



Case M1590G

Proposed acquisition of joint negative control of Digital UK
Ltd by Channel 5 Broadcasting Corporation Ltd.

Decision

Guernsey Competition & Regulatory Authority

3 November 2021

Guernsey Competition and Regulatory Authority
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Summary

1. The proposed transaction involves the acquisition of joint negative control by Channel 5 Broadcasting Ltd (**Channel 5**) of Digital UK Ltd (**DUK**), along with the ongoing joint negative control of DUK's current members.
2. The transaction has been notified to the Guernsey Competition and Regulatory Authority (**GCRA**) pursuant to Section 16(1) of the Competition (Guernsey) Ordinance 2012 (the **2012 Ordinance**).
3. The GCRA has determined that the proposed acquisition will not lead to a substantial lessening of competition in any relevant market and therefore approves the notified transaction.

The Notified Transaction

4. On 15 October 2021, the GCRA received a joint application by Channel 5 (**the Purchaser**), DUK (**the Target**) and the Sellers (the existing members and joint controllers of DUK) for the acquisition by Channel 5 of membership of DUK from its existing members (the **Notified Transaction**).
5. The British Broadcasting Corporation (**BBC**), ITV Network Ltd (**ITV**) and Channel Four Television Corporation (**Channel Four**) currently have negative joint control over DUK. As a result of the transaction, Channel 5 will also acquire negative joint control over the Target, which it will exercise along with BBC, ITV and Channel Four.
6. The GCRA registered the application on its website with a deadline for comments of 5pm on Friday, 29 October 2021. No submissions were received.

The Parties

7. Channel 5, the Purchaser is a UK registered private limited company controlled ultimately by National Amusements Inc, a private US registered company, through ViacomCBS Inc, a Delaware registered company listed on the NASDAQ Exchange. Channel 5 operates free to air (FTA) channels in the UK, including Channel 5 as a public service broadcaster, as well as My5 and Milkshake! VOD (video on demand) services. Channel 5 is also a shareholder in Youview, which provides a hybrid DTT-IP service retailed by BT Group.
8. DUK, the Target, is a UK registered private company limited by guarantee (registration number: 05422613) and is a full function corporate joint venture between BBC, ITV and Channel Four Television Corporation, each of whom exercises negative control over DUK.

9. DUK's core business is providing technical services that facilitate the reception of free to view (FTV) broadcasts of Freeview over the digital terrestrial television and services facilitating access to various underlying VOD players (through its operation of Freeview Play). DUK also operates the Freeview electronic programming guide (EPG) and Logical Channel Numbers (LCN) policies, which govern the numbering, ordering and prominence of Freeview channels. DUK ultimately controls Freesat (UK) Ltd, a satellite broadcasting platform for free to view television and radio and which facilitates access to subscription video on demand.
10. The current members and joint controllers of DUK are:
 - a. The BBC, which is an entity established by Royal Charter. BBC is a leading public service broadcaster providing a range of TV and radio channels and on-demand services for licence-payers, but also other Pay and FTV channels.
 - b. ITV is a UK registered private company limited by guarantee (registration number: 00603893:) and part of the ITV Group. The ITV Group is a content producer and broadcasts various public service and commercial channels and distributes its content on multiple platforms, including by way of subscription video on demand.
 - c. Channel Four, which is a statutory corporation. Channel Four is a publicly owned and commercially funded public service broadcaster that commissions the production of media content and operates various free to view (FTV) channels, on various platforms.

Guernsey: Requirement for GCRA Approval

11. Pursuant to s.61(1)(b)(i) of the 2012 Ordinance, a merger or acquisition occurs for the purposes of this Ordinance when: *"an undertaking [...] directly or indirectly acquires or establishes control of another undertaking"*.
12. As explained above, Channel 5 will through this transaction acquire negative joint control over DUK.
13. The Notified Transaction is therefore a merger, as defined by the 2012 Ordinance.
14. Under s.13(1) of the 2012 Ordinance, certain mergers must be notified to, and approved by the GCRA before they can be put into effect. Regulation 1 of the Regulations provides that mergers must be notified to the GCRA for clearance if:
 - a. The combined Channel Islands turnover of the undertakings involved in the merger exceeds £5 million, and

- b. Two or more of the undertakings involved in the merger have Guernsey turnover exceeding £2 million.

15. According to information provided by the notifying parties, the combined and individual applicable turnover of the Parties in the Channel Islands and Guernsey exceeds these thresholds (with due regard to the turnovers of their connected undertakings). On this basis, the GCRA's approval is required before the acquisition is executed.

Market Definition

16. Under s.13 of the 2012 Ordinance, the GCRA must determine if the merger would substantially lessen competition within any market in Guernsey for goods or services.

17. As an initial step, the GCRA will identify the markets which are likely to be affected by the merger since market definition provides a framework within which the competitive effects of a merger can be assessed.

18. When defining a market, the GCRA may take note of its own previous decision-making practice and/or market definitions applied by other competition authorities. However, these previous decisions are not precedents and are not binding, either on the merging parties or on the GCRA. Competition conditions may change over time, changing the market definition. Market definition will always depend on the prevailing facts¹.

Views of the Parties

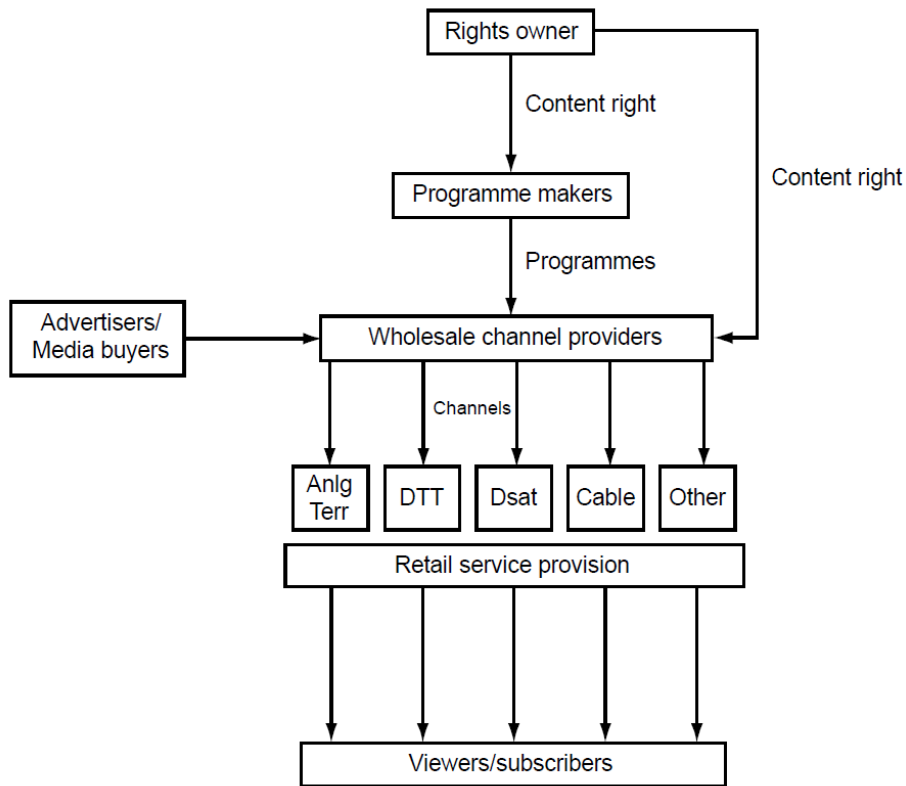
19. The notifying parties have identified the following TV supply and value chain illustrated by the following diagram from a 2007 Competition Commission investigation,² showing: content acquisition and production; content distribution; and the retailing of content and equipment.

¹ This approach is consistent with that taken under EU law – see, for example, Joined Cases T-125/97 and T-127/97 [2000] ECR II-01733, paragraphs 81-82

² Competition Commission, Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc (14 December 2007), at 2.20.

FIGURE 1

The television supply chain



Source: CC based on Ofcom diagram.

20. Based on the above diagram, the notifying parties identify these market levels as follows:

- a. TV content production and supply: being the production and supply of TV content, which would include players such as BBC and ITV.
- b. Wholesale supply of TV Channels: the wholesale supply of that content within channels and which would include players such as ITV, Channel Four and ITV.
- c. Retail supply of TV Services to viewers/consumers.

21. Within the above chain, the notifying parties identify the services of DUK as falling within the retail level of the market, because they facilitate the receipt by televisions and other devices of FTV television signals broadcast via the various distribution channels (and over which signals they have no control) and facilitating access to a variety of VOD players over the internet. Since they do not regard the facilitation of the receipt of signals itself as a relevant market, they indicate that these DUK services are merely part of a broader relevant market being the retail supply of TV services. Nevertheless, they acknowledge that such DUK services do not neatly fit within this retail supply of TV services. They further contend that, in any event, the GCRA may leave the market definition open, since the transaction will not substantially lessen competition on any reasonable basis.

22. The notifying parties point out that the geographic market for retail TV services is normally held to be national in scope (at minimum) and extends, in this case, to the United Kingdom and the Channel Islands.

GCRA Consideration

23. For the reasons set out below, the precise product and geographic market definition can be left open in this case, since the Notified Transaction will not give rise to a substantial lessening of competition on any plausible basis.

Effect on Competition

24. For the following reasons, the Authority considers that the merger is unlikely to give rise to horizontal or vertical concerns:

- a. The European Commission has approved this transaction on the basis that there are no horizontal or vertical overlaps between Channel 5 and DUK.³ There is no basis for analysing the same transaction differently in Guernsey nor should the transaction have materially different effects in Guernsey from any it might have in the European Union.
- b. The change in the nature of the joint control over DUK, with the introduction of Channel 5 as a joint controller with both ITV, BBC and Channel Four, would appear unlikely to provide the opportunity or incentive for changed behaviour by the jointly controlled DUK operation. In that respect, Channel 5 would appear to have interests largely aligned to ITV, Channel Four and BBC, given its FTV programming and its public service broadcaster status.
- c. Key Freesat/DUK functions, such as management of Electronic Programme Guide (EPG) and Logical Channel Numbering (LCN) policies that govern the allocation, ordering and metadata of broadcast channels, are provided on a FRAND⁴ basis, regulated by OFCOM licence conditions and regulation (such as the EPG Code of Practice), and this will continue after the transaction.
- d. A recent OFCOM consultation and related materials⁵ have identified significant decreases in audiences for traditional broadcast TV, significant shifts towards internet delivered

³ https://ec.europa.eu/competition/mergers/cases1/202143/M_10184_7974173_44_3.pdf (Decision in Case M.10184-Channel 5/BBC/ITV/Channel Four/Digital UK) and the Relevant Press release at https://ec.europa.eu/commission/presscorner/detail/en/MEX_21_5263

⁴ Fair Reasonable and Non-Discriminatory.

⁵ OFCOM, Small Screen: Big Debate Consultation: The Future of Public Service Media (8 December 2020). Mediatique Ltd, Future models for the delivery of public service broadcasting (December 2020) – a report commissioned by OFCOM.

media services, including a significant rise in VOD/SVOD (subscription video on demand), by significant providers other than BBC, ITV, Channel Four and Channel 5 and flat/declining broadcast advertising revenues for traditional broadcasters. Within this broader dynamic market context, it is unlikely that this transaction would have substantial adverse effects.

Decision

25. Based on the preceding analysis, the GCRA concludes that the acquisition will not substantially lessen competition within any market in Guernsey for goods or services.
26. The GCRA is also satisfied that the merger would not be to the prejudice of:
- (a) consumers or any class or description thereof;
 - (b) the economic development and well-being of the Bailiwick; or
 - (c) the public interest.
53. The merger is therefore approved under s.13 of the 2012 Ordinance.

3 November 2021

By Order of the Board of the GCRA