



**Jersey Competition Regulatory Authority (“JCRA”)**

**Decision M622/10**

**Acquisition**

**of**

**Virgin Media Television Rights Limited and Virgin Media**

**Television Limited**

**by**

**British Sky Broadcasting Group plc**

### **The Notified Transaction**

1. On 13 August 2010, the JCRA received an application (the “**Application**”) for approval under Articles 20 and 21 of the Competition (Jersey) Law 2005 (the “**Law**”) concerning the acquisition of Virgin Media Television Rights Limited and Virgin Media Television Limited, together with the rights to all assets used exclusively in the Virgin Media television business acquisition (together: “**VMTV**”) by British Sky Broadcasting Group plc (“**Sky**”), through the intermediary Kestrel Broadcasting Limited.
2. The JCRA published a notice of its receipt of the Application in the Jersey Gazette and on its website on 17 August 2010, inviting comments on the Acquisition by 31 August 2010. During this period, the JCRA received one written submission concerning the Acquisition. This submission is discussed in more detail in paragraph 29 below. In addition to public consultation, the JCRA conducted its own market enquiries concerning the Acquisition.
3. In addition to Jersey, the parties stated that the acquisition had been notified with the relevant authorities in the UK and the Republic of Ireland. On 29 June 2010 the Irish Competition Authority approved the Acquisition. The JCRA has had contact with the Office of Fair Trading (“**OFT**”), the UK authority, regarding the acquisition.

### **The Parties**

- (a) *Sky*
4. Sky is incorporated in England and Wales and its shares are listed on the London Stock Exchange. The worldwide turnover in the year ending June 2009 was approximately £5.4 billion. According to the Application, its activities include the creation and supply of a variety of television channels for ultimate consumption by viewers in the UK, the Republic of Ireland and the Channel Islands and the supply of packages of pay television channels, including Sky’s own channels and channels provided on a wholesale base such as those supplied by VMTV. Sky

channels include Sky 1-3, Sky Movies 1-2, Sky News, Sky Premiere and Sky Sports 1-3.

5. Sky is thus a vertically integrated company that is active at both the wholesale level and at the retail level.

6. Any reference to Sky includes reference to any of its subsidiaries.

(b) *VMTV*

7. VMTV is engaged in the creation of the VMTV channels. According to the Application, the VMTV channels are Living, Livingit, Bravo, Bravo 2, Challenge and Virgin 1.

8. As described above, VMTV comprises the following parts:

- Virgin Media Television Rights Limited (now known as Living TV rights Limited),
- Virgin Media Television Limited (now known as Living TV Group Limited), and
- the rights to all assets used exclusively in the Virgin Media television business acquisition.

#### The Requirement for JCRA Approval

9. According to Article 20(1) of the Law, a person must not execute certain mergers or acquisitions except with and in accordance with the approval of the JCRA. The type of mergers and acquisitions subject to this requirement is set out in the Competition (Mergers and Acquisitions) (Jersey) Order 2010 (the “**Order**”).

10. Sky retails audiovisual services to Jersey over direct-to-home (“**DTH**”) satellite and Sky considers that it accounts for a share of supply of more than 40% of DTH transmission to households in Jersey. On this basis, pursuant to the Order, the

JCRA's approval is required under Article 20(1) of the Law before an Acquisition is executed.

11. In order to facilitate the JCRA's review under the Law, Sky agreed [REDACTED] to defer integration of the acquired business with Sky's existing business until the assessment of the acquisition could be completed.

### **Assessment**

12. Under Article 22(4) of the Law, the JCRA must determine if the Acquisition would substantially lessen competition in Jersey or any part thereof, pursuant to the procedures set forth in the JCRA Merger Guideline.<sup>1</sup> As detailed below, the JCRA concludes that this would not be the case.

### **Defining the affected relevant market(s)**

#### **(i) The Relevant Product Market(s)**

13. According to Sky, the proper economic market for assessment of the Acquisition is, at least, the production and supply of general entertainment television channels, whether pay or non-encrypted free-to-air ("FTA").
14. Consumers in Jersey have different means of access to television programmes:
  - There are the FTA channels that are transmitted via the ether. FTA channels can be received from a suitable aerial plugged directly into the television set. The range of channels that are broadcasted FTA is limited. Telecommunications operators that require wireless frequency spectrum require spectrum licenses. Spectrum licenses for Jersey are issued by the regulator and competition authority for the UK communications industries Ofcom under the UK Wireless Telegraphy Act 2006 and the Communications Act 2003 by virtue of the extension of the appropriate sections of these laws to Jersey under Orders in Council. Ofcom manages spectrum and international

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<sup>1</sup> JCRA Guideline 6, *Mergers and Acquisitions*.

coordination on behalf of the States of Jersey as set out in these Orders in Council.

- DTH channels are transmitted via a satellite and received via a satellite dish. There are a very large number of DTH channels which includes various packages of basic pay television (“**BPT**”) channels, channels with separate subscriptions and FTA channels. In Jersey, DTH television services are provided by Sky and freesat (set up by the BBC and ITV). According to their channel guide, freesat offers about 90 television channels.<sup>2</sup> The Application details that Sky offers many hundreds of television channels and approximately [50-60]% of Jersey households subscribe to Sky DTH services.
  - Finally, there are channels that are distributed via cable. In Jersey, cable television services are provided by Newtel. According to their website, Newtel provide 47 television channels in various packages in and around the St Helier area.<sup>3</sup> Even within St Helier the coverage is not universal. As the coverage of this alternative is available to a relatively limited number of Jersey customers, we will ignore this alternative for the purposes of our investigation. If there are no competitive concerns by not taking into account the existence of an alternative for some parts, the inclusion of this alternative should not affect this conclusion.
15. Competition occurs on various levels. In the first place, there is competition between the platforms identified above for audiences (advertising) and content (i.e. television channels). For the purposes of this Decision, the JCRA will assume that the relevant product market is television channels supplied via satellite. If there are no competition concerns in this most narrowly defined market, there generally will be no competition concerns if the product market is expanded to include other platforms.

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<sup>2</sup> [www.freesat.co.uk](http://www.freesat.co.uk). This includes several channels that are broadcasted twice including once with a delay of one hour.

<sup>3</sup> [www.newtel.co.uk](http://www.newtel.co.uk).

16. In addition, there is competition between suppliers of television channels for audiences (advertising) and content (i.e. programmes). For the purposes of this Decision, there is no need to further delineate the relevant product markets.

(ii) The Relevant Geographic Market

17. According to the Application, Sky proposes that the relevant geographic market is the UK and the Channel Islands combined.

18. There are strong similarities between the supply of television in Jersey and the supply of television in the UK. In addition to the information detailed in paragraph 14 regarding the spectrum allocation, the Broadcasting and Communications (Jersey) Order 2004 extends the provisions of the Communications Act 2003 to Jersey, including the obligation to pay a TV licence fee. For the purposes of this Decision, the JCRA will assume that the relevant upstream geographical market for content is comprised of the UK and Jersey.

19. However, whereas there is a very considerable overlap between the television channels offered in the UK and Jersey, there are differences between Jersey and the UK resulting from the availability of platforms. There is evidence that the relevant geographical markets for advertising and for competition between platforms are limited to Jersey, and therefore, for the purposes of this Decision, the JCRA will assume that the relevant geographical market is limited to Jersey. If there are no competition concerns in the most narrowly defined market, there generally will be no competition concerns if the geographical market includes jurisdictions other than Jersey.

**Effect on Competition**

20. The JCRA may refuse to approve an acquisition if it is satisfied that the merger or acquisition would substantially lessen competition in Jersey or any part of Jersey.

**Foreclosure**

21. The JCRA notes that competition between the various platforms does not appear to be directly affected. For example, there is no indication that the acquisition will result in changes in the offering of television channels at the various platforms. Specifically, freesat and the ether do not appear to offer VMTV or Sky channels, hence the acquisition does not appear to affect these platforms.
22. Sky offers VMTV and Sky channels and thus potentially Sky could have an incentive to foreclose access to their platform in order to increase the audiences of its own channels. This incentive could be stronger the more comprehensive the range of Sky channels is, as this would result in a reduced need for complementary channels to satisfy demand. The incentive for foreclosure of access to the Sky platform applies in particular to channels that have a similar profile to, and thus are more directly in competition with, Sky and VMTV channels.
23. However, Sky has an open access obligation and its prices are regulated by Ofcom. This means that even if Sky had an incentive to foreclose access to its platform, legislation requires that Sky would have to grant access on terms that are regulated by a public body. Therefore, competing television channels would appear to have guaranteed access to UK consumers. As the Sky offering to UK consumers is identical to their offering to Jersey consumers and because UK regulation enforced by Ofcom to a large extent also applies to Jersey, Jersey consumers enjoy the same level of protection.

#### Markets for content

24. As a result of the increased concentration on the purchasing side in the market for content, the suppliers of content such as producers of television programmes and the suppliers of activities related to the production of television programmes could potentially be affected, as there may be fewer purchasers of such services.
25. In relation to the upstream markets for content and other inputs, it is relevant to note that according to the Application, the key characteristic of the VMTV

channels is that they are general entertainment television channels that comprise a mixture of different types of programmes. Arguably the strongest competitive constraints on the Sky and VMTV general entertainment television channels can be expected from competitors' general entertainment television channels. One can assume that general entertainment television channels have few constraints on supply, both as a result of the range of content that can be used (compared to for example sports channels that can only acquire content related to sports) and secondly because there are less inherent constraints (there is for example only one football Premier League to be broadcast). The JCRA has not identified any reasons nor received any complaints regarding concerns in any upstream markets.

26. It is relevant to note that the main public service broadcasters BBC, ITV and Channels 4 and 5 provide the majority of the general entertainment television channels available in the UK (and hence in Jersey). In addition, to the breadth and strength of their portfolios, the Application lists a number of unique advantages that these broadcasters have, such as the (near) universal availability to customers of the channels free of charge (in the case of the BBC, funding is guaranteed through the TV licence fee) and prominence, by virtue of being listed before any other channels, in electronic programming guides. Therefore, it is highly unlikely that the acquisition will result in a substantial lessening of competition in any of the markets where Sky faces competition from these channels.

#### Market for advertising

27. Advertising comes in many different forms. It can be embedded in programmes or placed between programmes. As a result of the increased concentration on the supply side for advertising space on television channels, customers that require such advertising space could potentially be affected as there may be fewer suppliers of such services.
28. From an advertising perspective, Jersey constitutes a very small part of the target audience of the television channels that are broadcast across the various platforms that are available in Jersey. Advertising aimed predominantly or only at Jersey or



Channel Islands' customers appears to only occur during regional broadcasts. However, there is no evidence that the availability or the pricing of such advertising is constrained by the prices and conditions for television advertising for general broadcasts that are mainly aimed at the UK audience. The JCRA notes that it has not received any comments related to competitive concerns from local television or advertising companies. Therefore, it appears that the acquisition would not have an effect on television advertising rates and conditions in Jersey.

29. The JCRA received one submission regarding the Acquisition. This submission relates in particular to the advertising market in the UK. As explained above, there is a distinct market for advertising aimed at Jersey or the Channel Islands, and the submission has no bearing on this Jersey or Channel Islands market. For this reason, the submission does not require further consideration.

#### **Ancillary Constraints**

30. According to the Application, Sky and the Virgin Media Group have entered into several complementary arrangements including a non-compete obligation. None of the restrictive covenants extend for a period of more than two years. The JCRA has reviewed these complementary arrangements in light of relevant EC guidance on so-called ancillary restraints, and is satisfied that they comply with this guidance.

#### **Conclusion**

31. In light of the analysis set forth above, the JCRA concludes that the Acquisition is not likely to lessen competition in Jersey or in any part of Jersey. Based on this conclusion, it is not necessary for the JCRA to consider other factors such as barriers to entry or pro-competitive effects or efficiencies.
32. Given this conclusion, the JCRA hereby approves the Acquisition under Article 22(1) of the Law.

**11 September 2010**

**By Order of the JCRA Board**