

OPINION

Does the Competition Commission care enough about competition?

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Competition regulators often face situations where a proposed merger would reduce by one an already small number of firms in a market. Examples are mergers involving the major accounting firms, tour operators (the famous *Airtours* case) and, more recently, mobile phone companies in Europe. As a broad generalisation, four-to-three mergers among equals face a serious challenge and three-to-two mergers, when they are proposed at all, stand little chance of being approved.

It is therefore surprising to learn that in March 2008, the Competition Commission approved a two-to-one merger, which created a text book monopoly, protected by barriers to entry in two of the markets which the Commission's report identified.¹ The duopolists are not household names like Airbus and Boeing, but are concealed within the broadcasting value chain. Nonetheless, the issue created – the value it is worth placing on even imperfect competition – is the same.

The background to the case is as follows. In the days of broadcasting's 'cosy duopoly', the BBC ran its own transmission service and the industry regulator ran ITV's, which supposedly made it easier to sack the regional franchisees. The transmission services were later privatised and subsequently acquired by, respectively, the National Grid Company and Macquarie Bank. Each provided sites and towers for mobile telephone companies, where they face competition from other site owners, and for radio and television broadcasters, where they do not.

In providing services to broadcasters, the two companies offered reciprocal access to their sites and towers, which are difficult or impossible to duplicate, but they competed in providing managed transmission services, which deliver programmes to customers' homes. There was particularly fierce competition for a recent BBC contract, and an analysis by Ofcom which sought to show that the companies were 'jointly dominant' in managed transmission services was abandoned. The Competition Commission report acknowledges that each constrains the other's pricing.

When National Grid auctioned its business, it was bought by Macquarie. Naturally, the transaction was sent to the Competition Commission, whose market analysis confirmed that it created a complete monopoly in radio and television transmission, and one behind high barriers to entry. There was therefore a 'significant lessening of competition'.

The normal response would be to prevent or unwind the merger, but the Commission, in its final report, has proposed another solution. It is prepared to tolerate the monopoly and accept behavioural undertakings by the acquirer, if the latter will accept them.

Not surprisingly, this response is likely to appeal to the acquirer, which has already completed the transaction. It would be accompanied by undertakings which give customers – the broadcasters – significant discounts. This is said to have won their 'broad consensus' support, and to have enabled the Commission to identify a relevant customer benefit, which it can take into account in deciding the question of remedies, even if it did not investigate, as it was entitled to, the impact on final consumers of broadcasting services.

The regulator, Ofcom, was also finally supportive of the merger, being concerned about the effect of any divestment on the current programme of digital switchover, in which analogue television broadcasting transmission will progressively be switched off. Thus Macquarie derives an advantage from having riskily completed the transaction before the reference.

Does this justify the Commission's conduct in authorising a monopoly? It seems very doubtful. The Commission has too much faith in regulation, and not enough in competition, which is effectively foreclosed. Broadcasters may be seduced by price cuts, and it may also be in their interest to have a predictably regulated monopoly supplier charging everyone the same rather than a more competitive and potentially innovative supplier market, which might yield surprises. The Commission's failure to consider end users' interests, particularly

¹ *Macquarie UK Broadcast Ventures Limited/ National Grid Wireless Group*, Competition Commission, 11 March 2008.

those of viewers in the future, is regrettable. The decision smacks of a willingness, reminiscent of an earlier era, to dispense with competition in favour of regulation and to defer to the interests of suppliers and the regulator rather than the long-term interests of end users.

It may not matter too much in this case. When high definition broadcasting takes off, the limitations of terrestrial transmission will become clear, and programmes will be delivered by advanced cable and fibre networks or by satellite. But even so, the Commission's willingness to sacrifice competition in this case is a worrying precedent.