because of other demands on the resources which Ofcom had devoted to the investigation and because of its assessment of the case against its administrative priorities, Ofcom decided to halt the investigation even though its concerns about the competitive effect of the agreement were not removed, albeit that they were reduced, by the shortening of the exclusivity term.

29. The witness statement of Mr David Stewart, Director of Investigations at Ofcom who was responsible for Ofcom's decision to close the file in this case, sets out in detail the course of the investigation and the contacts between Ofcom and the various parties.

30. IMS urged the Tribunal to treat Mr Stewart's evidence with caution on the grounds that it was inconsistent with what Ofcom said in the Case Closure Decision itself. Mr Hornsby on behalf of IMS pointed to para 1.7 of the Case Closure Document which states that --

> "During Ofcom's investigation, BBC Broadcast and the BBC amended the term of the [BBC Contract] from its end date of 31 December 2015, a duration of ten years and five months, to 31 December 2012, a duration of seven years and five months. In light of that amendment, and based on Ofcom's findings on the structure of competition in the relevant market as set out in the Channel 4 Decision, Ofcom considers that it is no longer an appropriate use of Ofcom's resources to engage in further investigation into this matter".

31. IMS rely particularly on the statement there that Ofcom's decision to halt the investigation is "based on Ofcom's findings on the structure of competition in the relevant market as set out in the Channel 4 Decision" as indicating that Ofcom had in fact carried out as much investigation as it needed in order to conclude that the BBC Contract did not infringe the Chapter I and Article 81 prohibitions. IMS also point to paragraph 47 of Ofcom's Defence (which paragraph forms part of Ofcom's Defence to the challenge to the Channel 4 Contract). This refers (footnotes not included) to the fact that--

> "… Ofcom assessed the effects on competition of the Channel 4 contract in the context of conditions in, and the structure of, the market, including the lengths of the terms of contracts within that market, the market positions of BBCB/Red Bee, its competitors and customers, entry barriers, and the level of trade".

32. These passages, it was submitted, show that Mr Stewart's assertions in his witness statement that substantial further investigation was needed in order to come to a substantive conclusion on the BBC Contract is inconsistent and should be disregarded. IMS also referred us to the case of *R v Westminster City Council ex p Ermakov* [1996] 2 All ER 302 in which the Court of Appeal considered how evidence given by the decision-taker in a challenge to a decision should be treated where it puts forward different reasoning from that set out in the contested decision itself.

33. The Tribunal does not regard Mr Stewart's evidence as inconsistent with what is said in the Case Closure Decision or in Ofcom's Defence to the challenge to the Channel 4 Decision. Clearly some aspects of the market analysis in the Channel

4 Decision are relevant to the analysis of the BBC Contract. But we do not construe what is said in the passages quoted above as indicating that the investigation as regards the BBC Contract was complete at the time that the Case Closure Decision was issued. This is not a situation, therefore, where the *Ermakov* case law is relevant.

34. Although Mr Stewart's description of events is submitted as evidence in support of Ofcom's case in this preliminary issue, the statement clearly distinguishes between those parts which set out the account of what took place and those parts which described Mr Stewart's own thought processes. We bear in mind also that no application was made to cross examine Mr Stewart. We therefore accept Mr Stewart's evidence as giving an accurate summary of the discussions and correspondence which took place between Ofcom and the parties to the BBC Contract. We have seen nothing to suggest that his description of his own and his team's evolving assessment of the BBC Contract has been coloured by the fact that the Case Closure Decision is now being challenged.

(b) The significance of the reduction in the length of the exclusivity term

35. A key plank of Ofcom's case was that it had serious doubts about the effect of a 10 year 5 month exclusivity agreement and that in Spring 2006 it was moving towards the issue of a statement of objections as regards the BBC Contract. This meant that the reduction of the exclusivity term to 7 years 5 months was a significant change in the facts of the case and that a considerable amount of the investigation and analysis to that point carried out by the team would need to be revisited.

36. IMS contests this, arguing that Ofcom had effectively concluded its investigation into the market in the context of its analysis of the Channel 4 Contract. Ofcom's conclusions as regards the features of that market were that there is countervailing buyer power; that the customer is indifferent to the length of these contracts and hence that no one has real power appreciably to restrict competition by the length of the contracts they enter into. Having concluded that the Channel 4 Contract did not appreciably restrict competition, it was

logically very difficult, according to IMS, to reach any different conclusion with regard to the BBC Contract even before the reduction in the term.

37. Ofcom's assessment of the BBC Contract at the point when the exclusivity term was 10 years 5 months was described by Mr Stewart in his account of a meeting between Ofcom and the parties to that Contract in March 2006:

> "42. On 8 March 2006 I, together with the case team and Sarah Turnbull, Legal Director responsible for investigations, attended a meeting with the BBC at our offices. At that meeting, I and members of the case team explained that Ofcom's current view was that we had concerns that the BBC contract might infringe the Chapter I prohibition given that this was a 10 year contract for half the available market. During this meeting Balbir Binning of the BBC referred to his conversation with Sean Williams [Competition Partner at Ofcom], noting in words to the effect that "it could happen that the BBC and Red Bee would review the terms of the contract" and querying what this would mean for the investigation process. Sarah Turnbull stated that the case team would need to be convinced that the contract caused no competition problems and therefore that a Statement of Objections was not necessary. Balbir Binning asked, in the light of the fact that the case team viewed a 10 year contract as "too long", what factors would the BBC and Red Bee need to take into account when reviewing the contract. I did not give a suggested duration and rather pointed the BBC to the Vertical Agreements Guidelines. My purpose in referring the BBC to the Guidelines was to highlight that the Guidelines specified a maximum duration of 5 years. Sarah Turnbull also indicated to the BBC that if, in the event of a revision of the contract duration, the contract period still exceeded 5 years, the case team would still have the same requirement that the BBC justify why a duration in excess of 5 years was necessary. Of course, I should point out that, even a five year exclusive duration, would not have brought the agreement within the Block Exemption, given the market share involved.
>
> 43. On 10 March 2006, Red Bee attended a meeting at our offices. At that meeting myself, the case team, Sarah Turnbull and I indicated to Red Bee the same preliminary view that the BBC contract breached the Chapter I prohibition and /or Article 81(1). The case team and I indicated to Red Bee that we were not convinced by the justifications for the contract duration and that, without further submissions from them on this point, our preliminary thinking could result in the issue of a Statement of Objections. Red Bee asked whether a Statement of Objections would set out what length the contract should be. In response, Sarah Turnbull and I specified that a Statement of Objections was likely to require that the infringement be brought to an end and that Red Bee should take its own advice and look at the guidelines in determining what would be an acceptable contract duration. We noted that anything longer that 5 years would need to be justified but that the case team would react according to what Red Bee brought to Ofcom for consideration".

38. The Tribunal does not agree that the analysis of the market in the Channel 4 Decision meant that it was inevitable that Ofcom would conclude that the

10 year 5 month term in the BBC Contract did not appreciably foreclose competition in this market. The main conclusion of the Channel 4 Decision as regards the application of the Chapter I prohibition was that, on the basis of the market shares held by the relevant parties at the material time, the agreement benefited from the Vertical Agreements Block Exemption for most of its duration. In contrast it was clear that the BBC Contract could not benefit from the Vertical Agreements Block Exemption because the market share of the supplier was too high: see paragraph 1.36 of the Case Closure Decision. In the circumstances it is entirely understandable that Ofcom's preliminary view as reported to BBCB on 10 March 2006 was that an exclusivity term of 10 years 5 months in an agreement covering half the available market breached the Chapter I prohibition and/or Article 81(1) EC.

39. Consequently the Tribunal agrees with Ofcom's assessment that the reduction in the term from 10 years 5 months to 7 years 5 months was a material change which would have required some revisiting of the market analysis if Ofcom were to proceed to issue a statement of objections in respect of the amended agreement. Mr Anderson on behalf of Ofcom fairly accepted that Ofcom would not have to "start from scratch" and could have drawn on the work undertaking in relation to the Channel 4 Contract. But the Tribunal accepts Ofcom's submissions that considerable further work would have been needed in order to reach a substantive conclusion on the BBC Contract.

40. The Tribunal notes also the submissions from Miss Stratford on behalf of BBCB that, from BBCB's point of view, the investigation "still had a considerable distance to run" at the point when the decision was taken to close the file. She pointed us to the submissions that BBCB made to Ofcom in June 2006 as showing the sorts of arguments that BBCB and the BBC would have developed and would have continued to put to Ofcom if the investigation had continued towards a statement of objections.

41. As to whether it was nonetheless open to Ofcom to undertake the further work it contends was necessary to reassess the competitive effect of the shortened contract, IMS argued that there was no suggestion that Ofcom was short of

resources. The Notice of Appeal refers to a meeting between IMS and Ofcom at which Ofcom fielded at least seven officials. Mr Stewart's witness statement describes at some length both the wide range of work that the Office carries out in general and also the many other calls on the time of the officials involved in this investigation in particular. In the Tribunal's judgment, the decision as to how best to deploy the resources available to the Office in this instance was an administrative decision for them to take and the reasonableness of Mr Stewart's decision not to pursue the investigation further is not a matter for this Tribunal.

42. Moreover, Ofcom's evidence is not that the decision was taken purely on the basis of a lack of resources to carry out further investigation. Mr Stewart's evidence is that he still had concerns about the anti-competitive effect of the BBC Contract even with the reduced term. Mr Anderson stressed that this case was different from the *Pernod* decision referred to earlier because whereas in that case the regulator had stated that the competition problems were *removed* by the assurances given by Bacardi, in this case Mr Stewart was clear that his concerns were *reduced* by the reduction in the exclusivity term but were not removed. The Tribunal accepts that Ofcom was less likely to be able to come to an infringement decision following the shortening of the exclusivity term and that, weighing this together with the prospective cost in terms of resources of continuing the investigation and the more limited benefits to be derived from its intervention, Ofcom decided to close the case. Accordingly, Ofcom genuinely abstained from expressing a firm view, one way or the other, on the question of infringement.

(c) Whether there was an understanding reached in relation to the reduction in the exclusivity term

43. In his witness statement Mr Stewart describes the discussions which resulted in the reduction in the length of the exclusivity term of the contract as follows:

> "61. On 16 June 2006 Ofcom received a joint submission from the BBC and Red Bee. This submission, whilst disputing that there were any competition concerns, included a proposal that the parties would reduce the term of the BBC contract by a third from 10 years 5 months to 7 years 5 months i.e. the incremental 3-year term added at the time of the sale of Red Bee would be removed and the original

termination date of 31 December 2012 would be reinstated so that the BBC contract would terminate on the same date as it would have done if the sale of Red Bee had not taken place.

62. On 20 June 2006, the case team attended a meeting of the IMG to discuss whether, if the contract term were reduced by three years, this would answer the competition concerns that had been identified by the case team. In particular, at that meeting the case team presented the arguments made by Red Bee and the BBC as to why, if a 7 year 5 months agreement was analysed under Chapter I/Article 81(1), it would not infringe those provisions. In its presentation the team explained that it was not persuaded by the parties' arguments on non-infringement, noting that whilst market growth may prevail in future it would be very difficult to quantify, and that a five year agreement would be more in line with market practice than would a seven year agreement, despite the apparent complexity of the BBC's requirements. Following discussion amongst the members of the IMG, it was proposed that Ofcom consider the letter as an offer of commitments and that Ofcom should enter into talks with the parties on that basis and the formal process for commitments, including consultation, should be followed.

63. By email on 21 June 2006, Selena Bevis, the case leader informed the BBC and Red Bee that Ofcom considered the proposal to be an offer of commitments under section 31A of the 1998 Act and invited the parties to a meeting to discuss the commitments process.

64. At the meeting with the BBC and Red Bee on 27 June 2006 (which I did not attend), I am informed that the BBC and Red Bee made it clear that they were keen to avoid the formal commitments process due to concerns over publicity surrounding a public consultation on any commitments proposed. Hugh Kelly, the senior case officer (sponsor) and Michelle Coco, the team lawyer made it clear to the BBC and Red Bee that it was not an option for Ofcom to agree assurances which bypassed the formal commitments process. At the meeting, various scenarios were discussed and these were confirmed in writing by Selena Bevis, the case team leader to Red Bee and the BBC on 28 June 2006. The options were as follows:

(a) the parties could formally offer commitments in which case Ofcom would follow the procedures set down in the OFT Guidelines; or

(b) if the parties chose not to offer commitments then Ofcom would proceed with its investigation; or

(c) if during the course of the investigation the parties were to reduce the duration of the contract, then this could represent a material change in the circumstances which Ofcom would take into account when deciding how best to proceed. The options available to Ofcom would be a Statement of Objections, a no grounds for action decision or a case closure decision.

65. I understand that on 29 June 2006, Michelle Coco, the team legal adviser received a call from Red Bee's lawyers requesting a conference call to discuss the options that Ofcom would consider should commitments not be offered. Whilst I did not participate in the conference call, I am aware that the conference call took place on 30 June 2006. I am informed that the BBC and Red Bee were keen to discuss what would happen if there was a unilateral variation of the contract and whether, if this amendment was made, Ofcom would proceed to issue an infringement decision. It was reiterated on that call that Ofcom had a variety of

> options but had not yet taken a decision on the way in which it would proceed. Polly Weitzman, General Counsel for Ofcom summarised that if there was no amendment to the BBC contract then Ofcom was likely to proceed to a Statement of Objections. However, if the contract was amended and that amendment, following due investigation, answered the competition concerns, then Ofcom could consider moving towards a case closure or non-infringement decision. Red Bee raised concerns about the publicity implications of these options. In responding to that Polly Weitzman pointed out that, in light of various judgments of the Competition Appeal Tribunal, a case closure may be considered to be akin to a non-infringement decision and that if we were to draft a case closure, it would need to set out the reasons why and we would need to consult with the complainant on whatever steps we took.
>
> 66. Subsequently, on 3 July 2006, I received a letter from the BBC and Red Bee advising that they intended to voluntarily reduce the term of the agreement and would prefer Ofcom to issue a non-infringement decision rather than a case closure decision. I understand that the way in which the letter was phrased incorrectly reflected the discussions that had occurred on 30 June and that Polly Weitzman, General Counsel for Ofcom called Red Bee's lawyers to discuss its contents. Polly Weitzman noted to Margaret Moore of Travers Smith that in her view the way in which the letter was drafted suggested that Ofcom had in fact asked the parties to consider commitments as a means of bringing the investigation to a close whereas Ofcom had made it clear that it was for the parties to consider whether they wished to offer commitments. Margaret Moore said that this had not been the intention. Similarly, Polly Weitzman noted that it would be a matter for Ofcom, and not the parties, to decide as to how to appropriately finalise a case. I understand that Polly Weitzman then asked Margaret Moore to either send a copy of an amended contract (if the contract is amended) or to confirm in writing that the letter of 3 July 2006 amounted to an offer of commitments.
>
> 67. In the event, no commitments were offered and on 7 July 2006, I received a letter informing Ofcom that the BBC and Red Bee had reduced the duration of their agreement from 10 years 5 months to 7 years 5 months".

44. IMS argued first that the evidence suggests a kind of "unilateral contract" whereby Ofcom offers a reward – either by its behaviour or its words for certain action – or the party receiving the communication understands that if certain things happen or if it does certain things then there will be a certain outcome. In other words IMS argue that given the discussions that took place, BBCB and the BBC would have understood that if they reduced the term of the contract to 7 years 5 months, that would be the end of the matter and further that Ofcom could only have given such an indication if it had been satisfied that such a reduction in exclusivity would remove its concerns about the adverse effect of the contract on competition. Mr Anderson on behalf of Ofcom strongly refuted this submission, pointing to Mr Stewart's evidence that Ofcom officials were careful not to give any comfort or assurance to BBCB and the BBC about the

likely reaction to an exclusivity term longer than 5 years. Ofcom's stance on this was supported by both the Interveners.

45. The Tribunal does not accept that IMS' case is a correct reading of Mr Stewart's evidence. It is true that Ofcom was contrasting a situation in which there was no reduction in the length of the term – in which case Ofcom was likely to move to issuing a statement of objections – with a situation where there was such a reduction. In the latter situation Ofcom was making it clear that there were still three possible courses available to it, namely still to issue a statement of objections, to take a non-infringement decision or to issue a case closure decision. We do not read the description of the discussion between General Counsel for Ofcom and BBCB's lawyers on 30 June 2006 as indicating to BBCB that a reduction in the term as envisaged would answer Ofcom's competition concerns. We note that these discussions followed earlier discussions in which Ofcom had pointed the parties to the Vertical Agreements Block Exemption and the accompanying Guidelines which refer to a maximum term of five years as being acceptable in an exclusivity agreement (2000 OJ C 291, p.1). There is nothing in the evidence which supports a contention that BBCB would have come away from the discussions in June 2006 confident that a reduction of the term to seven and a half years would result in the investigation being closed.

46. IMS' second point is that Ofcom was prepared to treat the offer of a reduction in the term as an offer of commitments. IMS refer to the OFT's Commitment Guidelines, in particular paragraph 4.3 which provides:

> "4.3 The decision whether to accept binding commitments is at the discretion of the OFT. The OFT is likely to consider it appropriate to accept binding commitments only in cases where:
>
> • the competition concerns are readily identifiable
>
> • *the competition concerns are fully addressed by the commitments offered*, and
>
> • the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time" (emphasis added).

47. IMS interprets paragraph 65 of Mr Stewart's witness statement as showing that everybody in Ofcom believed that it was appropriate to use the commitments procedure in response to the reduction of the term of the contract and that, since commitments can only be accepted by Ofcom if its competition concerns are fully addressed, this must mean that Ofcom believed that the reduction in the term to 7 years 5 months was enough to satisfy their concerns.

48. This argument proceeds on a misreading of Mr Stewart's evidence. Mr Stewart's evidence is not that Ofcom treated the offer of a reduction in the contract term as an informal commitment which it then accepted. The point being made in paragraph 65 is that Ofcom was prepared to treat the offer of a reduction in the term as triggering the commitments procedure. That procedure, which is set out in Schedule 6A to the 1998 Act (as amended), is summarised in the Commitments Guidelines as follows:

> **"4.17** If a person or persons wish to offer commitments prior to the issue of the OFT's statement of objections and the OFT considers that the case is one in which commitments may be appropriate, the OFT will issue a summary of its competition concerns to such person or persons. Such a summary is not a replacement for a statement of objections. It will set out the OFT's competition concerns and a summary of the main facts on which those concerns are based. However, it will not generally include detail of the source of the facts on which the OFT relies.
>
> **4.18** Once commitments have been offered, the OFT may enter into discussions with the person or persons in order to reach agreement as to the form and content of commitments which would be acceptable to the OFT.
>
> **4.19** The fact that the OFT has issued a summary of its competition concerns and/or entered into discussions on the form and content of commitments does not preclude the OFT from making a decision in relation to the agreement or conduct if acceptable commitments are not agreed or if other factors mean that it is not appropriate to accept commitments.
>
> **4.20** The OFT will not use the offer of commitments as evidence in any such subsequent decision in relation to the agreement or conduct.
>
> **4.21** Where the OFT proposes to accept commitments, it will give notice to such persons as it considers likely to be affected by the commitments providing a summary of the case and setting out the proposed commitments and stating the purpose of the commitments and the way in which they meet the OFT's competition concerns. Interested third parties will have an opportunity to make representations within a time limit fixed by the OFT (being not less than 11 working days starting with the date the notice is given)".

49. It is clear, however, that BBCB and the BBC were not prepared to pursue this route because they were unwilling to submit their proposals to the degree of publicity that was required for the commitments process. They therefore decided to amend the term of the BBC Contract in the hope, but not in the expectation, that this would be sufficient to bring the investigation to a halt. As Miss Stratford pointed out on behalf of BBCB, it is important for the Tribunal to bear in mind that with hindsight it is very easy to view the decision that BBCB and the BBC took in the light of what we know eventuated.

50. The evidence does not support a conclusion either that there was a tacit deal between Ofcom and the parties to the BBC Contract that a reduction of the term would lead to the closure of the case or that the commitments procedure was invoked informally in a way which must have meant that Ofcom had decided that its competition concerns were removed.

(c) Subversion of the commitments process

51. Two further points made by IMS can be disposed of briefly. The first point arises from paragraph 63 of Mr Stewart's statement which refers to Ofcom's readiness to treat the proposal of a reduction in the term of the contract as an offer of commitments under section 31A of the 1998 Act. That section is set out in paragraph 14, above.

52. IMS argued that if Ofcom's submissions were accepted in this case, this would undermine the formal commitments process which came into force in May 2004 and which is designed, in part, to protect the rights of complainants when the regulator effectively negotiates the closure of the investigation with the alleged infringing undertaking. IMS illustrates the problems that arise for a complainant if Ofcom accepts informal assurances, thereby bypassing the section 31A process. It points to the fact that IMS was not made aware of the reduction in the term of the contract until December 2006 whereas if the formal commitments procedure had been followed, IMS would have been consulted by Ofcom on the proposed commitments before they were accepted.

53. The Tribunal recognises the importance of the commitments procedure introduced in 2004 and the statutory safeguards put in place to ensure that proper consultation takes place before commitments are accepted. The Tribunal also recognises that complainants may feel aggrieved if the decision to close the case file is taken without the level of consultation that would comply with the statutory requirements and the Commitments Guidelines. But the regulator cannot oblige parties to an agreement to offer commitments where, as in this case, the parties make it clear they do not want to go down that route. Nor can Ofcom refuse to address a change in circumstances brought about by the action of the parties part way through an investigation on the grounds that the change could have been handled by the formal offer of commitments. In the light of this, the Tribunal does not regard the current case as undermining the commitments procedure as alleged by IMS.

(d) The split jurisdiction

54. The second additional point raised by IMS is that the Tribunal should avoid an outcome whereby Ofcom can, by disposing of a single complaint against the Channel 4 Contract and the BBC Contract in separate decisions, create an appealable decision in relation to one but a decision which is amenable only to judicial review in relation to the other.

55. The Tribunal does not accept that it was unfair or inappropriate for Ofcom to conduct separate investigations into the two contracts or to issue two decisions. Although the contracts both relate to the same services and BBCB is a party to both of them, they arose at different times and in different circumstances, indeed it was at one point thought possible that the BBC Contract would be considered by the OFT as ancillary to the sale of BBCB to CBSL rather than be considered by Ofcom. Furthermore, we do not need to decide whether it is possible for a single document issued by Ofcom to contain both an appealable decision which is subject to review by the Tribunal and a file closure decision which is not within the Tribunal's jurisdiction. We also leave open what would be the position if it appeared that a regulator had artificially sought to divide up a

single complaint in order to avoid part of its disposal of that complaint falling within the jurisdiction of the Tribunal.

56. The Tribunal recognises that the conclusion that the Channel 4 Decision can be appealed to the Tribunal and the Case Closure Decision cannot is unsatisfactory from the point of view of the complainant and for the regulatory system more generally. This may act as incentive to regulators to arrive at a case closure decision (without concluding whether or not there has been or still is an infringement) rather than a non-infringement decision given that, from the viewpoint of the regulator, the decision has the same outcome in terms of effect on the market. However, this situation is a result of the legislation which limits the Tribunal's jurisdiction to certain kinds of decision only. It cannot be cured by the Tribunal seeking to extend its jurisdiction beyond the scope provided for in the legislation.

VII CONCLUSION

57. In light of the above, the Tribunal determines that the Case Closure Decision is not a decision falling within section 46(3) of the 1998 Act.

Vivien Rose Michael Blair Paul Stoneman

Charles Dhanowa 31 October 2007
Registrar