Neutral citation [2008] CAT 13

IN THE COMPETITION APPEAL TRIBUNAL Case No: 1087/2/3/07

Victoria House
Bloomsbury Place
London WC1A 2EB

20 May 2008

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

- supported by -

RED BEE MEDIA LIMITED

First Intervener

- and -

BRITISH BROADCASTING CORPORATION

Second Intervener

Heard at Victoria House from 7 to 8 April 2008

JUDGMENT

APPEARANCES

Mr. Stephen Hornsby (Solicitor, Davenport Lyons) appeared for the Appellant.

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

Mr. Nicholas Green QC and 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 is brought by the appellant ("IMS") under section 47 of the Competition Act 1998 ("the 1998 Act"). IMS challenges two decisions adopted by the Office of Communications ("OFCOM")[1] on 30 May 2007. This judgment determines the issues raised by the appeal in relation to the decision entitled "Complaint from Independent Media Support Limited about BBC Broadcast's provision of television access services to Channel 4" ("the Channel 4 Decision"). It is common ground that the Channel 4 Decision comprises a non-infringement decision which is capable of being appealed to the Tribunal under the 1998 Act.

2. Pursuant to section 303 of the Communications Act 2003, OFCOM's Code on Television Access Services requires licensed public service television broadcasters, such as the Second Intervener, the British Broadcasting Corporation ("the BBC") and Channel 4, to address the needs of the deaf, hard of hearing, blind and visually impaired communities by providing subtitling, signing and audio description (collectively referred to as "access services"). Access services obligations set out in the OFCOM Code take the form of quota requirements for the percentage of programme hours to which various access services must be applied. Broadcasters can meet their regulatory requirements either by providing access services in-house or by contracting with an access services provider, such as IMS and the First Intervener, Red Bee Media Limited ("Red Bee").

3. The decisions under appeal concern contracts entered into by Red Bee for the exclusive supply of access services to the BBC and Channel 4 respectively. At the time the contracts were concluded, Red Bee was known as BBC Broadcast Limited and since the Channel 4 Decision refers to the First Intervener by that name, the Tribunal will refer to them as "BBCB" in this judgment.

[1] OFCOM is empowered to enforce the 1998 Act prohibitions and Articles 81 and 82 of the EC Treaty concurrently with the Office of Fair Trading in relation to commercial activities connected with communications: see section 54 of the 1998 Act, read with section 371 of the Communications Act 2003.

4. The contract between BBCB and the BBC dates back to April 2002 when BBCB was a wholly-owned subsidiary of the BBC. 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 and the term of that service level agreement has been extended on a number of occasions. The BBC decided to sell the business comprised in BBCB and entered into an agreement for the sale of that business to take place on 1 August 2005 to Creative Broadcast Services Limited ("CBSL"). The day before BBCB was sold to CBSL, the Framework Agreement, including the exclusive term for the supply of access services, was extended until 31 December 2015. BBCB was subsequently renamed Red Bee on 1 November 2005. The Channel 4 Contract is described in section II below.

5. In June 2005 IMS lodged a complaint with OFCOM in respect of BBCB's contracts with both the BBC and Channel 4. In July 2005 OFCOM opened an investigation into IMS's complaint regarding the Channel 4 Contract. The scope of the investigation was extended, in December 2005, to include IMS's allegations relating to the BBC contract under the Chapter I prohibition and Article 81(1) EC. OFCOM gathered information from the parties to these proceedings, Channel 4 and other interested parties. In addition, OFCOM engaged consultants IAMCO Partners LLP to conduct research into the market(s) in which access services were being provided. In December 2006 OFCOM issued a draft non-infringement decision in respect of the Channel 4 Contract.

6. On 30 May 2007 OFCOM issued the Channel 4 Decision. It also issued a case closure decision entitled "Complaint from Independent Media Support Limited about BBC Broadcast's provision of television access services to the BBC" ("the Case Closure Decision"), which set out OFCOM's reasons for not pursuing further its investigation into the BBC contract.

7. IMS's appeal challenged both the Channel 4 Decision and the Case Closure Decision. By Order of 14 August 2007 the Tribunal ordered the trial of a preliminary issue, namely whether it had jurisdiction to hear an appeal against the Case Closure Decision. For the reasons set out in its judgment of 31 October 2007, [2007] CAT 29, the Tribunal held that the Case Closure Decision was not an appealable decision. That

judgment also explains the circumstances in which the exclusivity term of the BBC Contract was reduced so that it is due to expire at the end of December 2012 rather than December 2015. But the Tribunal has in mind that this appeal against the Channel 4 Decision takes place against the background of the fact that BBCB has an exclusive right to provide access services to the BBC until the end of 2012.

II. THE CHANNEL 4 CONTRACT

8. Prior to the award of the contract to BBCB, Channel 4 purchased access services from Intelfax Limited ("Intelfax"). In January 2004 Channel 4 issued an invitation to tender to certain access services providers and on 14 July 2004 it entered into the Channel 4 Contract with BBCB conferring on BBCB the exclusive right to provide access services to Channel 4 from 1 December 2004 for an initial period of five years.[2] Following the loss of the contract with Channel 4, Intelfax ceased trading.

9. The Channel 4 Contract gives Channel 4 an option to renew the contract for a further three years (i.e. until July 2012). If this option is exercised, the exclusive term of the Channel 4 Contract would be a total of eight years. In the event that Channel 4 decides not to exercise the option to renew, Channel 4 is obliged to reimburse BBCB certain employment-related costs, a sum known as the "Cost Reimbursement Fee". The Cost Reimbursement Fee and what implications, if any, it has for the duration of the Channel 4 Contract and the likely effect of that contract on the competitive process is considered below: see section VII.

10. IMS's complaint to OFCOM was in part that BBCB had abused its dominant position by winning the Channel 4 Contract on the basis of a below-cost bid. IMS further alleged that the term of exclusivity in the Channel 4 Contract infringed the Chapter I and Chapter II prohibitions and Articles 81 and 82 EC.

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[2] The contract also provides for an initial transitional period of one month from 1 December 2004 for the purposes of migration, during which time the access services were still supplied by Intelfax.

III. LEGAL FRAMEWORK

11. The question now before the Tribunal is whether OFCOM was correct to decide, on the basis of the evidence before it, that the Channel 4 Contract did not infringe the prohibitions in Articles 81(1) and 82 and the equivalent provisions of the 1998 Act.

(i) The European and domestic competition provisions

12. Article 81(1) EC, which has direct effect in the United Kingdom, provides, in particular, that all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market are prohibited. Although this is not expressly stated in the Treaty provisions themselves, it is clear from the jurisprudence of the European Court of Justice that in order to fall within Article 81(1) the agreement must have an appreciable effect both on competition and on trade between Member States: in other words, agreements which are *de minimis* do not fall within the prohibition.

13. Article 81(3) EC provides that the prohibition in Article 81(1) EC may be declared inapplicable, *inter alia*, where the agreement has certain pro-competitive effects listed in the provision. In April 2004 the EC Commission published its Guidelines on the application of Article 81(3) of the Treaty (OJ 2004 C 101, p. 97) ("the Article 81(3) Guidelines"), the purpose of which is to set out the EC Commission's view of the substantive assessment criteria applied to various types of agreements and practices and how it interprets the conditions for exception contained in Article 81(3).

14. Article 81(3) can be applied to categories of agreement by the application of block exemption regulations promulgated by the EC Commission. The block exemption which is relevant to this case is Commission Regulation 2790/1999 (1999 OJ L 336, p. 21) ("the Vertical Agreements Block Exemption")[3] which came into effect on 1 June 2000. The EC Commission has also issued Guidelines on Vertical Restraints in December 1999 (2000 OJ C 29, p.1) ("the Vertical Restraints Guidelines") which give guidance not only as to the application of the Vertical Agreements Block Exemption

[3] Block Exemption Regulations and Commission Notices are available on the DG Competition website: http://ec.europa.eu/comm/competition/index_en.html.

but also more generally on the interpretation and application of Articles 81(1) and 81(3) to commonly used kinds of vertical restraints.

15. Article 82 EC provides that any abuse by one or more undertakings of a dominant position is prohibited in so far as it may affect trade between Member States.

16. As a matter of domestic law, the 1998 Act came into force on 1 March 2000. Part I of the 1998 Act contains two prohibitions, known as the Chapter I and Chapter II prohibitions. Section 2(1) of the 1998 Act contains the Chapter I prohibition which is to the same effect as Article 81(1) save that the requirement in the latter provision that there be an effect on trade between Member States is replaced with a requirement that there be an effect on trade within the United Kingdom.

17. Agreements that fall within section 2(1) may escape the Chapter I prohibition if, *inter alia*, the conditions set out in section 9 are satisfied. Section 9 contains equivalent criteria to those contained in Article 81(3) and, as with that provision, the burden of proof is on the undertaking seeking to justify an agreement: see section 9(2) of the 1998 Act. Section 10 of the 1998 Act makes provision for the 'parallel exemption' of agreements which satisfy the terms of a European Community block exemption.

18. Section 18 of the 1998 Act imposes the Chapter II prohibition and, subject to certain excluded cases, section 18(1) corresponds to Article 82 EC.

19. Section 60 of the 1998 Act provides, broadly speaking, that questions arising under Part I of that Act in relation to competition within the United Kingdom are to be dealt with, so far as possible and "having regard to any relevant differences", in a manner consistent with Community law. Pursuant to section 60(2) of the 1998 Act, the Tribunal must ensure there is no inconsistency between the principles applied and the decision reached by the Tribunal and the principles laid down by the EC Treaty or the Court of First Instance and the European Court of Justice ("the CFI" and "the ECJ" respectively or, together, "the Community Courts"), and any relevant decisions of the Community Courts, in determining "any corresponding question arising in Community law". In addition, the Tribunal must have regard to any relevant decision or statement of the European Commission (section 60(3)).

20. On 1 May 2004, Article 3(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 (2003 OJ L 1, p.1), commonly known as "the Modernisation Regulation", came into effect. That requires national competition authorities, such as OFCOM, to apply Article 81 and/or 82 when they apply their national competition law prohibition to agreements or conduct which may affect trade between Member States. It was common ground between the parties that the Channel 4 Contract was capable of having an effect on trade between Member States and so OFCOM rightly considered the possible application of both the Community and domestic prohibitions.

21. In December 2004, the Office of Fair Trading published its Guideline on the "Assessment of Market Power" (OFT 415) in accordance with section 52 of the 1998 Act. That Guideline provides advice and information about the factors which the OFT, and, within commercial activities connected with communications, OFCOM, may take into account in considering whether one or more undertakings possess market power.

22. For convenience, references to Article 81(1) and Article 82 in this judgment should be taken to include the equivalent prohibitions contained in the 1998 Act.

(ii) Powers of the Tribunal

23. The Tribunal's powers in deciding the present appeal are set out in paragraph 3(1) of Schedule 8 to the 1998 Act. That requires the Tribunal to decide this case "on the merits" by reference to the grounds set out in the notice of appeal.

24. The parties agreed that the Tribunal's role in the context of an appeal brought by a third party, such as the complainant in this case, is to apply the test as set out by the Tribunal in its judgment in *Freeserve.com plc v Director General of Telecommunications* [2003] CAT 5. The Tribunal must consider whether "the decision is incorrect or, at the least, insufficient, from the point of view of (i) the reasons given; (ii) the facts and analysis relied on; (iii) the law applied; (iv) the investigation undertaken; or (v) the procedure followed" (see paragraph [114] of the *Freeserve.com* judgment). A complainant in the position of IMS is entitled, if OFCOM rejects the complaint by making a finding of non-infringement, to receive a reasoned decision which gives sufficient detail to enable the complainant to understand why the complaint has been rejected, and for the Tribunal to control the adequacy of those reasons and their correctness in law.

IV. THE CHANNEL 4 DECISION

25. In the Channel 4 Decision issued on 30 May 2007 OFCOM set out its conclusions that:

- It was appropriate for the purposes of OFCOM's analysis of the case to proceed on the basis that the proper definition of the relevant market was the market for the supply of access services to United Kingdom television broadcasters.

- 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 supply of access services to United Kingdom television broadcasters. On this basis, OFCOM decided that there were no grounds for action in relation to the allegation that BBCB had abused a dominant position by means of predatory pricing or because of the exclusivity granted by the Channel 4 Contract.

- At the time the Channel 4 Contract was made in July 2004, it fell within the terms of the Vertical Agreements Block Exemption. This meant that it was exempt both from the prohibition in Article 81(1) and from the Chapter I prohibition.

- BBCB's market share subsequently rose above 35 per cent so that, as from 1 January 2007, the Channel 4 Contract (which still had three years to run) did not benefit from the Vertical Agreements Block Exemption.

- From 1 January 2007, the Channel 4 Contract did not have an appreciable foreclosure effect, whether taken alone or in conjunction with other contracts, and so fell outside the prohibitions in Article 81(1) or Chapter I of the 1998 Act because it is *de minimis*.

V. THE APPEAL TO THIS TRIBUNAL

26. IMS filed its Notice of Appeal on 29 June 2007. Following the Tribunal's Order of 14 August 2007 that pleading was amended and re-served on 17 August 2007. The sixth and seventh sections of that Notice set out IMS's case in relation to the Channel 4 Contract, contending that the contract infringes both the Chapter I prohibition and

Article 81(1). Section 8 argues that OFCOM was wrong to conclude that BBCB did not enjoy a dominant position on the relevant market.

27. As regards the relief sought, IMS applies to the Tribunal for an order that, in the event of the Tribunal deciding to set aside the Decision, the Tribunal should itself exercise its powers under paragraph 3(2)(e) of Schedule 8 of the 1998 Act to make any decision that OFCOM could have made, in particular to declare that BBCB did and does hold a dominant position.

28. OFCOM contends that the Tribunal should dismiss the appeal. Following a case management conference, OFCOM served a Defence to IMS's clarified grounds of appeal in relation to IMS's challenge to the Channel 4 Decision. The First and Second Interveners filed statements of intervention on 17 and 18 September 2007 respectively; both interveners supported OFCOM in disputing IMS's submissions and asking for the appeal to be dismissed. The substantive hearing of the appeal took place on 7 and 8 April 2008.

29. At the hearing IMS accepted that it does not challenge the factual evidence relied upon by OFCOM in the Channel 4 Decision. Rather it disputes the inferences properly to be drawn from that evidence. IMS did not serve any evidence of its own, although it provided the Tribunal with a copy of a presentation prepared by Red Bee's management in November 2005. At the hearing, BBCB provided the Tribunal with a redacted copy of the Channel 4 Contract.

30. The appeal raises the following questions:

Article 82 issues

(i) Was OFCOM correct to focus, in determining whether or not BBCB was dominant, on BBCB's market position in the first half of 2004, as opposed to at some later time, and, in particular, as at the date of the Channel 4 Decision?

(ii) Assuming OFCOM was correct to assess dominance in the first half of 2004, did BBCB hold a dominant position at that point?

(iii) If OFCOM was correct in finding that BBCB was not dominant at the time it entered into the Channel 4 Contract, does the later increase in BBCB's market share have any relevance for the investigation under Article 82?

Article 81(1) issues

(iv) For the purposes of applying Article 81(1), should the Channel 4 Contract be treated as being for five years or for eight years?

(v) If OFCOM was right to treat the Channel 4 Contract as being of five years' duration, was OFCOM correct to conclude that the Channel 4 Contract did not infringe Article 81(1) after 1 January 2007?

31. In the following sections we seek to encapsulate the main thrust of the arguments of the main parties. We omit matters which seem to us to be irrelevant or of lesser importance. We have taken into account the submissions of the BBC and BBCB - those of the latter were particularly helpful - but we have not always found it necessary to reproduce them in their entirety.

VI. ARTICLE 82 ISSUES

32. By this ground of appeal, IMS criticises OFCOM's findings in section 7 of the Channel 4 Decision, according to which BBCB was not dominant in the market for the supply of access services to UK broadcasters. IMS does not challenge OFCOM's definition of the relevant market as being the market for the supply of access services to UK television broadcasters. There was however an issue between the parties as to the proper measurement of the size of the overall market and hence of the calculation of the shares of the different participants in that market.

33. As to the proper way to measure market share, OFCOM noted in the Channel 4 Decision that it had considered market shares both calculated by sales value data and those calculated by volume data. Given, however, that one of the allegations was of predatory pricing, sales value data might be distorted. OFCOM therefore relied on volume data to calculate market share (that is, the number of hours of programming which uses access services), in particular data concerning the volume of "origination

hours" where the service provider supplies an entirely new subtitle, signing or audio description file for a new programme.

34. OFCOM also noted that an important consideration in the context of calculating market shares was the treatment of self supply, that is, whether access services provided by a television broadcaster to itself should be included in determining the overall size of the market. OFCOM referred to the Vertical Restraints Guidelines which state in paragraph 98:

> "In-house production, that is production of an intermediate product for own use, may be very important in a competition analysis as one of the competitive constraints or to accentuate the market position of a company. However, for the purpose of market definition and the calculation of market share for intermediate goods and services, in-house production will not be taken into account".

35. OFCOM considered that it was appropriate to apply this guidance when assessing market shares for the purpose of applying Article 81(1). For the purpose of its assessment of Article 82, OFCOM set out its calculation of market shares both including and excluding in-house supply in Table 6 of the Channel 4 Decision:

Supplier	Market share excluding in-house supply	Market share including in-house supply
BBCB	[0-10%]	[30-40]%
IMS	[60-70]%	[20-30]%
ITFC	[0-10]%	[20-30]%
Intelfax	[10-20]%	[0-10]%
Sky	[0-10]%	[0-10]%
Other	[0-10]%	[0-10]%
Total	100%	100%

36. Various clarifications were attached to this share analysis in footnotes in the Decision. First, the share figures were stated to relate to the year 2004. OFCOM explained that the results were based on data provided for the calendar year 2005, or for the first six

months of 2005 in some cases, from access services providers. Because Intelfax had ceased to exist as a company by that time, OFCOM then imputed from this 2005 data a market share for Intelfax in 2004. Because supply in this market is based on one-off contracts, the 2005 data provides, in OFCOM's view, an accurate reflection of market shares in 2004.

37. The next footnote to the market share tables explained:

> "Ofcom has considered the market share of [BBCB] at the time of entering into the Channel 4 contract when the share of supply attributable to the BBC's requirements was regarded as in-house and therefore excluded from market share calculations. Ofcom notes that the characterisation of the BBC's requirements as in-house supply subsequently changed upon the sale of [BBCB] to CBSL on 1 August 2005."

38. As regards Sky's market share, OFCOM explained that Sky's share of the market, through its in-house supply of signing and audio description services, appeared relatively high. This might, OFCOM indicated, have been linked to the fact that as Sky's origination hours were not easily available, OFCOM calculated a proxy for them from total hours and a sample week of repeat rates provided by Sky.

39. Finally, OFCOM stated that it had considered market shares both including and excluding in-house supply. This was because in this relevant market, market shares excluding in-house supply may not provide an accurate picture of market power, as they may underestimate the market power of the suppliers which supply significant business to their vertically integrated owners.

40. As to the date at which dominance should be assessed, the issue which was the focus of this appeal was dealt with in a lengthy footnote attached to the section in the Decision setting out OFCOM's approach to the assessment of dominance (footnote 104):

> "In its response to the consultation on the draft decision, IMS argued that the market shares that Ofcom has used in its assessment of [BBCB's] market position are incorrect as they should not be based on [BBCB's] position prior to the signing of the Channel 4 contract, rather Ofcom should have taken a "dynamic" approach to its analysis as the alleged pricing abuse persists as long as the price is maintained (paragraphs 2.5 and 2.5). Accordingly, in IMS's view, Ofcom should have taken into account that [BBCB] gained the Channel 4 contract and that, subsequently, the BBC contract ceased to be in-house, giving it market share in the range of 60-80%. *Ofcom considered the market shares at the time the contract was entered into and which is the point in time at which IMS alleged that [BBCB]*

> *abused a dominant position through the alleged abusive conduct of predatory pricing to gain the contract and by the length or exclusive nature of the contract.* In doing this, Ofcom has considered market shares both with and without in-house sales i.e. taking into account [BBCB's] supply to the BBC. In addition, as set out in paragraph 6.24 while inclusion of the BBC contract in a market share calculation does increase [BBCB's] market share, its underlying market power remains unchanged and may in fact decrease as the BBC contract will in future be contestable. In any case, as set out in paragraph 7.17, Ofcom's analysis of dominance relies more heavily on criteria such as barriers to entry and expansion and countervailing buyer power, and less on market shares." (emphasis added)

41. The cross-reference in that footnote to paragraph 7.17 was to the section of the Decision which considered whether there were special features of this market which meant that it was not appropriate to rely solely on market share analysis to determine whether BBCB was dominant. OFCOM noted that in this market contracts are awarded infrequently and so market shares may change substantially on the award of a major contract. Market share data for markets which exhibit features of a "bidding market" need therefore to be interpreted cautiously. A "bidding market", OFCOM stated, is one where the majority of sales are made by competitive tenders. In such markets, if competition at the bidding stage is effective, an undertaking which has a high share of sales over a period of time may not in fact have market power because most or all of those sales could be lost to a competitor in the next bidding round.

42. Looking at particular features of this relevant market OFCOM found that the majority of the market is taken up by a few large contracts; there are usually three or four suppliers which participate in each competitive tendering process; there are no significant capacity constraints; and a well established brand or reputation is likely to be favoured over a less established one. OFCOM concluded that the market "displays some of the characteristics of a bidding market" so that it was important to place weight on the wider competitive context when assessing dominance rather than looking simply at market shares.

43. OFCOM then considered the existence of barriers to entry and expansion and concluded that the only barrier was the need for reputation and experience. But, OFCOM noted, this barrier is one that is set by the broadcasters and in the event that suppliers of access services failed to make acceptable offers during a competitive tender, there is evidence to suggest that some action would be taken by the broadcasters to stimulate entry.

44. OFCOM also considered buyer power and concluded that buyers would sponsor entry in the event that existing potential suppliers failed to make acceptable offers and attempted to exploit them. Buyers of access services, OFCOM concluded, "typically possess a significant degree of countervailing buyer power in their dealings with access services providers". Having considered these various factors, OFCOM found that BBCB's share at 0-10% excluding in-house supply and 30-40% including in-house supply was insufficient on its own to indicate dominance.

The first issue – was OFCOM correct to determine whether or not BBCB was dominant by considering its market position in the first half of 2004?

45. IMS argues, first, that OFCOM erred in law in confining its assessment of dominance to a 'snapshot' taken in the first part of 2004 (either when the Channel 4 Contract was bid for or at the point it was awarded to BBCB). The approach adopted by OFCOM is, IMS submits, incompatible with the case law of the Community Courts. IMS submits that, as is clear from the judgment in Joined Cases T-125/97 and T-127/97 *Coca-Cola v Commission* [2000] ECR II-1733, a finding of a dominant position "is the outcome of an analysis of the structure of the market and of competition prevailing at the time the Commission adopts each decision" (paragraph [81]). According to IMS, OFCOM should have updated its analysis to assess the conditions of competition in the relevant market prevailing at the time of the Channel 4 Decision (i.e. in May 2007).

46. IMS argues, secondly, that OFCOM necessarily reached the wrong conclusion on dominance as a result of confining its analysis to a period of time that was far too short. IMS argues that the relevant period of time for assessment of dominance is at least three years in duration, which, in this case, was from July 2004 (when the Channel 4 Contract was made) to May 2007 (when the Channel 4 Decision was adopted). In its submission, the judgments in Case 322/81 *Michelin v Commission* [1983] ECR 3461 ("*Michelin*") and Case C-62/86 *AKZO v Commission* [1991] ECR I-3359 ("*AKZO*"), and Commission Decision 2000/74/EC of 14 July 1999 (IV/D 2/34.780 – *Virgin/British Airways*) (OJ 2000 L 30, p. 1) ("*British Airways*"),[4] demonstrate that the EC Commission analyses market power over a period of time up to the point when the

[4] The Decision was upheld on appeal to the Court of First Instance in Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, and on appeal to the European Court of Justice in Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331.

decision is taken. As with the continuing conduct at issue in those cases, IMS argues that the alleged abuses in this case, namely that the prices offered under the Channel 4 Contract are predatory and that the long-term, exclusive provision of access services by BBCB to Channel 4 is anti-competitive, are likewise continuing. IMS submits that the continuing nature of the alleged abuses is relevant to the period of time which should be taken into account when assessing whether an undertaking is dominant. It follows that BBCB's market position should properly be assessed over a period of time (of at least three years) preceding the date of OFCOM's decision.

47. If OFCOM had assessed dominance in the manner which IMS submits is correct, OFCOM would have taken into account various market developments: (a) Intelfax's exit from the market; (b) the changes brought about by CBSL's acquisition of BBCB; and (c) the unsuccessful attempt by the US company, Wordwave, to enter the market on its own (see paragraph A3.9 of the Decision). All of these developments, say IMS, indicate that OFCOM underestimated the economic strength of BBCB on the relevant market. In reality, OFCOM is seeking to restrict the assessment of BBCB's market position to a short period of time, whereas that period of time finds no basis in the case law or competition authorities' guidance.

48. In the Channel 4 Decision, OFCOM approached these temporal issues on the basis that the principal concern in relation to a suspected infringement of Article 82 was whether, at the time it entered into the Channel 4 Contract, BBCB held a dominant position in the relevant market. OFCOM refined its position in its Defence, stating that the most likely time when the alleged infringement occurred was when BBCB submitted its bid to Channel 4. BBCB's market position at each of these times was essentially the same, and it was therefore unnecessary for OFCOM to choose between them for the purposes of its assessment of dominance.

49. OFCOM submits that, since IMS's complaint was that BBCB infringed Article 82 by winning the Channel 4 Contract on the terms that it did, it is necessary to establish that BBCB held a dominant position at the time when that alleged infringement occurred i.e. in the first half of 2004. It follows that the first half of 2004 was the time at which BBCB's alleged dominance had to be determined and IMS is wrong to argue that market developments, and in particular the sale of BBCB to CBSL, which post-date the

bidding and award of the Channel 4 Contract (the alleged abusive conduct), are relevant.

50. As regards IMS's argument that OFCOM based its dominance assessment on a 'snapshot' of BBCB's market position, OFCOM submits that it did take into account a sufficient period of time *before* 2004 in order properly to assess the competitive conditions prevailing at the time of the alleged infringement. OFCOM accepts that any noticeable trends in the market in the three, or even five, years before 2004 could, as a matter of principle, be relevant to the assessment of market power (although that approach would not have made any difference in this case).

51. BBCB adopts OFCOM's submissions in their entirety and urges the Tribunal to reject all aspects of IMS's appeal on the Article 82 issues.

The Tribunal's assessment

52. The Tribunal rejects IMS's analysis of the relevant period of time which should be taken into account when assessing whether an undertaking is dominant. We consider that IMS's submissions on this point elide two different stages of analysis: the first stage is to identify the material time at which dominance must be assessed (which all parties agree at least *included* the first half of 2004); the second stage is then to consider the structure of the relevant market over an appropriate period of time to ascertain whether an undertaking is dominant at the time of the alleged infringement.

53. As to the first stage, in our judgment the nature of the alleged abuse, or abuses, might affect the point in time at which the existence of dominance should be assessed. At the hearing there was disagreement among the parties as to the precise character of the infringements alleged to have occurred in the present case. IMS refers to the length and exclusive nature of the Channel 4 Contract, and the prices offered by BBCB, as a continuing infringement because those prices and that exclusivity persisted throughout the duration of the contract. OFCOM in contrast characterised the alleged abuse in its decision as securing the Channel 4 Contract by the terms which it tendered for, and by which it won, that contract in the first half of 2004. We agree with OFCOM that IMS's reliance by analogy on *Michelin* and *AKZO* is misplaced. Unlike the circumstances relating to the tender for, and conclusion of, the Channel 4 Contract, those cases were

concerned with ongoing pricing practices which were found to be abusive. It is also clear that the Court of Justice found both *Michelin* and *AKZO* to hold a dominant position at the beginning of the alleged infringement and for as long as those practices were continued.

54. The closest analogy in the European case law to which we were referred is Case T-51/89 *Tetra Pak Rausing SA v Commission* [1990] ECR II-309 ("*Tetra Pak I")* which is similar to the present case since the abuse alleged was that Tetra Pak entered into a particular patent licence. The Commission found that by acquiring, through the takeover of another company, an exclusive patent licence to technology for sterilising milk cartons Tetra Pak had abused its dominant position on the market for liquid food packaging. However, it was entirely clear in that case that Tetra Pak was dominant when it acquired the patent licence and continued to be dominant until it abandoned claims to exclusivity in the licence.

55. Even if IMS's characterisation of the conduct as a continuing infringement were to be accepted, it is still necessary to establish that BBCB was dominant *at the start* of that continuing infringement and there is no doubt that the infringement was alleged to have started in 2004. We therefore find that, whether the alleged infringement is regarded as having been committed only at the time that the contract was concluded, or as having lasted from the time the contract was concluded onwards, OFCOM was right to consider that dominance had to be established at the beginning of 2004.

56. As to the second stage of the analysis, it was common ground that dominance should be assessed over time; what divided the parties was whether this period of time should only precede the material point at which dominance must be assessed.

57. In determining whether BBCB was dominant in the first half of 2004 (which was the time when OFCOM said the alleged abuse occurred and when IMS argued that BBCB was dominant), we consider that OFCOM is right to argue that market developments occurring at some point in the future are irrelevant. A finding of dominance must be based on the evidence available at the appropriate time; that evidence may relate to the behaviour of the undertaking in question, its market position as well as that of its competitors, and other salient features of the market, such as barriers to entry. Changes

in the market strength or performance of the undertaking after the material point in time at which dominance must be assessed are irrelevant.

58. The Tribunal's finding does not mean, as IMS appeared to suggest, that the assessment of whether or not BBCB was dominant would be unduly static or would necessarily be based on an overly abbreviated timeframe. The case law of the Community Courts has consistently recognised the importance of the persistence of a significant market share over time before a finding of a dominant position can be made (Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph [41]). Although the Court has not specified the required time, it is apparent from the case law that a period of three years would probably be sufficient (*AKZO*, cited above, paragraphs [59]-[60]) but that a period of less than that, especially in a dynamic market, might be considered too short for a high market share to be indicative of a dominant position. In order to get a realistic view of competitive conditions, it follows that OFCOM was right to consider market conditions prior to 2004, even though it did not find – and indeed IMS did not suggest – that there was any significant market development prior to 2004 that would have altered OFCOM's conclusion on dominance.

59. It follows that IMS is wrong to maintain that the analysis of a dominant position referred to in the Channel 4 Decision was based on data relating to too short a period. The plea that OFCOM erred in law by not also looking at prevailing market conditions from January 2005 to May 2007 when assessing dominance in 2004 is therefore unfounded.

The second issue – assuming OFCOM was correct to assess dominance in the first half of 2004, did BBCB hold a dominant position at that point in time?

60. IMS's challenge to the findings OFCOM made in relation to dominance can be summarised as follows. IMS argues that it is safe to assume that BBCB's market share exceeds 50 per cent and that it is unlikely to fall below that level until at least 2012. IMS relies on various figures contained in a presentation given by the Red Bee Management in November 2005 for the proposition that BBCB held a 50 per cent share of the relevant market (calculated by value). IMS takes the view that, properly

assessed, OFCOM has failed to rebut the presumption of dominance to which BBCB's persistently high market share gives rise.

61. IMS submits that OFCOM also erred by overestimating the other factors which it found undermined reliance on BBCB's market share figures as indicators of market power. Referring to the judgment in *AKZO*, cited above, IMS disputes OFCOM's conclusion that because the relevant market displays some characteristics of a bidding market, BBCB did not hold a dominant position. IMS points out that there are only three providers of access services (BBCB, ITFC and itself) since by the time of the contested decision, Intelfax had left the market. There had been no successful market entry. This, says IMS, clearly shows that BBCB has the ability to act independently of its competitors which is the hallmark of dominance.

62. IMS also contends that the arguments OFCOM advances about countervailing buyer power are insufficient. IMS points out that the BBC, for example, is unable to re-enter the market, or sponsor new entry, until the end of its existing contract with BBCB in 2012. Channel 4 has also ruled out self supply entirely and IMS refers to paragraph 7.60 of the Channel 4 Decision to the effect that broadcasters regarded the question of whether they would sponsor new entry as hypothetical and the responses were "accordingly (sometimes strongly) caveated". It follows, in IMS's submission, that broadcasters' buyer power does not rebut the presumption of dominance arising from high market shares.

63. OFCOM and BBCB are agreed that, whichever point in 2004 is regarded as that of the alleged infringement, BBCB was not dominant in the relevant market. OFCOM relied on the findings it had set out in the Channel 4 Decision concerning the absence of barriers to entry and expansion, the need to treat market share data with caution in this market and the strong degree of countervailing buyer power - access services buyers are well informed and appear to be in a good bargaining position with suppliers to acquire better terms.

The Tribunal's assessment

64. By virtue of settled case law a dominant position exists where the undertaking concerned is in a position of economic strength which enables it to prevent effective

competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers (see, for example, *Hoffmann-La Roche*, paragraph [38]; *Michelin*, paragraph [30]).

65. In order to establish that a dominant position exists, the importance of market shares may vary from one market to another. A very high market share, which has continued throughout the period of infringement and is likely to continue for several years, may well be sufficient, depending on the circumstances, to infer the existence of dominance: (*Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraphs [156] to [160], and the cases there cited).

66. We have described earlier how OFCOM analysed the market to arrive at the conclusion that BBCB was not dominant. Although not formally accepting that the relevant market was a 'bidding market', IMS accepted before the Tribunal that it did not challenge the facts as found by OFCOM, including that one characteristic of this market is the award of a limited number of high-value contracts. In the Tribunal's judgment, this means that the fact that a particular company has had a number of recent 'wins' does not necessarily mean that one of its competitors will not be successful in the next contract to be tendered. Provided that its reputation, experience and track record satisfy UK broadcasters – which at least ITFC, IMS and BBCB do – and it can offer a competitive price, a competitor can always win a large contract and increase its market share considerably at one go. In these circumstances, as OFCOM has rightly observed, such a market share is unlikely to give an access services provider the power to prevent the maintenance of effective competition on the relevant market by providing it with the possibility of engaging in independent conduct to a significant extent vis-à-vis its competitors and broadcasters.

67. The Tribunal therefore upholds OFCOM's finding that access service providers' market shares as at a given date are less significant for the analysis of competitive conditions in the UK market for access services than might normally be the case. It is necessary to look at and weigh up all relevant economic facts, including the "winner takes all" aspect of those access services subject to competitive tender. The existence of a dominant position will be the outcome of a number of factors, including any barriers to,

and the likelihood of, new entry and any countervailing buyer power (see, to that effect, the OFT's Guideline on Assessment of market power, (OFT 415, December 2004)).

68. The underlying facts found by OFCOM include:

(a) Most UK broadcasters prefer not to have more than one provider for all access services and, accordingly, to award exclusive contracts;

(b) 94 per cent of all origination hours in 2005 are currently served by the three largest suppliers of access services to broadcasters, namely IMS, BBCB and ITFC;

(c) The market was characterised by a few, large contests to supply broadcasters and those contests are open to at least three providers which have the necessary reputation and experience, namely BBCB, ITFC and IMS;

(d) The incumbent provider does not have a particular advantage over the other bidders when a contract comes to be re-tendered;

(e) There are no significant capacity constraints in the access services market because the IT equipment needed to provide access services is readily available and it is relatively easy to subcontract particular services;

(f) An established reputation and relationships with broadcasters are important pre-conditions to be able to compete effectively for the award of an access services contract, but BBCB's reputation is not necessarily any stronger than ITFC and IMS. Further, in the event that existing access services providers did not meet the needs of UK broadcasters, there is evidence to suggest that the broadcasters would be willing to relax their reputational criteria and take action to stimulate entry;

(g) Although switching costs, that is the costs incurred by the customer in moving its business from one access services provider to another, exist, they are unlikely to prevent broadcasters from switching providers. Paragraph 5.35 of the

Channel 4 Decision gives various examples of switching between access services providers;

(h) There is a degree of supply-side substitutability from UK providers of adjacent access services and overseas providers of access services;

(i) In the future it is likely that an increasing number of new, but much smaller, contracts will become available, as more television broadcasters are required to offer more access services under the OFCOM Code;

(j) Broadcasters are well informed about alternative sources of supply and typically specify the duration and terms of contracts. If existing providers failed to offer acceptable terms, some broadcasters may have the option of self supply, while others could sponsor new entry to constrain existing providers;

(k) Finally, UK broadcasters expect prices for access services to fall, and, in one case, at the time of the Decision, OFCOM is aware that one broadcaster renegotiated a significantly lower price for certain access services.

69. Much of this factual background was accepted by IMS although they disputed some aspects of it such as the significance of switching costs or the likelihood of broadcasters sponsoring market entry. However, we do not consider that the facts as found by OFCOM suggest that BBCB is able to behave, to an appreciable extent, independently of its competitors, its customers and ultimately of its consumers within the meaning of the *Hoffmann-La Roche* test.

70. IMS criticises the Channel 4 Decision for including Intelfax in the assessment of BBCB's market power, but we note that OFCOM's conclusion on this issue does not rely on the presence of Intelfax in the market. In any event, the fact that Intelfax lost the Channel 4 Contract to BBCB does not demonstrate that it was an ineffective competitor at the time of the bids for the Channel 4 Contract or that BBCB was dominant at the time of that bidding process. IMS further argues that Wordwave, a US company, was unable to enter the market on its own, but we note that it subsequently formed a joint venture with ITFC in order credibly to compete for UK contracts. In any

event, OFCOM did not deny that reputation and experience constitute a barrier to entry, but found that: (a) those criteria did not prevent IMS, BBCB and ITFC from credibly competing in future tenders, and (b) broadcasters would be prepared to sponsor new entry should they fail to obtain satisfactory bids from the existing providers.

71. IMS also criticises OFCOM's market share analysis on the basis that OFCOM wrongly included Sky's self supplied origination hours in the overall size of the market. IMS read paragraphs 6.21 – 6.25 of the Channel 4 Decision as indicating that OFCOM had decided that self supply should be included in the market only if there was evidence that the self supplying undertaking has the capacity and willingness also to supply third parties. Although IMS accepts that there is evidence that BBCB and ITFC supply third parties, there was no such evidence in relation to Sky. Sky's market share, IMS argues, should not have been included and, if the size of the market is recalibrated to exclude Sky's hours, this increases the market shares of the other participants.

72. We do not read those paragraphs in the Decision as indicating that in-house supply should only be included in the market size if there is evidence that the particular self supplier has in fact attempted to win contracts with third parties in the past. The point being made by OFCOM was, we consider, that it is clear that those undertakings which self supply in this market can exercise a competitive constraint on the independent providers by being actual or potential competitors to those independent providers. Even if Sky has not, thus far, sought third party business, OFCOM's conclusions on the absence of barriers to entry (the ready availability of technology, the active market in freelance skilled staff) mean that it is right to include its business in the overall market. The important point is that if a business opportunity arises from the behaviour of the incumbents, those undertakings currently supplying their in-house needs can and probably will expand their business by offering services to third parties.

73. In the Tribunal's judgment, OFCOM was fully entitled to arrive at the conclusions it did on the evidence before it. In these circumstances the Tribunal does not consider that OFCOM made a material error of assessment when it found that BBCB did not hold a dominant position on the market for the supply of access services to UK broadcasters in the first half of 2004.

74. This ground of appeal must therefore be rejected.

The third issue – even if an undertaking is not dominant at the time they enter into a contract, can the prohibition in Article 82 nonetheless apply if that undertaking becomes dominant during the term of the contract?

75. Although IMS maintained that BBCB was dominant both at the time the Channel 4 Contract was entered into and thereafter, at the hearing IMS advanced a further argument to counter OFCOM's assertion that BBCB had not been dominant in 2004. IMS argued that, even if BBCB were not dominant at the time that it entered into the Channel 4 Contract, and that therefore that contract could not be abusive when it was concluded, BBCB committed an abuse when it became dominant during the term of the contract. It was not necessary, IMS argued, for an undertaking to be dominant when a contract is entered into, since the effects of that contract, for example the predatory price set or the exclusivity granted, last for the duration of the contract. It is sufficient therefore for that undertaking to become dominant at some point during the alleged infringement.

76. For this part of its argument, IMS relied on the findings of OFCOM in relation to the application of Article 81(1) rather than Article 82. In its Article 81(1) analysis OFCOM has relied on market share data which *excluded* in-house supply. Calculating BBCB's market share in this way meant that at the time when the BBCB business was sold by the BBC to CBSL in August 2005 – and thus moved from being in-house supply to being external supply – the size of the overall market and BBCB's share of it had to be recalibrated. The BBC's sales volume thus expanded the size of the overall market available to the access services providers and, because the BBC had agreed that BBCB would satisfy that demand exclusively it also expanded BBCB's market share of that expanded market to between 60-70 per cent.

77. Looking at a market share of that size, IMS argued that BBCB had clearly become dominant. As soon as an undertaking holds a dominant position, it is subject to the "special responsibility" to which the Court of Justice referred in *Michelin* (see paragraph [57] of the judgment of the ECJ), such that behaviour generally considered lawful on the market in question might be considered to be an abuse of a dominant

position. This, in IMS's submission, restricts BBCB's commercial freedom to maintain the Channel 4 Contract on its present terms.

78. OFCOM argued that there is no authority for the proposition that a contract legitimately entered into becomes abusive, without any other change, if the supplier becomes dominant. Whether or not such a change could result in an infringement of Article 81(1), OFCOM maintains its stance that the only relevant time for assessing the alleged abuse for the purposes of Article 82 was the time when BBCB tendered for and/or entered into the Channel 4 Contract.

79. At the hearing, BBCB supported OFCOM's position in arguing that IMS's argument about dominance arising during the term of the contract was unfounded. They put their case in two ways. First, they said that the argument was novel, having been raised for the first time at the hearing, and that it falls outside the grounds of appeal contained in IMS's notice of appeal. Secondly, they said that even if the argument were admissible, it has no factual basis because a contract made in competitive circumstances cannot become abusive simply because one of the parties later acquires a greater market share.

80. This is even more so when the change in market share occurs in a bidding market and does not alter the available capacity in the marketplace (since the capacity supplying the BBC remained the same before and after the sale to CBSL). In the present case the "growth" in BBCB's market share during the course of the contract came about not because BBCB had achieved more sales or won a further contract. In fact the "growth" arose only if one calculated market share first as excluding in-house supply and then expanded the market because of the later inclusion of the BBC's demand. Thus, BBCB argued that the features of the relevant market previously identified meant that it would be wrong to regard BBCB as having any greater market power after the sale to CBSL than it had before.

The Tribunal's assessment

81. The Tribunal notes that it was common ground between the parties that an agreement which when it was first concluded fell outside Article 81(1), could subsequently fall within that prohibition, for instance because the market position of the parties increases over time or the nature of the market changes. An agreement, or more specifically the

economic effect of it, can become subject to the prohibition in Article 81(1) if one of the parties' market share increases during the currency of the contract (see Article 81(3) Guidelines, paragraph 44). The issue here is whether the same can be said of the prohibition in Article 82.

82. The Tribunal accepts OFCOM's and BBCB's submission that IMS's case that OFCOM should have assessed whether BBCB became dominant during the course of the Channel 4 Contract, because the adherence to the Contract thereafter could contravene Article 82, falls outside the grounds pleaded in the amended notice of appeal. Paragraph 3(1) of Schedule 8 to the 1998 Act limits the appeal to the points taken in the notice of appeal. The thrust of IMS's case in the original pleading is clear: namely that OFCOM had failed, in various respects, properly to assess BBCB's dominant position at the time it won the Channel 4 Contract. The allegation is therefore that if OFCOM had properly appreciated the competitive position of BBCB in the market at the time of the alleged infringement (that is, in the first part of 2004), it should have found that BBCB held a dominant position.

83. IMS's characterisation of this failure now as a failure by OFCOM to assess whether, because of the changes in BBCB's market position between 2004 to the date of the decision, the Channel 4 Contract *subsequently* became abusive, raises a new ground falling outside the proper scope of the appeal.

84. Secondly, we agree that, since the apparent growth in BBCB's market share in 2005 arises solely because the market was expanded once the BBC moved from in-house to external supply, that development does not materially affect the analysis conducted by OFCOM in its decision. For the reasons given in paragraphs 65 *et seq*, above, it is clear that market shares alone are not a reliable guide to market power in the access services market. We are satisfied that, in the circumstances of this case, these market changes do not alter the relative strength of the broadcasters to set the terms on which they outsource access services, in particular by way of competitive tender, and to switch suppliers if need be.

85. Thirdly, no authority was cited to us, and we are not aware of any authority, where a contract that was legitimately entered into at the time when an undertaking was not

dominant becomes abusive simply because that undertaking's market share increases. In *Tetra Pak I* where the facts are closest to the present case, the CFI held that the acquisition of an exclusive licence by a dominant company was not *per se* abusive, but that because Tetra Pak's acquisition precluded all competition on the relevant market the application of Article 82 was justified. That case is no authority therefore for the proposition that had BBCB become dominant during the lifetime of the Channel 4 Contract (which BBCB denied), this fact could, without more, mean that the contract infringed Article 82.

86. Having come to the conclusion that OFCOM was right to assess dominance according to the timeframe it used in the decision, we therefore find it unnecessary to express any views on the third issue. The first plea, alleging errors of assessment of dominance is accordingly rejected.

VII. THE ARTICLE 81 ISSUES

87. As regards the application of Article 81 EC, OFCOM found that at the time the Channel 4 Contract was concluded in July 2004, it fell within the terms of the Vertical Agreements Block Exemption. Those terms include a requirement that the supplier's (in this case BBCB's) share of the relevant market does not exceed 30 per cent and that any non-compete obligation contained in the agreement lasts no longer than 5 years. Applying paragraph 98 of the EC Commission's Guidelines on Vertical Restraints, which states that in-house production should not be taken into account when applying the market share threshold in the Vertical Agreements Block Exemption, OFCOM found that BBCB's market share at the relevant time was around 5 per cent. This meant that it was to be treated as benefiting from the block exemption and therefore falling outside the prohibition in Article 81(1). By virtue of section 10 of the 1998 Act, it fell outside the Chapter I prohibition as well.

88. When BBCB was sold to CBSL in August 2005, and had thereby become an independent company from the BBC, BBCB's market share rose above 35 per cent. Applying the provisions of the Vertical Agreements Block Exemption which give some transitional leeway to contracts in these circumstances, the Channel 4 Contract ceased to benefit from block exemption as from 1 January 2007. At that point the Channel 4

Contract still had three years left to run. Nevertheless, OFCOM found that the Channel 4 Contract did not, during that three year 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.

89. IMS challenged OFCOM's analysis under Article 81(1) on two grounds: first, IMS argued that the effective length of the exclusivity terms in the Channel 4 Contract was eight years, and not the five year term found by OFCOM, and thus it was more likely to fall within Article 81(1). Secondly, even if OFCOM had properly treated the remaining term of the Channel 4 Contract as at 1 January 2007 as being three rather than five years, OFCOM had erred in deciding that the contribution to market foreclosure brought about by that contract was *de minimis*. At the hearing IMS confirmed that its arguments, and the relief sought, only concerned the period after 1 January 2007 although some of its arguments might also have been deployed to challenge the application of the block exemption to the Contract in the first place.

The first issue - was the effective term of the Channel 4 Contract five years or eight years?

90. The question of the duration of the exclusivity under the Channel 4 Contract arose from the inclusion of an option to renew in that Contract. During the hearing the Tribunal was provided with a redacted copy of the Channel 4 Contract so that we could see how the option to renew and the Cost Reimbursement Fee fitted into the contractual scheme. Under clause 4 of the Contract, Channel 4 may elect to renew the contract for a further term of three years on the same terms and conditions as before (except that the prices are increased by a compounded RPI inflation). Renewal would mean that the total length of the contract would then be eight years. Alternatively, Channel 4 may allow the contract to expire at the end of the initial term of five years but in that case it must pay to BBCB a "Cost Reimbursement Fee".

91. The Cost Reimbursement Fee covers employment-related costs, namely outstanding holiday pay, payment in lieu of notice and contractual or statutory awards for redundancy or unfair dismissal, that may arise as a result of the possible application of Transfer of Undertakings (Protection of Employment) Regulations 1981 (S.I. 1981, No.

1794[5]). Under the terms of the contract, BBCB calculated and provided details of the amount of the Cost Reimbursement Fee at the end of the first year of the Channel 4 Contract. It was accepted by BBCB that the actual figure is a "six figure sum or thereabouts". The fee is only payable, however, if Channel 4 decides not to exercise the option to renew and the contract expires at the end of the fifth year i.e. in 2009.

92. The effect of the Cost Reimbursement Fee was considered at paragraphs 8.21 to 8.24 of the Channel 4 Decision. OFCOM estimated that the amount of the Cost Reimbursement Fee was equivalent to approximately 3 per cent of the fees that Channel 4 would likely be liable to pay to BBCB over the three additional years if it exercised the option to renew. This percentage could only be an estimate since the actual total fees that Channel 4 would have to pay over the extended three-year term would depend on variables such as inflation from 2009 to 2012 and the volume of various access services actually acquired. At the time of preparing its skeleton argument, OFCOM confirmed its 3 per cent estimate in the light of what is now known about the revenues which are being earned by BBCB under the Channel 4 Contract, as adjusted for inflation.

93. IMS submits that the practical consequence of this fee is that it is more difficult for it to win the Channel 4 Contract and more likely that BBCB will retain it. Therefore the Channel 4 Contract should be treated, for the purpose of assessing its economic effect, as if it conferred exclusivity on BBCB for eight years, i.e. until 2012. According to IMS, the 3 per cent of fees that OFCOM estimates that Channel 4 would have to pay BBCB as the price for not extending the Channel 4 Contract was a significant sum which would, in all likelihood, have to be paid by a competing provider upfront. Such a fee necessarily put smaller competing providers, such as IMS, at a competitive disadvantage. This is all the more the case if, as IMS alleges, the prices set in the Channel 4 Contract are set at a predatory level.

94. OFCOM and BBCB submit that the relevant question was whether the cost incurred by Channel 4 if it does not renew the Contract is sufficiently high to provide a material disincentive to Channel 4 allowing the contract to expire at the end of five years. This

[5] Since replaced by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (S.I. 2006, No. 246).

is a question of fact to be decided on the particular circumstances of the case, including the relationship between the Cost Reimbursement Fee and the value of the extended Channel 4 Contract.

The Tribunal's assessment

95. The Tribunal agrees with OFCOM that the relevant question is whether the Cost Reimbursement Fee hinders or discourages Channel 4 from allowing the contract to expire at the end of the initial five-year term. The Tribunal is not concerned with the negotiations that led to the inclusion of the Cost Reimbursement Fee or its commercial rationale.

96. A key element in this is, in our judgment, whether prices for access services are falling or rising. Given that the option available to Channel 4 is to renew at the same or higher prices than prevailed during the initial term, clearly the financial incentive to re-tender the contract, even if it means paying the Cost Reimbursement Fee, is likely to be stronger if the bids that are likely to be tendered on the expiry of the initial term are lower than the prices which would prevail if the option were exercised.

97. Although the Tribunal recognises that if, as IMS alleges, the prices included in the Channel 4 Contract were set at a very low rate, that might mean that lower bids are less likely, there was some evidence in the Channel 4 Decision to the effect that prices for access services are falling. In paragraph 7.59 of the Decision, OFCOM states that broadcasters generally consider that prices are on a downward trend. It quotes Sky as saying that with technology developing and because providers can operate with fewer people, prices will drop. ITV is also quoted as saying that it expects a price decrease over the next few years. IMS accepted that "free market" access services prices were falling, by which it presumably meant prices other than those charged under the BBC and Channel 4 contracts, though it did not accept that prices were falling across the market.

98. On the basis of the evidence set out in the Channel 4 Decision, the Tribunal finds that it would be open to providers to undercut the price currently being paid under the Channel 4 Contract or offer to improve the quality of the services being provided or both, so that Channel 4 would find it economically beneficial (and thus commercially

rational) to pay the Cost Reimbursement Fee and switch providers at the end of the initial five-year term of the Channel 4 Contract in 2009.

99. It follows that the relevant duration for the purposes of applying Article 81(1), and indeed the Vertical Agreements Block Exemption, was the period during which the agreement cannot be effectively terminated[6] which, in this case, was five years.

The second issue – was OFCOM correct to conclude that the Channel 4 Contract did not infringe Article 81(1) after 1 January 2007?

100. IMS argues that OFCOM erred in its assessment of the effect of the remaining term of the Contract as from 1 January 2007 even if it is right to treat that remaining term as three years not five.

101. The Channel 4 Decision dealt with this aspect of its analysis rather shortly:

> "8.16 Ofcom's analysis of the structure of the market and [BBCB's] market power is set out above in relation to Ofcom's assessment of dominance. This has shown that there are at least three access services providers that can credibly compete for the large contracts in the relevant market (see paragraph 7.42) and that buyers of access services typically possess a significant degree of countervailing buyer power in their dealings with access services providers (see paragraph 7.72). Further, in the relevant market contracts are only awarded infrequently meaning that a market position at any particular point in time may not be permanent feature and could change rapidly (albeit at infrequent intervals – see paragraph 7.17). Applying the Commission's Guidelines and taking into account these factors, as well as the nature of the products or services in question and the duration of the remaining non-compete obligation after the contract loses the benefit of the Block Exemption, Ofcom has concluded that the remaining term of the non-compete obligation would be unlikely to have the effect of appreciably restricting competition in the relevant market. Further, Ofcom believes that given the market structure in this case, any cumulative impact of agreements would not alter this conclusion."

102. It is clear from the Decision, and OFCOM fully accepted, that the non-infringement decision taken as regards Article 81 was based on a finding that there was no appreciable effect on competition so that the Contract falls outside Article 81(1). OFCOM did not consider whether the Contract would have satisfied the criteria in Article 81(3) had it fallen within the prohibition.

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[6] See, to that effect, Park J in *Crehan v Inntrepreneur Pub Company (CPC)* [2003] EWHC 1510 (Ch), paragraph [179].

103. IMS argues first that, based on the Vertical Restraints Guidelines, the factors taken into account by OFCOM when assessing the Channel 4 Contract were relevant to the application of Article 81(3) rather than Article 81(1). Secondly, IMS argues that OFCOM is not permitted to "recycle" its Article 82 analysis of the Channel 4 Contract in 2004 for the purposes of considering that contract in 2007 under Article 81.

104. IMS also referred to the decision of the ECJ in Case C-214/99 *Neste Markkinointi Oy v Yötuuli Ky* [2000] ECR I-11121 ("*Neste*"). That case concerned an exclusive purchasing agreement to be terminated upon a short period of notice between Neste Markkinointi Oy, a supplier of motor fuels, and Yötuuli Ky, the owner of a service station in Finland. Following a request for a preliminary ruling by the Tampere District Court the Tampereen Käräjäoikeus, the ECJ held that, because of the relatively short notice period, the contract did not make a significant contribution to any foreclosure of the market for supplying petrol to filling stations. IMS referred to the Opinion of Advocate General Fennelly which noted that "unlike, for example, in the beer and ice-cream markets, … there is little or only insignificant brand loyalty among consumers" in the market for the supply of petrol (at paragraph [35] of his Opinion). The contracts which were held not to have an appreciable effect in that case because of their short notice period and the lack of brand loyalty can be contrasted with the contract in the instant case where OFCOM found that a well-established brand is likely to be favoured over a less-established one. IMS further submitted that *Neste* was "as far as the law had gone" as regards finding that an agreement falling outside the block exemption did not fall within the prohibition in Article 81(1).

105. As to the proper analysis of the Channel 4 Contract, IMS refers the Tribunal to paragraphs 141 and 145 of the Vertical Restraints Guidelines which, in its view, make clear that non-dominant companies whose market shares exceed 30 per cent need to justify non-compete obligations of more than one year. At the hearing IMS also referred to paragraph 135 of the Guidelines, which states that: "where an undertaking is dominant or becomes dominant as a consequence of the vertical agreement, a vertical restraint that has appreciable anti-competitive effects can in principle not be exempted" by Article 81(3). IMS contends that BBCB is dominant (or, at least, should be regarded as being in a strong market position) and that, therefore, the Channel 4 Contract not

only fell within Article 81(1), but was incapable of satisfying the criteria set out in Article 81(3).

106. OFCOM submits, first of all, that it does not follow that a contract which no longer benefits from a block exemption necessarily infringes Article 81(1). Second, OFCOM argues that it analysed the effects of the Channel 4 Contract in accordance with the case law of the Community Courts, in particular the judgment of the ECJ in Case C-234/89 *Delimitis v Henninger Bräu AG* [1991] ECR I-935 ("*Delimitis*"), and the relevant provisions of the Vertical Restraints Guidelines. The core of OFCOM's reasoning is set out at paragraph 8.16 of the Decision, set out above, which cross-refers to its Article 82 assessment of the structure of the market and BBCB's market power and concludes that the remaining term of the Channel 4 Contract would be unlikely to have the effect of appreciably restricting competition in the relevant market. In OFCOM's submission, the alternative analysis put forward by IMS does not cast any real doubt on the correctness of that conclusion.

107. BBCB agrees with and adopts OFCOM's submissions on this issue and contends that the plea should be dismissed.

The Tribunal's assessment

108. The central issue raised is whether OFCOM should have found that the Channel 4 Contract fell within Article 81(1) as from 1 January 2007 because: (a) it provided for the exclusive provision of access services; (b) it still had (at least) three years left to run; (c) the business covered by the Contract represented 10 per cent of the total market for access services; and (d) one of the parties to that contract, BBCB, had a significant share of the market. The nub of IMS's case is that OFCOM's analysis is inadequately supported by its reasoning or the facts upon which it relies.

109. It is apparent from paragraph 62 of the Vertical Restraints Guidelines that there is no presumption that a vertical agreement which falls outside the Vertical Agreements Block Exemption will fall within the prohibition in Article 81(1): the agreement will need to be assessed on the particular circumstances of the case. The EC Commission states in the Guidelines that a "full competition analysis" is called for and sets out a number of factors which it considers to be relevant, including the market position of the

parties to the agreement, its competitors, barriers to entry, the coverage of the market by similar agreements and the duration of the agreements (at paragraphs 122-133).

110. The effects of an exclusive purchasing agreement on competition have to be assessed in the economic and legal context in which the agreement occurs and compared to the situation that would exist in its absence (Case 56/65 *Technique Minière v Machinenbau Ulm* [1966] ECR 235, at p. 250). In the absence of the contested Channel 4 Contract, IMS accepted in its notice of appeal that an access services provider may legitimately enter into an exclusive agreement pursuant to a tender, and that the period of time can be set by the broadcaster.

111. In order to determine whether the Channel 4 Contract falls within Article 81(1), it is also important to consider whether all the similar agreements entered into in the relevant market and the other features of the economic and legal context of the agreements at issue, show that those agreements cumulatively have the effect of foreclosing access to that market (*Delimitis*, paragraph [23]: often referred to as *Delimitis* condition 1). If, on such examination, the market is found to be foreclosed, it is then necessary to assess the extent to which the Channel 4 Contract contributes to the cumulative effect produced; only those agreements which make a significant contribution to market foreclosure may be caught by Article 81(1) (*Delimitis*, paragraph [24]: referred to as *Delimitis* condition 2).

112. In the Channel 4 Decision, OFCOM applied the foregoing principles and found that a cumulative effect may arise from the fact that a supplier of access services to one television broadcaster has a similar or longer term exclusive agreement to supply access services to another television broadcaster. However, as we have already described OFCOM went on to find that the market was not foreclosed because, *inter alia*, there were at least three access services providers that can credibly compete for the large contracts.

113. The Tribunal rejects IMS's criticism that the foregoing analysis wrongly applied factors that were only relevant to the assessment of Article 81(3) and not Article 81(1). IMS based its argument on the fact that the Contents page of the Vertical Restraints Guidelines lists relevant factors for the assessment of Article 81(3) as being found in

paragraphs 137-229. However, it is readily apparent from the paragraphs in question that they provide guidance on the application of Article 81(1) and Article 81(3) to specific vertical restraints. It would appear that there has simply been a typographical error in the contents page.

114. As regards IMS's concern that OFCOM has simply "recycled" the Article 82 analysis of the market structure in 2004 for the purposes of establishing that there was no infringement of Article 81(1) in 2007, the Tribunal agrees that the Channel 4 Decision is not quite as clear and as fully developed on this issue as perhaps it could be. It is true that OFCOM is not required to discuss in its decisions each argument advanced by the interested parties or, indeed, to repeat its own findings. Nevertheless, within the context of the application of Article 81(1) to the present case, OFCOM's analysis was to a large extent a simple 'read-across' from the assessment of the question of dominance to the question whether the remaining term of the Channel 4 Contract was likely to have appreciable adverse effects on competition.

115. There is an important difference between the degree of market power required for the purposes of Articles 81 and 82, as noted by the EC Commission at paragraph 25 of the Article 81(3) Guidelines:

> "The degree of market power normally required for the finding of an infringement under Article 81(1) in the case of agreements that are restrictive of competition by effect is less than the degree of market power required for a finding of dominance under Article 82."

116. An agreement can properly be regarded as appreciably restricting competition under Article 81(1) if it satisfies a much lower threshold than that set for determining whether an undertaking holds a dominant position under Article 82. It must therefore be determined whether the reasoning in the Channel 4 Decision, taken as a whole, indicates that OFCOM has erred in its analysis of the foreclosure effect of the Channel 4 Contract for the purposes of Article 81(1).

117. In determining whether the Channel 4 Contract has the effect of appreciably restricting competition, it is necessary to ask whether it could result in BBCB being able to engage in conduct adverse to the interests of customers, for example by reducing output and thereby raising price. We consider that there would likely be sufficient competitive

constraints upon BBCB to prevent it from doing so: there are at least three access service providers, namely BBCB, IMS and ITFC, all of whom could credibly compete for such contracts; there appears to be spare capacity, suggesting that others could compete if BBCB were to raise its prices; and there are well-informed buyers, in the form of BBC, ITV, Channel 4, Five and Sky (together accounting for approximately 94 per cent of all origination hours purchased), who could use their power to switch providers or even sponsor new entry to counteract any anti-competitive initiative by BBCB.

118. In the absence of any evidence put forward by IMS to the contrary, the Tribunal accepts that the factual conclusions of OFCOM were properly based on the detailed evidence put forward by numerous broadcasters and access services providers. In particular, in the context of the BBC and Channel 4 contracts, it does not seem to the Tribunal necessary to presuppose that these contracts will be "unavailable in future" to persons other than BBCB. On the evidence before the Tribunal, IMS's contention that IMS and ITFC will be unable to bid for these contracts is not substantiated; rather there is a real possibility of competition between existing access services providers and of broadcasters being able to influence the competitive environment which means that the first condition of *Delimitis* is not satisfied.

119. We do not accept IMS' "recycling" argument in so far as it sought to criticise OFCOM for using its assessment of the market situation as at the start of 2004 (for the purposes of its Article 82 analysis) then to analyse the competitive effect of the Channel 4 Contract as at 1 January 2007. At the hearing IMS accepted that only two changes in competitive conditions occurred from 2004 to 2007, namely Intelfax's exit from the market after BBCB won the Channel 4 Contract and the sale of BBCB to CBSL. However, as explained above, neither of those changes altered the competitiveness of the market to a material extent and therefore cannot undermine the validity of OFCOM's conclusion.

120. Furthermore, although IMS argues more generally that an exclusivity period of three years is by itself sufficient to engage Article 81(1), no convincing argument or evidence has been put forward to persuade us that this is right in this case. The Tribunal notes that paragraph 141 of the Vertical Restraints Guidelines states:

> "Similarly, the longer the duration of the non-compete obligations, the more significant foreclosure is likely to be. Non-compete obligations shorter than one year entered into by non-dominant companies are in general not considered to give rise to appreciable anti-competitive effects or net negative effects. Non-compete obligations between one and five years entered into by non-dominant companies usually require a proper balancing of pro- and anti-competitive effects, while non-compete obligations exceeding five years are for most types of investments not considered necessary to achieve the claimed efficiencies or the efficiencies are not sufficient to outweigh their foreclosure effect."

121. But the subsequent paragraphs of the Guidelines go on to stress the importance of the factors to which OFCOM in fact had regard in its analysis in this case: whether the undertaking's competitors are of a similar size and able to offer equally attractive products; the existence or absence of entry barriers; the extent of countervailing buyer power and whether the trade is in an intermediate or final product. OFCOM looked carefully at all these factors and we do not find that there is any error of reasoning, analysis or law which would justify setting the decision aside.

122. IMS regarded the ECJ's reasoning in *Neste* as demonstrating that a three year exclusive supply agreement normally falls within Article 81(1), unless there is an efficiency justification. It seems to us, however, that *Neste* does not warrant such a conclusion. It was necessary there to consider exclusive purchasing agreements for the supply of motor fuel which may be terminated upon giving a short period of notice and which represented only a very small proportion of all the agreements entered into by the supplier. The Court ruled that such agreements could not be regarded as making a significant contribution to the cumulative foreclosure effect and therefore did not breach Article 81(1). However, *Neste* is not to be interpreted as laying down any rule to the effect that agreements of a longer duration necessarily do fall within Article 81(1). Certainly, the length of the Channel 4 Contract exceeds that of the agreements at issue in *Neste*, but, in light of the specific features of the access services market, discussed above, none of the arguments of IMS undermines OFCOM's conclusion on the question.

123. The references to *Neste* and the Vertical Restraints Guidelines confirm that an assessment of the competitive effect of an agreement requires careful market analysis and should take into account the surrounding circumstances, including the duration of the agreement and buyer power. On the facts before the Tribunal, we are not satisfied

that we should set aside section 8 of the contested decision. It follows that the second ground of appeal must also be rejected as unfounded.

124. In light of all the foregoing, the Tribunal unanimously dismisses the appeal in its entirety.

Vivien Rose | Michael Blair | Paul Stoneman

Charles Dhanowa
Registrar

Date: 20 May 2008