BAUER MEDIA GROUP / CELADOR ENTERTAINMENT LIMITED, LINCS FM GROUP LIMITED, WIRELESS GROUP LIMITED, UKRD GROUP LIMITED: PHASE 2 MERGER INQUIRY

GLOBAL'S RESPONSE TO PROVISIONAL FINDINGS AND NOTICE OF POSSIBLE REMEDIES

1. Introduction

1.1 The CMA published its Provisional Findings and Notice of Possible Remedies in relation to the acquisitions by Bauer Media Group of certain businesses of Celador Entertainment Limited, Lincs FM Group Limited, Wireless Group Limited and UKRD Group Limited on 5th December 2019.

1.2 Global wishes to comment on the CMA's Provisional Findings in respect of the long term viability of First Radio Sales (FRS), and the related question in the CMA's Notice of Possible Remedies as to whether a behavioural remedy would be appropriate in respect of the SLC which the CMA has found in the market for representation of independent radio stations for national advertising in the UK. Global considers that these two issues go hand in hand and that therefore it is appropriate to make a single submission to the CMA on both Provisional Findings and the Notice of Possible Remedies.

1.3 This submission is divided into two main sections. First, we consider the CMA's Provisional Findings in relation to FRS' long-term future. In this section, we show that the four factors on which the CMA has based its conclusions do not in fact support the contention that FRS' exit in the next 10 years is most likely or plausible. In support of this position, we address the assumptions underlying Bauer's calculations regarding the longevity of FRS, and the likelihood of the Acquired Businesses being acquired absent the Bauer Transaction.

1.4 In the second section, we discuss potential remedies. We explain why we consider a structural remedy would be appropriate and set out the scale of a structural remedy that would be required in order to be effective. We also consider the application of a behavioural remedy. We explain why we consider that there would be considerable risk that such a remedy would not address the SLC and therefore why we do not consider that a behavioural remedy is appropriate in this case.

2. Provisional Findings in relation to FRS' long-term future

2.1 In its assessment of the counterfactual, the CMA has concluded that FRS is not a failing firm and would "*have remained active providing national advertising sales representation to radio stations*"[1] had Bauer not acquired the Acquired Businesses. We agree with this assessment. FRS has been trading successfully for 17 years, and, as we show later in this submission, the quantitative evidence in fact shows that stations represented by FRS have improved their position over recent years.

[1] Provisional Findings, paragraph 6.67

2.2 Nonetheless, the CMA has concluded that "while the timing of closure is uncertain, we provisionally conclude that the most likely longer-term position for FRS is that it would have exited the market at some point … within, at most, ten years."[2] This is an extraordinarily speculative assessment.

2.3 Based heavily on evidence submitted by Bauer[3], the CMA cites a number of factors which make FRS's position "*potentially vulnerable*".[4] These factors are:

(a) Local radio being in decline due to national commercial radio;

(b) Additional FRS stations seeking alternate sales representation;

(c) Changes to Ofcom's localness requirements; and

(d) The mutually reinforcing interaction between station exits and declining advertising revenues.

2.4 Global considers that a scenario which contemplates the exit of FRS within the next 10 years is not only highly speculative, but is also not plausible based on these factors and the cited evidence. Global does not consider that such an event is the "*most likely longer-term position for FRS*".[5] In this section, we set out why these factors do not in fact demonstrate to the necessary legal standard that FRS's future is necessarily limited. We then consider whether the CMA has adequately tested the assumptions underlying Bauer's calculations regarding the longevity of FRS. Lastly, we argue that the CMA cannot assume that the Acquired Businesses would have been sold absent the Bauer Transaction. First, however, we consider how likely an event should be in order for the CMA to take it into account in the counterfactual analysis.

3. The CMA's approach is in the Provision Findings has a questionable legal basis

3.1 The CMA will typically incorporate into the counterfactual

"only those aspects of scenarios that appear likely on the basis of the facts available to [the CMA] and the extent of [the CMA's] ability to foresee future developments; [the CMA] seeks to avoid importing into its assessment any spurious claims to accurate prediction or foresight."[6]

3.1 The Merger Guidelines state that the CMA may consider events or circumstances which are "*not sufficiently certain to include in the counterfactual*".[7] The Merger Guidelines refer to the Court of Appeal judgment in *BSkyB and Virgin Media v Competition Commission and BERR* [2010] EWCA CIV 2. No further cases are cited.

3.2 In this case, the Court of Appeal cited with approval paragraphs 91 and 92 of the Tribunal's decision. In these paragraphs, the Tribunal had argued that the counterfactual analysis should take into account "*the potential for change in the market*". However, this was not an unfettered discretion - the Tribunal went on to say

[2] Provisional Findings, paragraph 6.73
[3] Provisional Findings, paragraph 6.62
[4] Provisional Findings, paragraph 6.70
[5] Provisional Findings, paragraph 6.73
[6] Merger Guidelines, paragraph 4.3.6
[7] Paragraph 4.3.2

that the Commission was entitled to take into account "*plausible situations or strategies which might result in the postulated independent ITV ceasing to be so*" (emphasis added).

3.3 The CMA accepts that its assessment of FRS' long-term future goes beyond its typical counterfactual framework.[8] Indeed, the CMA accepts that the long-term assessment is "*inherently uncertain, as precisely what events could happen, and their timing, cannot be predicted*".[9] We agree with this conclusion.

3.4 As we explain below, we consider that on the basis of the evidence presented by the CMA, the exit of FRS in the next 10 years is highly speculative (nor is it the "*most likely*" longer term outcome as proposed by the CMA[10]). Consequently, the CMA's counterfactual analysis goes well beyond what was contemplated by the Court of Appeal in the *BSkyB* case or by the CMA in its own Merger Guidelines.

4. The CMA's reliance on relative aggregate listening share between local and national commercial radio to draw conclusions about future FRS performance is unsound

4.1 It is correct at a general level that, in aggregate, national commercial stations are growing their listening share, and local commercial stations, in aggregate, are seeing a reduction in listening share. However, this is not the case in respect of the radio stations currently represented by FRS.

4.2 Table 1 below shows the reach, listening hours and commercial share of FRS stations in the most recent RAJAR survey alongside the FRS totals 5 and 10 years ago.[11]

Table 1: Reach, hours and commercial share for FRS stations (thousands)

	Reach	Hours	Commercial share
Q3 2009	4,813	43,721	10.1%
Q3 2014	5,543	46,014	10.4%
Q3 2019	4,475	35,664	7.4%

Source: RAJAR

4.3 FRS' total listening hours have fluctuated as stations' individual performance has fluctuated and also as stations have joined and left FRS. Over a 10-year period, FRS' reach has fallen by 7% and listening hours by 18%.

4.4 However, all of the decline in reach has occurred in the past 5 years. This decline, in both total reach and its listening hours, has been due entirely to the loss of large stations or a net loss of stations over this period, rather than to any structural decline in listening to local stations.

[8] Provisional Findings paragraph 6.69
[9] Supra
[10] Provisional Findings paragraph 6.73.
[11] Bauer submitted evidence to the CMA that FRS listener reach has fallen between 2015 and 2018 but the details have been redacted, despite RAJAR audience data being in the public domain.

4.5 To assess whether a shift in listening from local to national stations will have an impact on FRS' future viability, it is more instructive to consider the performance over time of the stations currently represented by FRS. (The impact of stations leaving FRS is discussed further below.)

4.6 Table 2 below shows reach, listening hours and commercial listening share for the stations which were represented by FRS as at Q3 2019 (the latest available RAJAR data). In contrast to the mistaken impression formed by the CMA, these data clearly show that in aggregate the stations currently represented by FRS have not suffered any structural decline in their reach or listening hours. On the contrary, the stations currently represented by FRS have grown their reach consistently over the past 10 years; while hours grew between 2009 and 2014 before declining slightly between 2014 and 2019, they remain 17% above their 2009 level.

Table 2: Reach, hours and commercial share for current FRS stations (thousands)

	Reach	Hours	Commercial Share
Q3 2009	3,340	30,373	7.0%
Q3 2014	4,343	37,440	8.4%
Q3 2019	4,475	35,664	7.4%

Source: RAJAR

4.7 This evidence clearly shows that FRS's continued presence in the market is not in any way under threat due to the underlying performance of the stations it represents, either because of a shift in listening from local to national stations or for any other reason. On the contrary, the stations currently represented by FRS have grown their reach and listening hours during the past 10 years, with only a modest decline in listening hours of under 5% over the past 5 years, offset by a growth in reach.

4.8 The above analysis includes stations which were not broadcasting in 2009 or 2014 but which were represented by FRS in 2019. Even if it were the case that FRS's current stations were seeing a reduction in listening hours as a result of the shift in listening from local to national commercial stations, this would need to be balanced against the opportunity which exists for FRS to represent new digital stations, whether broadcast locally or nationally. For example, the following new digital stations have all joined FRS in the past 5 years: -

(a) Nation Radio London, Nation Radio Scotland and Dragon Radio Wales operated by Nation Radio

(b) Mi-Soul

(c) Chris Country

(d) Love 80s Liverpool

(e) Pulse 80s, Wave 80s and Signal 80s operated by Wireless in addition to News UK's digital stations in Scotland, Scottish Sun 80s, Scottish Sun Hits, Scottish Sun Greatest Hits

4.9 Based on the objective evidence above, the CMA cannot reasonably have reached the provisional conclusion that FRS's competitive position is in inexorable decline – a conclusion that would be necessary to sustain the provisional conclusion that FRS will exit in the market in the next 10 years. On the contrary, the evidence actually shows the diametric opposite – namely that (a) stations currently represented by FRS have in aggregate expanded their reach and listening hours; and (b) FRS has won new representation mandates for new stations coming to market. Neither of these basic facts is consistent with the CMA's provisional conclusion.

5. The likelihood of a material number of FRS stations seeking alternate representation is likely overstated

5.1 Again, the objective evidence available to Global does not support the provisional conclusion reached by the CMA**.**

5.2 Global is not able to respond fully to the CMA's reasoning here as the basis for concluding that more stations may leave FRS has been redacted. However, Global would make the following comments.

5.1 *First*, no stations have left FRS in the past five years as a result of concluding a national sales representation agreement with Bauer. We agree that Bauer is a potential competitor to FRS but we do not believe that there is any evidence to suggest that, absent the acquisitions, FRS' viability would in any way be at risk because of stations leaving FRS for Bauer. No objective or verifiable evidence has been advanced in the CMA's provisional conclusions to sustain this hypothesis.

5.2 *Second,* nor is it plausible that local FRS stations will switch their representation to Global. With the exception of Quidem, the only stations which have moved their national sales representation from FRS to Global have done so following being acquired by Global or Communicorp.

5.3 *Third,* Global has provided evidence to the CMA on [✄]. We stated that "[✄]*"*[12] because of the [✄] and the fact that there are very few independent stations [✄] and which also broadcast to areas not already served by Global's brands. Many of FRS' customer stations do not wish to enter into a brand licensing agreement[13]. The CMA agreed and therefore concluded that even amongst those stations willing to enter into a brand licence agreement, "*there are not many independent radio stations for whom Global would be a viable option, because of the independent stations' limited scale and their potential overlap with Global's stations.*"[14]

[12] Note of CMA call with Global on 23 October
[13] Provisional Findings, paragraph 8.9
[14] Provisional Findings, paragraph 8.41

5.4 *Fourth*, even if some small stations did leave FRS, we do not consider that this would have a material impact on FRS' viability. [15] Indeed, the CMA has concluded that "*most of FRS' client stations, apart from the Acquired Businesses, are small, so there would be no substantial impact on FRS' profitability if individual stations did leave."*[16] In fact, Global is aware of a net gain of 4 stations for FRS over the last 5 years.[17]

5.5 There is therefore no reason to believe that independent stations accounting for a significant proportion of FRS' total listening would be likely to leave FRS to secure national sales representation by Global by entering into a brand licensing agreement. Nor does the available evidence support the provisional conclusion that, in the next several years, there will be an obvious switch of stations to Bauer which would threaten FRS's viability. On the contrary, the available evidence of competition over recent years suggests that, whilst the constituent stations within FRS may continue to change, FRS itself will continue to provide viable and credible national sales representation alongside Global and Bauer. There is no evidence that anything will change in local radio competition in the coming years to suggest that the current pattern (or structure) of competition will obviously change. As explained in the next part of this response, the CMA's provisional view that changes in Ofcom's localness requirements will provide the impetus for this change in competition is fundamentally misconceived.

6. The CMA has fundamentally misunderstood the implications for FRS' stations of the change in Ofcom's localness requirements

6.1 Global is currently the only radio group which offers brand and content licence agreements alongside national sales agreements. We refer the CMA to the evidence we have already provided to CMA in respect of [✂] regarding brand and content licensing agreements. Quidem is the only group to have taken advantage of this opportunity following Ofcom's relaxation of localness requirements in October 2018.

6.2 Global has submitted evidence to the CMA [✂]. There is no objective market evidence that the independent stations in FRS have shown any greater appetite to enter into brand licensing agreements as a result of Ofcom's relaxation of localness requirements. The [✂] to entering into a brand licensing agreement remain precisely the same as before, namely:

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[15] Global has analysed the latest RAJAR data for FRS stations. Apart from the Acquired Businesses and Nation Radio, which we understand may have entered into a national sales representation agreement with Bauer at the approximately the same time as it agreed to acquire various stations from Bauer, all other station groups account for 6% or less of FRS total listening hours. See Table 3 below.

[16] Provisional Findings, paragraph 20

[17] The only stations which Global are aware of having left FRS in the past 5 years are the following 14 stations: 2BR and Juice FM Liverpool which were acquired by Global in 2018; Connect FM, which was acquired by Communicorp and entered into a brand licence agreement with Global in 2019; Touch FM, Banbury Sound and Rugby FM, operated by Quidem which entered into a brand licence agreement with Global in 2019; Spire FM, Minster FM, Eagle Radio, and Yorkshire Coast Radio operated by UKRD; Five FM and Seven FM (part of the Q Radio network in Northern Ireland); 3FM; and Star Radio Darlington. During the same period, the following 17 stations joined FRS: Time 107.5; Channel 103 FM and Island FM operated by Tindle Radio; Ipswich 102 Wave FM, operated by DC Thomson; Nation Radio London, Nation Radio Scotland and Dragon Radio Wales operated by Nation Radio; Mi-Soul, a digital station; Chris Country, a digital station; Love 80s Liverpool, a digital station; Pulse 80s, Wave 80s and Signal 80s, digital stations operated by Wireless; Wireless' digital stations in Scotland, Scottish Sun 80s, Scottish Sun Hits, Scottish Sun Greatest Hits.

(a) [✄].

(b) The fact that few stations have sufficient scale [✄]; and

(c) The fact that few stations broadcast in areas not already covered by Global's brands.

6.3 FRS stations had the opportunity to enter into such arrangements before Ofcom's relaxation of localness requirements in 2018, and the CMA has not shown why it is more likely than not the FRS' stations would do so over the next ten years (particularly given the lack of brand licensors, for the reasons outlined above).

6.4 In any event, the relaxation of Ofcom's localness requirements were – as the CMA recognises – in part designed to help local radio stations compete more effectively for advertising revenues, which would <u>strengthen</u> rather than weaken their position. In other words, to sustain the provisional conclusion set out by the CMA, the CMA would need to conclude that the relaxation of the localness requirements has achieved the diametric opposite of the policy goals intended by Ofcom. Global is not aware of any empirical evidence whatsoever that would permit the CMA to reach this view – and certainly no such evidence is set out in the Provisional Findings.

6.5 Furthermore, the idea that FRS' competitive position has been weakened by the relaxation of rules on local programming is directly contradicted by evidence FRS has itself submitted in previous competition investigations. In its evidence to the Competition Commission in 2012 in relation to Global's acquisition of GMG, FRS gave evidence that "*it considered its ability to stay in touch with a more local community to be a key strength and defining quality in a time when the overall market had moved away from local content.*"[18]

6.6 There is therefore no evidence that Ofcom's relaxation of localness requirements will have a material impact on FRS' viability in the future. The CMA's provisional conclusion on FRS's future viability is not therefore supported by the evidence on this point.

7. The CMA cannot rely on any 'mutually reinforcing interaction' between station exits and declining advertising revenues absent stronger evidence that either is probable over such a long-time horizon

7.1 This appears to us to be a circular argument. It is correct that "a loss of significant scale" would make FRS less attractive to advertisers but, having been trading successfully for 17 years, there is no evidence that, absent the Bauer acquisitions, FRS would suffer such a significant loss of scale unless a number of its larger station customers were to exit.

7.2 FRS has traded successfully for many years. Smaller independent stations have joined and left FRS over the years without undermining FRS' viability. The stations currently represented by FRS have seen their reach and listening hours grow over the past 10 years, with audiences stable over the last 5 years. There is no evidence that recent

[18] Global/GMG: Summary of hearing with First Radio Sales on 21 November 2012

regulatory changes will result in more stations leaving, and new digital stations are joining FRS.

7.3 In order to reach such a highly speculative conclusion, the CMA would need to advance concrete, coherent and compelling evidence regarding all of:

(a) the likely behaviour of the pre-Bauer acquisition FRS constituent stations in the next 10 years;

(b) the likely behaviour of new radio stations coming to market in the next 10 years and their representation by FRS;

(c) the likely impact on FRS's attractiveness to advertisers over that time; and

(d) the likely impact on FRS's financial position over that time period.

Every one of these propositions is speculative on its own: taken together, they represent a set of conditions so uncertain and vague that the evidential burden on the CMA to demonstrate them is very high. As it is, Global has explained above that the available evidence that does exist shows the very opposite of the CMA's speculative conclusion.

8. The CMA does not appear to have adequately tested the assumptions underlying Bauer's calculations regarding the longevity of FRS

8.1 The degree of speculation (as opposed to concrete, coherent and compelling evidence) which sustains the CMA's provisional conclusions is also apparent from the CMA's treatment of the evidence on FRS' likely future viability.

8.2 The choice of the change in FRS revenue between FY17 and FY18 as the long run trend does not appear to be justified, nor is the argument that this is conservative "given the wider trends in commercial share of listening and the shift to digital"[19]. As noted above, the stations currently represented by FRS show a long-term trend of growth in both reach and listening hours, while FRS has recently attracted a number of new digital stations. The basic foundation of the analysis in the Appendix C is not therefore consistent with the real-world evidence of FRS's performance in recent years. The CMA cannot therefore legitimately say that the proposed model of financial performance is based on actual evidence. The Appendix C model is speculative at best.

8.3 Also, the model in Appendix C specifically assumes that no investments are made "which might be necessary for FRS to remain competitive"[20], but this is a specific strategic response and not necessarily the only one or the most appropriate. Again, there is no evidence on which to base this assumption, and – given that this is a critical input to the analysis – the CMA cannot base its Provisional Findings on such a speculative input.

9. The CMA's reasoning as to why FRS would likely exit relies on an alternate merger scenario, which would trigger an equivalent merger review

9.1 For the reasons discussed above, the only circumstances in which FRS might become financially unviable in the future is if it were to lose one or more of its larger customers.

[19] Provisional Findings, Appendix C, paragraph 12
[20] Provisional Findings, Appendix C, paragraph 12

As shown below in Table 3, all of FRS' larger customers, apart from Nation, are Acquired Businesses.

Table 3: FRS listening hours by radio group

Group	Hours	% of FRS total
Wireless	6,936	19%
Lincs	6,273	18%
Celador	4,895	14%
Nation	2,839	8%
UKRD	2,675	8%
News UK	2,053	6%
Q Radio	1,958	5%
Media Sound Holdings	1,203	3%
DC Thomson	1,199	3%
KMFM	994	3%
Tindle	834	2%
Time FM	545	2%
Adventure	494	1%
Oxis	465	1%
Mi-Soul	359	1%
Radio Plymouth	296	1%
Radio Exe	285	1%
Dee	265	1%
Fosse	253	1%
Central FM	249	1%
Chris Country	226	1%
Radio Mansfield	177	0%
Revolution	190	1%

Source: RAJAR

9.2 This appears to be accepted by the CMA in paragraph 6.73 where the CMA states that, "*in the light of the factors noted in paragraph 6.70, it seems likely that one of more of the Acquired Businesses would have been sold and removed from FRS representation within a number of years beyond the time period relevant to the counterfactual. A loss of significant scale is likely to make FRS less attractive to advertisers and so increase the likelihood of further stations choosing to leave. Because FRS' profitability is dependent on maintaining a scale of turnover (as potential for cost-savings in proportion to scale appear limited) it is likely that it would no longer be economically viable to continue in such circumstances.*"

9.3 Global questions the logic of this statement since none of the factors listed in paragraph 6.70 are relevant to the question of whether or not the Acquired Businesses would anyway have been sold in the longer term. Notwithstanding this, we agree that the only circumstances in which FRS would be likely to see a significant loss of scale would be if one or more of the Acquired Businesses were to be acquired and taken out of FRS.

9.4 Global and Bauer are the only players who have made any significant acquisitions in UK local commercial radio in the last 5 years. That is not say that other buyers would not emerge in the right financial circumstances, but for purposes of assessment of the counterfactual there is plainly insufficient evidence for the CMA to conclude that another player would enter the market or acquire the departing FRS stations. Even if there were a new entrant, it would need to continue to procure national sales representation since only Global, Bauer and Wireless (whose sales operation is specialised and sells only Talksport and Wireless' national digital stations) have their own sales houses.

9.5 Therefore, the only reasonable counterfactual hypothesis that the CMA can have considered which is consistent with the evidence in which "*one or more of the Acquired Businesses would have been sold and removed from FRS*" would be if the businesses in question were acquired either by Bauer or by Global. There are two major problems with this analysis.

(a) First, such a transaction would clearly fall within the scope of the CMA's merger review regime. The CMA cannot assume that such a transaction would receive approval; indeed given the market positions of the parties, it may not be likely or plausible that such a transaction would be approved. The CMA cannot therefore reasonably adopt as part of its counterfactual a scenario in which it prejudges the outcome of a future CMA competition assessment.

(b) Second, in any event, this argument is entirely circular: the CMA's assessment essentially amounts to no more than saying that if Bauer were the only buyer available for the local stations in the future, then there can be no SLC arising from a purchase now. This is nonsensical and inconsistent with CMA's own Merger Guidelines.

10. <u>Potential Remedies to address the SLC in the market for the supply of representation for national advertising to independent radio stations</u>

10.1 In this section, we discuss the relative merits of a structural and behavioural remedy. We explain why we consider a behavioural remedy would not be an adequate remedy for the SLC. First, we discuss the merits of a structural remedy and the necessary scope of such a remedy.

11. Potential structural remedies

11.1 Global agrees that a structural remedy comprising the divestiture of the 50% shareholding in FRS and the four Acquired Businesses to an independent operator would be an effective remedy.

11.2 The divestiture of the 50% shareholding in FRS and some, but not all, of the Acquired Businesses could be effective, but only to the extent that FRS then remained a viable competitor in the long term. Global does not have access to FRS' financial results, as FRS does not publish full accounts. We are not able therefore to comment on what would be a suitable divestment package without speculating on the likely impact on FRS' viability. However, the CMA's analysis of historic FRS financials in Appendix C does not appear a sufficient basis to make fine judgements as to whether a partial divestment is sufficient to remove its concerns – this is a static historic analysis which does not consider the dynamic consequences of a partial divestment on FRS' ability to compete.

11.3 In any event, the question the CMA must ask is not whether FRS is financially viable at some given level of divestment but whether the remedy removes a substantial lessening of competition – therefore, in order to conclude that the partial divestment would be an effective remedy, the CMA must also satisfy itself not only that FRS is financially viable but that it would compete in much the same way as prior to the transaction.

11.4 As a general matter, Global notes that, in these circumstances, the CMA should be more concerned with the error cost of a remedy that is ineffective rather than one that more than compensates for its concerns (i.e., it should err on the side of caution) to ensure that the proposed remedy in fact works.

11.5 We consider that a divestment package comprising a selection of individual stations from all four Acquired Businesses would not be an ideal solution since the new owner of the stations would not necessarily have acquired a consistent set of assets and would also face significant up-front costs and operational overheads in integrating sales, finance and other systems for a portfolio of stations that currently operate entirely separately. The complexity of the separation and transitional issues may also rule this option out.

11.6 In respect of other non-local radio station assets such as the interests in multiplexes, Global's view is that these assets should be included in the divestment package. The multiplex interests are in multiplexes covering areas served by stations in the divestment package and it therefore make sense for them to be included in the package. This will help ensure that the purchaser is able to continue to compete effectively and independently.

11.7 Global believes that there are likely to be suitable purchasers for a sufficiently broad remedy divestment package. Provided that the divestment package consists of some or all of the Acquired Businesses in whole, rather than a package of stations from across different businesses, and the divestment is completed in a reasonably timely manner, Global does not consider that there are any particular risks of the competitive capability of the divestment package deteriorating. Nor should there be any requirement for behavioural remedies, with the possible exception of short-term transitional services agreement, provided that the purchaser is independent and committed to continuing to operate FRS as an independent sales house.

11.8 We consider that it is important that the purchaser of the 50% shareholding in FRS also acquires a substantial proportion of the divested radio stations. Indeed, while it may not be essential, Global believes that a single purchaser for the entire divestment package would ensure FRS remains independently competitive.

11.9 Global considers that the divestment should be completed within no more than 4 months, and that it would be appropriate for the current monitoring trustee to oversee the divestiture.

12. Potential behavioural remedies

12.1 Global does not consider that a behavioural remedy is appropriate to remedy the SLC resulting from the reduction in competition in the market for the representation of independent radio stations for national advertising. As explained below, the adoption of a behavioural remedy in the circumstances of this case requires the CMA to specify and regulate all of the terms of FRS's representation of its entire constituent body of local radio stations for a significant period of time; even on the CMA's own highly speculative assessment, this would be up to 10 years.

12.2 ***First***, this is not a case which fits the scenarios envisaged in the CMA's Merger Remedies as appropriate for a behavioural remedy. Paragraph 7.2 states that behavioural remedies will generally only be used where:

(a) Structural remedies are not feasible;

(b) The SLC is expected to have a short duration; or

(c) Behavioural measures will preserve substantial RCBs that would largely be removed by structural measures.

12.3 None of the three situations noted above are found in the current case: structural remedies are clearly possible; it is not plausible to say that the SLC will have a short duration; and no substantial RCBs have been identified (see paragraph 12.35 of the Provisional Findings: "*we are unpersuaded that we can necessarily expect a persistent reduction in prices and that customers will benefit in the longer term.*").

12.4 ***Second***, the risks associated with any remedy are too high to ensure that the remedy is effective. The Merger Remedies guidance (paragraph 7.4) identifies four types of risk, all of which are relevant to this case.

12.5 *Specification risks*: these arise if the form of conduct required to address the SLC or its adverse effects cannot be specified with sufficient clarity to provide an effective basis for monitoring and compliance.

12.6 In order to address the SLC, there would need to be a requirement for Bauer to guarantee a fair and proportionate share of total national revenue to each station currently represented by FRS or which in future required national sales representation from Bauer. This level of revenue would depend on a large number of factors including overall market conditions, the reach and listening hours of the station, its location and demographic profile.

12.7 However, total industry revenues fluctuate over time, the demands of national advertisers for different demographics or types of station fluctuate as well as potentially their geographic requirements changing and the fortunes (and hence national revenue) of individual stations will fluctuate depending on their listener performance but also depending on the performance of other competing commercial stations in their region or locality.

12.8 In addition to commitments from Bauer on minimum revenue for individual stations (including all other FRS stations not part of the CMA's current investigation which nonetheless compete with other Bauer stations), there would also need to be a number of additional controls in any behavioural remedy.

(a) The remedy would need to control the quantity of inventory FRS stations would be required to make available to Bauer and limits on the prices at which Bauer offered FRS stations inventory to advertisers. Without such limits, Bauer could have an incentive to offer national advertisers lower prices on FRS stations relative to their own stations. This would have the knock-on effect of reducing the inventory available for FRS stations to sell to local advertisers, and result in a reduction of competition for local advertising in any area where an FRS station competed with a Bauer station (i.e., the behavioural remedy runs the risk of distorting competition in many more areas than the CMA has investigated here)

(b) The remedy would also need to address the counter-concern: that Bauer may have an incentive to price FRS airtime for national advertisers so highly that this has an effect akin to a "margin squeeze" where the income to FRS constituent stations from national advertising declines, impacting their respective competitive propositions, and there is a reduction in competition for national and local advertising. Again, this could impact any area in which an FRS station competes with a Bauer station.

(c) Further, any such formula would need to be based on individual station data and would therefore require historic data. Implementation of the remedy would therefore require the wholesale disclosure of competitively sensitive information from all FRS stations to Bauer.

(d) Finally, there would therefore be no basis on which such a minimum revenue formula could be applied in a fair and non-discriminatory way to new stations seeking representation for the first time from Bauer or former FRS stations "re-joining". The CMA refers to "new entrants following a re-advertising of a licence or a change in ownership of a station"[21] but this also applies to new digital stations, such as those listed above which have joined FRS in recent years. This would discriminate against new stations launching into the market.

12.9 All of these variables would need to be factored into a formula to calculate each FRS station's minimum revenue for each quarter and Global does not believe it could be specified with sufficient clarity to provide an effective basis for monitoring or compliance: there are simply too many individual variables to enable a fair and transparent set of minimum revenue formulae to be constructed.

12.10 For this reason alone, a behavioural remedy cannot be effective in ensuring independent radio stations currently represented by FRS continue to receive the same national revenue that they would have received absent the acquisitions.

12.11 The CMA may be tempted to draw comparisons with the Contract Rights Renewal (CRR) mechanism which has applied to ITV since the merger of Carlton and Granada. We consider the current situation to be much more complex than that addressed by CRR, while the parties affected in this instance (independent radio station operators) lack the resources of those which CRR was designed to protect (UK national TV advertisers represented by specialist media buying agencies). Furthermore, there is a fundamental asymmetry of information between Bauer, an experienced national radio sales house, and independent stations represented by FRS who have no direct exposure to, or knowledge of, national advertising markets. In the case of CRR, by contrast, advertisers impacted by the ITV merger also had the option to buy advertising from other TV stations and other national media owners. This gives them some information about the state of the market by which they can judge whether ITV's pricing is fair. The independent stations represented by FRS do not have any other source of national revenue or any other means of gauging the state of the market. Bauer, in contrast, is the second largest radio operator in the UK and also a major magazine publisher. This

[21] Notice of Possible Remedies paragraph 26 (c)

asymmetry of information would make it very hard to construct a sufficiently robust set of measures to make any behavioural remedies effective, because independent stations would not have access to any information which might indicate that Bauer was diverting revenue to its own stations.

12.12 It is also worth noting that the CRR remedy was adopted as a behavioural merger remedy by the CMA's predecessor bodies in not dissimilar circumstances to the present case. The CMA's predecessor bodies concluded that the identified adverse effects on the public interest would dissipate over three to five years, and the CRR remedy could then be released. The CRR remedy is still in place more than 15 years after its original adoption, notwithstanding several intervening reviews of that remedy by the CMA. Quite simply, the CMA's predecessor bodies then engaged in the same highly speculative SLC analysis, adopted the CRR remedy to address the concerns, and none of the predicted market developments have in fact transpired.

12.13 *Circumvention risk*: the risk that other adverse forms of behaviour may arise if particular forms of behaviour are restricted.

12.14 The principal risk to FRS customers is that Bauer will clearly be incentivised to divert advertisers' spend from FRS stations to their own existing or acquired stations. Global's understanding is that FRS' commission levels [✄] of on-target sales. Even after accounting for royalty payments and other direct costs, Bauer would expect to retain c.85% of revenues for sales on its own stations.

12.15 As discussed above, there is no evidence that FRS would not be financially viable for the next 10 years and beyond absent an acquisition of one or more of the Acquired Businesses, which owing to the very small pool of potential buyers of radio groups, would itself result in an investigation by the CMA. An ongoing remedy, and not one which is time-limited, is therefore needed to address the SLC.

12.16 In the absence of being able to specify minimum levels of national revenue for each station currently represented by FRS or which in the future wishes to benefit from independent national sales representation, there would be an unacceptably high risk of circumvention by Bauer in diverting revenue from independent stations.

12.17 *Monitoring and enforcement risks*. Effective monitoring and enforcement of a complex set of behavioural remedies would be very challenging. It would require significant resources, access to information about current trading in the market for national radio advertising, and expertise in radio advertising trading. Ofcom does not have access to this information or expertise in radio advertising trading, and we are not aware of any other organisation that could potentially undertake monitoring and enforcement activities.