



[2014] CAT 8

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1227/4/12/14

B E T W E E N:

A. C. NIELSEN COMPANY LIMITED

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

INFORMATION RESOURCES, INC.

Intervener

ORDER

UPON reading the letter from the Intervener to the Respondent dated 15 May 2014 (albeit actually sent on 20 May 2014) and the Intervener's response, including the annexes, of 30 May 2014 to the questions of the Respondent dated 28 May 2014

AND UPON the Tribunal having granted permission to the Applicant to amend its grounds of application to include the additional ground of application filed on 27 May 2014

AND UPON the parties having agreed that the decision in these proceedings be quashed and remitted to the Respondent

AND UPON the Respondent having informed the Tribunal that it will consider, pursuant to section 22(1) of the Enterprise Act 2002 (the “Act”), whether to make a reference to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 in relation to the completed acquisition by Information Resources, Inc of Aztec Group

AND UPON the parties having provided the Tribunal with a draft agreed Order

IT IS ORDERED THAT:

1. The Office of Fair Trading’s decision on reference under section 22(1) of the Act given on 13 December 2013, entitled “Completed acquisition by Information Resources, Inc. of Aztec Group” with reference ME/6211/2013, be quashed and referred to the Respondent to make a new decision pursuant to section 22(1) of the Act
2. There be liberty to apply
3. Costs be reserved

REASONS

(1) On 17 April 2014, A.C. Nielsen Company Limited (“Nielsen”) brought an application for review of the Office of Fair Trading’s (“OFT”) decision not to refer to the Competition Commission the acquisition by Information Resources, Inc. (“IRi”) of Aztec Group (the “Decision”). Since Nielsen filed its application, IRi has provided further relevant information to the OFT’s successor body, the Competition and Markets Authority (“CMA”). In light of this new information, the parties have agreed that the Decision should be quashed and the matter remitted to the CMA for a new decision to be taken. The background to the parties’ position is summarised below.

(2) By its Notice of Application, Nielsen contested the Decision on four grounds and asked the Tribunal to set aside the Decision and remit it to the CMA for reconsideration. The Notice of Application focussed on the OFT’s finding that the

completed merger did not give rise to a realistic prospect of a substantial lessening of competition.

(3) On 20 May 2014, IRi provided further information to the CMA regarding the exclusivity arrangements between Litmus (a subsidiary of the acquired entity, Aztec Group) and its customers. This information had not previously been provided to the OFT. No suggestion has been made before the Tribunal that information was withheld in bad faith.

(4) On 27 May 2014, Nielsen applied to the Tribunal to supplement its Notice of Application with an annex in order to introduce an additional ground of challenge (“Ground 5”). Ground 5 argued, in essence, that the information provided by IRi to the CMA meant that the Decision had been taken on the basis of a material error of fact, such that it could not be assumed that the OFT would have reached the same conclusions had it had an accurate understanding of the primary facts. We granted Nielsen permission to amend its Notice of Application in this regard on 2 June 2014.

(5) We understand that IRi has since provided further additional information to the CMA in relation to Litmus’ exclusivity arrangements. As a result of this new information, which had not been provided to the OFT during its investigation, the CMA considers that the OFT’s decision contains material errors of fact as to the relevant exclusivity arrangements. The CMA’s view is that these errors of fact may have affected the OFT’s decision as to whether or not to make a reference to the Competition Commission pursuant to section 22(1) of the Act. Accordingly, the CMA concedes Ground 5, save that it does not accept that the OFT failed to make reasonable enquiries to establish the accuracy of the information that the merged firm had provided. Further, the CMA considers that the Decision should be quashed and the matter remitted to the CMA for a new decision to be taken. Nielsen and IRi have confirmed that they agree with the CMA’s proposal.

(6) In the circumstances, the Tribunal endorses that approach. We unanimously consider that, in light of the additional information provided to the CMA since the OFT’s Decision, it is appropriate for the Tribunal to quash the Decision and refer the matter back to the CMA under section 120(5)(b) of the Act with a direction that the

CMA make a new decision pursuant to section 22(1) of the Act. It should be noted that the Tribunal heard no argument on the four grounds set out in the Notice of Application as originally filed and has made no decision one way or the other on the merits of those grounds of complaint.

The Honourable Mr Justice Sales
Chairman of the Competition Appeal Tribunal

Made: 4 July 2014
Drawn: 4 July 2014