Jersey Competition Regulatory Authority (‘JCRA’)

Decision M799/11

PUBLIC VERSION

Proposed Joint Venture

between

Scripps Networks Interactive Inc.

and

BBC Worldwide Limited

The Notified Transaction

1. On 19 August 2011, 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 by Southbank Media Limited ("**Southbank**"), a wholly owned subsidiary of Scripps Networks Interactive Inc. ("**Scripps**"), of a 50% interest in each of UK Channel Management Limited, UK Gold Holdings Limited and UKTV New Ventures Limited (collectively "**UKTV"**) from Flextech Broadband Limited, a wholly owned subsidiary of Virgin Media Inc. ("**Virgin Media**").

2. The other 50% of the UKTV joint venture ("**JV**") is held by BBC Worldwide Limited ("**BBCW**"), a wholly-owned subsidiary of the British Broadcasting Corporation ("**BBC**"). The effect of the proposed transaction is merely to substitute one JV partner, Virgin Media, with another, Scripps; BBCW's interest in UKTV remains unchanged by the proposed transaction. Following the proposed transaction, Scripps will also acquire a [REDACTED]% stake in UK Programme Distribution Limited; the remaining [REDACTED]% stake is, and will continue to be, held by BBCW.

3. The JCRA published a notice of its receipt of the Application in the Jersey Gazette and on its website on 23 August 2011, inviting comments on the Acquisition by 6 September 2011. No comments were received.

4. In addition to Jersey, the parties stated that the proposed transaction had been notified to the relevant authorities in the Republic of Ireland. On 1 September 2011, the Irish Competition Authority approved the proposed transaction.

The Parties

(a) Southbank and Scripps

5. Southbank is a new company set up for the purpose of the proposed transaction and is a wholly-owned subsidiary of Scripps. Scripps is a lifestyle content and

interactive services company with a number of popular television channels, primarily broadcast in the United States, and interactive brands. Scripps' Food Network channel[1] is available in the United Kingdom ("**UK**") to subscribers of British Sky Broadcasting plc. ("**Sky**") and Freesat and Freeview customers. In Jersey, it is available to Sky and Freesat customers only, but no Jersey-specific advertising airtime is sold.

6. For the financial year ending 31 December 2010, Scripps generated worldwide turnover of US$2.07 billion. Turnover in the UK related to the Food Network brand for the year ending 31 December 2010 was £[REDACTED]. For the same period, no data is available for Jersey, but the parties submit that it was negligible.

7. Any reference in this decision to Scripps includes reference to any of its subsidiaries.

(b) BBC and BBCW

8. The BBC is a public corporation and the main public service broadcaster for the UK and the Crown Dependencies (including Jersey). Its activities are funded through a licence fee and, via an agreement with the UK Secretary of State for Culture, Media and Sport, it provides television, radio and online services across the UK and Crown Dependencies, and internationally via BBCW.

9. The BBC offers a wide range of television programme content, including news, current affairs, entertainment, sport, educational, lifestyle and documentaries. 11 BBC television channels are available in Jersey, including BBC1, BBC One HD, BBC2, BBC4 and BBC News 24. The BBC's channels are broadcast free-to-air, as well as via an online video-on-demand service.

10. Those of the BBC's activities with a primarily commercial objective are carried out at arm's length by BBCW, and the latter has seven core businesses: global channels; global television sales; magazines; content and production; home

[1] Including the time-shifted version of the same channel.

entertainment; global brands and digital media. The main activities of BBCW in Jersey relate to its interests in the target, UKTV.

11. The BBC's revenue for the year 2010-2011 was £4,993 million (including BBCW's activities). No separate figures are available for Jersey.

c) *The Target: UKTV*

12. UKTV is active in developing, scheduling and broadcasting television channels, websites and on-demand services. Its television channels include G.O.L.D, Dave, Watch, Home, Yesterday and Eden[2].

13. In Jersey, UKTV's full range of channels is available to Sky subscribers, although the UKTV channels do not carry advertising targeted specifically at viewers in Jersey. In addition, UKTV channels are shown on Virgin Media's (the seller's) UK cable network with three channels – Dave, Yesterday and Really – also available on Freeview in the UK, although in neither case are UKTV's channels available via these methods in Jersey. The Freeview service in Jersey is different to that in the UK in that it only carries the public sector broadcasting channels, Channel Television and Five.

14. For the financial period ending 31 December 2010, UKTV generated turnover in Jersey of £[REDACTED].

<u>The Requirement for JCRA Approval</u>

15. Under 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. According to Article 2(5)(b) of the Law, a merger or acquisition occurs for the purpose of the Law on the creation of a joint venture, "being a business activity carried on by a company formed by 2 or more persons to enable them to carry on that activity jointly by means of their joint control of the company or by means of their ownership of shares in the capital of the company". The JCRA is satisfied

[2] Included in the portfolio are the time-shifted channels associated with the parent channels.

that the proposed transaction will result in both BBC and Scripps (through their respective subsidiaries) having joint control of UKTV.

16. The parties applied for JCRA approval of the proposed transaction on the basis that currently BBC's share of supply of television channels in Jersey is over 25% and therefore the proposed acquisition falls within the conditions of Article 2 of the C*ompetition (Mergers and Acquisitions) (Jersey) Order 2010* (the '**Order**') through a horizontal overlap between the parties, albeit that the share of supply of Scripps in the same services is *de minimis*, at a level of less than 0.1%.

17. The parties also applied for JCRA approval on the basis of BBC's share of supply of television channels in Jersey, and the vertical relationship between the BBC and UKTV, in that BBCW provides programming for UKTV channels, and [REDACTED] Scripps programmes are currently under license to UKTV for broadcasting in the UK and Jersey. Therefore the proposed acquisition also falls within the conditions of Article 3 of the Order.

18. However, there is no material change to the extent of vertical overlap and the only horizontal overlap is at a *de minimis* level by virtue of Scripps' Food Network channel. The horizontal issues are considered at paragraphs 23-25 and 30-31 below.

19. On the basis of these facts, pursuant to the Order, the JCRA's approval is required under Article 20(1) of the Law before the proposed acquisition is executed.

<u>Assessment</u>

20. 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's *Guidelines for Mergers and Acquisitions*.[3]

21. The JCRA has concluded that the proposed acquisition will not substantially lessen competition in Jersey or any part thereof, for the reasons set out below.

[3] JCRA (2010) *Mergers and Acquisitions*, at page 6.

Defining the affected relevant market(s)

(i) The Relevant Product Market(s)

22. '*A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use*.'[4]

23. As noted in paragraphs 17 and 18 above, the obligation to apply for the JCRA's approval of the proposed JV arises by virtue of the BBC's existing share in the supply of television services in Jersey and the fact that it is proposed that Scripps will be both a participant in the JV and will continue to make the Food Network channel available in Jersey to Sky subscribers and Freesat customers.

24. According to the parties, the proper economic market for assessment does not need to be defined because there will be no material effect on competition arising from the proposed transaction, regardless of how the market is defined. However, they submit that given the multi-platform nature of the channels supplied by the proposed JV, the most appropriate economic market would encompass television channels supplied in Jersey.

25. The JCRA has previously considered this sector in Virgin Media / BSkyB[5] and, in that instance, consideration was given to whether a narrower market definition was more appropriate. In the absence of any evidence of potential conglomerate effects, the JCRA has limited its analysis of the proposed JV to vertical and horizontal effects and to areas of material horizontal overlap. As there is unlikely to be a substantial lessening of competition in any potential product market, it is not necessary to reach a definitive conclusion regarding product market definition. Therefore, the JCRA has adopted a working definition of the relevant product market as the supply of television channels.

[4] European Commission Notice on the definition of the relevant product market for the purposes of Community competition law, O.J. C372 at 2 (9 December 1997)
[5] JCRA Decision M622/10, Acquisition of Virgin Media Television Rights Limited and Virgin Media Television Rights Limited by British Broadcasting Group plc.

(ii) The Relevant Geographic Market

26. The relevant geographic market is, stated simply, the area in which competition takes place.

27. In the Application, the parties state that the geographic scope of the market for the supply of television channels is at its narrowest Island-wide but is likely to be significantly wider, given that UKTV channels are broadcast in identical format in the UK and the Channel Islands.

28. There are strong similarities between the supply of television in Jersey and the supply of television in the UK. In addition, the *Broadcasting and Communications (Jersey) Order 2004* extends the provisions of the *Communications Act 2003* (UK) to Jersey, including the obligation to pay a TV licence fee. In previous cases in related sectors[6], the JCRA has acknowledged that relevant geographic markets include Jersey and the UK. For the purposes of this Decision, however, the JCRA need not make a definitive determination of the extent of the relevant geographic market. The JCRA has therefore proceeded on the basis that the relevant geographic market is Jersey, since the proposed JV does not raise competition concerns in this narrow geographic market, and, as such, there would be no competition concerns if the geographic market were expanded to include the UK.

Effect on Competition

29. The JCRA has reached the view that the proposed JV will not substantially lessen competition in the supply of television channels in Jersey. The factors set out in the following paragraphs have led the JCRA to this view.

30. With the exception of some Channel Television programmes and local BBC television productions, almost all television in Jersey is imported. Using the working definition of the relevant market set out at paragraphs 25 and 28 above,

[6] Ibid

the BBC has an estimated market share of 32.90%[7]. Scripps has only one television channel broadcast in Jersey, which has an estimated market share of less than 0.1%[8]. UKTV does not have Jersey-specific data, but in the UK, its market share is 3.86%[9].

31. There is a horizontal overlap between the activities of BBC, UKTV and Scripps, in that each is presently involved in the supply of television channels in Jersey. However, the activities of Scripps are currently very small, so there is very unlikely to be a material effect on competition arising from a JV that brings Scripps together with UKTV or the BBC. Importantly, none of the channels of Scripps or UKTV carry advertising specifically targeted at a Jersey audience.

32. Moreover, the Application notes that the parties face strong competitive constraints imposed by existing competition in the market, as well as the threat of new entrants[10] and expansion on the part of existing operators. In the view of the parties, the launch of new distribution platforms and the expansion of existing platforms (e.g. the proposed new YouView service) may also facilitate new entry.

<u>Ancillary Restraints</u>

33. Under European Union competition law, so-called 'ancillary restraints' – agreements that do not form an integral part of the asset or share transfer but are considered to be 'directly related and necessary to the implementation of the concentration' – are subject to analysis as part of the review of the relevant merger.[11]

34. Applicable European Commission (EC) guidance states that non-competition and non-solicitation clauses for periods of up to two years are justified when the

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[7] The British Audience Research Board, *Report on Trends in Television Viewing 2010. Table 5*– www.barb.co.uk

[8] Ibid

[9] Ibid.

[10] Food Network UK was launched in November 2009.

[11] *See Commission Notice on restrictions directly related and necessary to concentrations*, O.J. C 56/03 paragraphs 1 and 10 (5 March 2005). Article 60 of the Law requires that, so far as possible, matters arising under competition law in Jersey are treated in a manner that is consistent with the treatment of corresponding questions arising under competition law in the European Union.

proposed acquisition includes the transfer of goodwill, and for periods of up to three years when the proposed acquisition includes the transfer of both goodwill and know-how.[12]

35. The Application details that the proposed JV includes a number of restrictive obligations as contained in [REDACTED]. On balance, in light of the terms of the Share Purchase Agreement, the JCRA is satisfied that the proposed acquisition does involve the transfer of goodwill. Under the EC guidance summarised above, this provides justification for non-solicitation clauses with durations of up to two years.

36. Thus, the JCRA has concluded that non-competition and non-solicitation clauses for a period of up to two years are ancillary to the proposed acquisition and justified.

Conclusion

37. Based on the preceding analysis, the JCRA hereby approves the proposed transaction under Article 22(1) of the Law.

22 September 2011 **By Order of the JCRA Board**

[12] *See ibid* at paragraph 20.