Jersey Competition Regulatory Authority ("JCRA")

PUBLIC VERSION

Decision M810/11

Proposed acquisiton of

Channel Television Holdings Limited

by

ITV Broadcasting Limited

The Notified Transaction

1. On 19 October 2011, the JCRA received an application (the "**Application**") seeking approval under Articles 20 and 21 of the *Competition (Jersey) Law 2005* (the "**Law**") of the proposed acquisition by ITV Broadcasting Limited ("**ITV Broadcasting**"), a subsidiary of ITV plc ("**ITV**"), of Channel Television Holdings Limited and its subsidiaries ("**Channel**"). Channel is presently a subsidiary of Yattendon Group plc ("**Yattendon**").

2. Under the proposed acquisition ("**Acquisition**"), ITV plc will acquire 100% of the shares in Channel from Iliffe News and Media Limited ("**Iliffe**"), a Yattendon group company. It is intended that Channel will divest its interests in TXTV Limited and Media Holdings Unlimited[1] to a third party before completion of the Acquisition.

3. The JCRA published a notice of its receipt of the Application in the Jersey Gazette and on its website on 21 October 2011, inviting comments on the Acquisition by 4 November 2011. No comments were received.

4. The parties have informally advised Ofcom, the communications regulator in the United Kingdom, which enforces the *Communications Act 2003* ("**Act**"), of the Acquisition. Ofcom's review of the 'change of control' of Channel's regional Channel 3 license under section 351 of the Act will begin once the Acquisition has received approval from the JCRA and is completed, and a formal notification is lodged by the parties to Ofcom. The 'change of control' review is discussed further in paragraphs 16-18 below.

The Parties

a) ITV

5. ITV was formed in February 2004 as a result of the merger between Granada plc ("**Granada**") and Carlton Communications plc ("**Carlton**") and its principal

[1] TXTV is an independent programme production company and Media Holdings Unlimited is the sponsoring employer in relation to a group pension scheme.

activities include UK and international programme production and distribution, the sale of television advertising and sponsorship and screen advertising.

6. Channel 3 is made up of a collection of 15 regional licenses that cover the whole of the UK and Crown Dependencies. ITV is the largest commercial television broadcaster in the UK and operates eleven of the fifteen regional Channel 3 licenses, as well as one national licence (ITV Breakfast) and ITV's digital channels[2]. ITV is also a member of ITV Network Limited, which acquires the programmes that are shown across the whole Channel 3 service.

7. ITV's broadcasting and online business sells advertising for its own channels and services, and also sells national advertising and sponsorship on behalf of the other regional Channel 3 licensees that it does not operate, i.e. STV plc (with two licences that cover the majority of Scotland), UTV plc (with one licence covering Northern Ireland) and Channel. ITV plc and its subsidiaries have no local advertising or any other local activities in Jersey.[3]

8. Online, ITV delivers ITV programming across various video-on-demand platforms, including itv.com.

9. ITV owns a 50% interest in Freesat, the UK free to air digital satellite broadcasting platform that is also available in Jersey. The remaining 50% interest is owned by the British Broadcasting Corporation, the main public service broadcaster for the UK and the Crown Dependencies (including Jersey).

10. For the financial year ending 31 December 2010, ITV generated worldwide turnover of £2,325 million. For the same period, its turnover in Jersey was nil.

11. Any reference in this decision to ITV includes reference to any of its subsidiaries.

[2] Including ITV2, ITV3 and ITV 4 which are broadcast free-to-air on analogue (Channel 3 licenses only), Freeview and Sky/Freesat and cable. The HD versions of ITV2, ITV3 and ITV4 are available for a subscription on Sky.

[3] ITV's digital channels can be viewed by Jersey consumers, but they are UK wide channels and not specific to or focused on Jersey in anyway.

(b) Channel

12. Channel is the only local commercial television broadcaster based in Jersey and operates the regional Channel 3 license for the Channel Islands. Each Channel 3 licensee is responsible for acquiring its own regional news and other regional programmes. As with ITV, Channel is also a member of ITV Network Limited. ITV currently provides the broadcast feed of its Meridian Channel 3 service to Channel, which the latter uses as the basis for its programming service.

13. Channel produces regional news and programmes, such as Channel Report[4] and Puffin's Plaice[5]. Channel's regional free-to-air Channel 3 service and its regional production activities both derive turnover from the sale of local television advertising and sponsorship, as well as from the sale of national advertising. Channel also operates the online news website channelonline.tv and produces corporate videos.

14. All of Channel's activities are carried on in the Channel Islands, except for its programme compliance activities (i.e. ensuring that programs comply with Ofcom's Broadcasting Code)[6], which are undertaken from Channel's London office.

15. For the financial year ending 31 December 2010, Channel generated worldwide turnover of £7,378,000. Of this sum, it is estimated Channel's turnover in Jersey was approximately £[REDACTED].[7]

Ofcom's review

16. Whenever a Channel 3 licensee undergoes a "change of control", Ofcom is required under section 351 of the *Communications Act 2003* (the "**Act**") to review

[4] Channel Islands news programme.
[5] A 5-10 minute regional children's programme broadcast on weekend afternoons (usually just before Channel Report). The programme, one of the longest-running children's series to air on the ITV network, has been broadcast since 3 March 1963. www.channelonline.tv/channelonline_puffin
[6] When ITV Network Limited commissions a programme from an independent producer, one of the regional Channel 3 licensees must be appointed as compliance licensee for that programme.
[7][REDACTED].

the effects or likely effects of this on various matters listed in the Act. These matters include original productions, news, current affairs, and regional production and, in the case of Channel 3 regional programmes, employment in the regions and the quality and range of programmes made available by licensees to the network. The *Communications (Jersey) Order 2003* extends the provisions of Chapter 5 of Part 3 of the Act regarding media ownership and control to Jersey.

17. When the "change of control" review is complete, Ofcom must publish a report setting out its conclusions and any action it proposes to take to safeguard the position which existed before the change of control. The basis on which it can or must take such action is set out in sections 352 and 354 of the Act.

18. Consequently, the JCRA's review of the Acquisition focuses solely on its effect on competition in markets in Jersey. Any effects on regional content (e.g. programmes such as Puffin's Plaice and Channel Report) are exclusively the purview of Ofcom under the Act.

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

19. 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(1)(b) of the Law, a merger or acquisition occurs for the purpose of the Law if a person who controls an undertaking acquires direct or indirect control of the whole or part of another undertaking.

20. The Acquisition involves ITV acquiring control of Channel as defined under Article 2(1)(b). The parties applied for JCRA approval of the Acquisition on the basis that Channel is the only local commercial television service in Jersey and has a share of more than 40% in the supply of local television services in Jersey, and therefore the Acquisition falls within the conditions of Article 4 of the *Competition (Mergers and Acquisitions) (Jersey) Order 2010* (the "**Order**").

21. Given that ITV supplies the broadcast feed which Channel uses as the basis for its service and is thus active upstream of Channel, and Channel has more than 25%

of the supply of local television services in Jersey, the Acquisition also falls within the conditions of Article 3 of the Order. The parties therefore also applied for JCRA approval of the proposed transaction on that basis.

22. There is no horizontal overlap, because ITV is not presently active in Jersey. The vertical issues as they relate to the Acquisition are considered in the paragraphs below.

23. 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 Acquisition is executed.

Assessment

24. 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*.[8]

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

Defining the affected relevant market(s)

(i) The Relevant Product Market(s)

'*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*.'[9]

26. As noted in paragraphs 20 and 21 above, the obligation to apply for the JCRA's approval of the Acquisition arises by virtue of both Channel's existing share in the supply of local commercial television services in Jersey and the fact that ITV supplies the broadcast feed which Channel uses as the basis for its service and is thus active upstream of Channel.

[8] JCRA (2010) *Mergers and Acquisitions*, at page 6.
[9] 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.

27. According to the parties, the correct economic markets for assessment do not need to be defined because there will be no material effect on competition arising from the Acquisition, regardless of how such markets are defined. However, they submit that given Channel's principal activities in Jersey, the most appropriate product markets would encompass local television broadcasting, regional production and the sale of local advertising.

28. In the absence of any evidence of potential conglomerate effects, the JCRA has limited its analysis to the possible vertical effects of the Acquisition. 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. However, the JCRA observes that when advertising services have been considered previously by competition authorities in the UK and other jurisdictions, relevant markets have been defined more narrowly by media type[10]. The JCRA notes that there is a considerable difference in terms of price and availability between different platforms for advertising media i.e. online, television, radio and print. Therefore, the JCRA has adopted a working definition of the relevant product markets as the supply of local television broadcasting, the supply of regional television productions and the supply of airtime for television advertising.

The supply of airtime for television advertising

29. When ITV was formed by the merger of Carlton and Granada, the UK Competition Commission concluded that the merger should only be allowed to proceed subject to certain conditions, including that a remedy be put in place to protect advertisers in the sale of commercial advertising airtime on Regional Channel 3 Services[11]. This remedy was described as the Contracts Rights Renewal ("**CRR**") remedy. Undertakings including the CRR remedy were given

[10] OFT, *Anticipated acquisition by ITV plc of 25% of GMTV Limited*, 17 September 2004; OFT, *JC Decaux UK Ltd of Titan Outdoor Advertising Limited*, ME/4470/10, May 2010.

[11] Competition Commission, *Carlton Communications plc and Granada plc, a report on the proposed merger*, Cm5952, October 2003.

by Carlton and Granada and accepted by the then Secretary of State for Trade and Industry under the Fair Trading Act 1973.

30. The CRR remedy gave all existing customers of the merged entity the option of renewing the terms of their pre-merger contracts; it also allowed customers to negotiate different contract terms and to nominate any new contract as a 'protected contract'. In addition, ITV was required to offer any variation to existing contracts for airtime on Regional Channel 3 Services on fair and reasonable terms. An independent Office of the Adjudicator was established at ITV's expense to rule on contractual disputes. ITV was also prohibited from materially changing its current airtime sales system without the consent of the UK Office of Fair Trading.

31. At present, ITV sells national television advertising airtime on behalf of Channel. Those sales are subject to the CRR undertakings and this will continue after the Acquisition. Channel currently also sells its own local television advertising. These sales are not presently subject to the CRR undertakings, but the parties have told the JCRA that they will be covered by the CRR procedures once the Acquisition has been completed.

32. From an advertising perspective, Jersey constitutes a very small part of the target audience of the ITV Network Limited programmes that are broadcast across the whole Channel 3 service. Advertising aimed solely or predominantly at viewers based in Jersey or the Channel Islands appears before, during or after regional broadcasts. The JCRA notes that it has not received any comments relating to competitive concerns from local advertising companies and there is no evidence that the availability or the pricing of local television advertising is constrained by the prices and conditions for television advertising for general broadcasts that are aimed predominantly at a UK audience.

33. Further, the JCRA notes that the CRR provides a guarantee of access "to fair and reasonable terms for regional advertising" and that "the Adjudicator is also empowered to resolve any disputes that arise about such terms".[12]

(ii) The Relevant Geographic Market(s)

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

35. In the Application, the parties state that the geographic scope of the market for local television broadcasting and regional production is likely to be the Channel Islands. The parties consider the likely geographic market for the sale of local advertising to be Jersey.

36. Of Channel's broadcasting output, it is only regional news and regional programmes produced by Channel that are broadcast exclusively to viewers in the Channel Islands, and which therefore attract local advertisers. For the purposes of this Decision, the JCRA has proceeded on the basis that the geographic scope of the relevant markets is Jersey, on the basis that the Acquisition does not raise competition concerns in Jersey, and so would also be unlikely to do so if the geographic market were expanded to include the Channel Islands region as a whole.

Effect on Competition

37. The JCRA has reached the view that the Acquisition will not substantially lessen competition in the supply of local television broadcasting in Jersey, the supply of regional television productions in Jersey and the supply of airtime for television advertising in Jersey. The factors set out in the following paragraphs have led the JCRA to this view.

38. With the exception of Channel Report, Puffin's Plaice and some regional programmes, as detailed in paragraph 13 above, Channel uses the broadcast feed

[12] Office of Fair Trading, *ITV Micro-regions*, September 2011, OFT 1336dec, paragraph 3.20.

of ITV's Meridian Channel 3 service as the basis for its programming service. Therefore, almost all of the programmes shown via the regional Channel 3 licence are already imported from ITV.

39. As noted above, there is no horizontal overlap between the activities of ITV and Channel because ITV has no local activities. Vertical mergers will often have either a neutral or beneficial effect on competition, and may also produce efficiencies. In accordance with the stance taken by the European Commission[13] and the UK competition authorities[14], the JCRA will usually only have concerns about vertical mergers where it considers that the merged entity would have the ability and incentive to harm its rivals - for example by raising prices for inputs or refusing to supply inputs to them - and the effect of such conduct on consumers would be sufficient to reduce competition in the affected market such that a substantial lessening of competition might result.

40. In the present case, there is no concern regarding ITV's potential to foreclose access to programming, as prior to the Acquisition, there were no downstream competitors to Channel in Jersey. ITV already supplies the broadcast feed to Channel from its Meridian regional 3 service and, as a result of the Acquisition, will also operate the regional Channel 3 licence that controls the remainder of the programmes shown to Channel viewers in Jersey.

41. In respect of the potential effect of the Acquisition on the supply of local advertising, the parties state that barriers to entry are low as a result of the growth of the internet. Without having conducted any detailed analysis, the JCRA considers that advertising on the internet may not constitute an effective substitute

[13] *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, OJ C265, pages 6-25, 18 October 2008. 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.

[14] Competition Commission and Office of Fair Trading, *Merger Assessment Guidelines*, September 2010 – section 5.6

for television airtime, and is therefore unlikely to lie within the same product market as television advertising. However, in any case, in relation to the supply of airtime for television advertising in Jersey, the JCRA notes that the Acquisition does not appear to alter the state of competition in that market. In addition, the JCRA is satisfied that the CRR rules will provide sufficient safeguards against ITV engaging in conditional selling or exploiting any increased ability to price discriminate against local advertisers.

Ancillary Restraints

42. 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.[15]

43. Applicable European Commission ("**EC**") guidance states that non-competition and non-solicitation clauses for periods of up to two years are justified when the 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.[16]

44. The Application details that the Acquisition will include a number of restrictive obligations contained in Clause 13.1 of the Sale and Purchase Agreement, including non-compete and non-solicitation clauses for a period of [REDACTED]. On balance, in light of the terms of the Sale and Purchase Agreement, the JCRA is satisfied that the Acquisition does involve the transfer of goodwill. On the basis of the EC guidance summarised above, this provides

[15] *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.
[16] *See ibid* at paragraph 20.

justification for non-compete and non-solicitation clauses with durations of up to two years.

45. Thus, the JCRA has concluded that the non-compete and non-solicitation clauses are ancillary to the Acquisition and justified for a period of up to two years.

Transitional Services Agreement

46. The Application also notes that it is contemplated that a Transitional Services Agreement will be entered into between Iliffe, ITV Broadcasting Limited and Channel[17], [REDACTED]. Applicable EC guidance states that purchase and supply obligations aimed at guaranteeing the product previously supplied can be justified for a transitional period of up to five years.[18]

47. The JCRA has concluded that, following the EC guidance summarised above, the purchase and supply obligations in the Transitional Services Agreement are ancillary to the Acquisition and justified for a duration of up to [REDACTED].

Conclusion

48. Based on the preceding analysis, the JCRA hereby approves the Acquisition under Article 22(1) of the Law.

18 November 2011 **By Order of the JCRA Board**

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[17] [REDACTED]

[18] *See Commission Notice on restrictions directly related and necessary to concentrations*, O.J. C 56/03 paragraphs 1 and 10 (5 March 2005), paragraph 33.