Case M1382J

Proposed acquisition of Sky Plc by Comcast Corporation

Decision

REDACTED

*CONFIDE*NTIALITY PROVISIONS APPLY

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Summary

1. Comcast Corporation (**Comcast**) proposes to acquire the entire issued and to be issued share capital of Sky Plc (**Sky**) by way of a takeover offer, pursuant to the relevant provisions of Part 28 of the UK Companies Act 2006. Whilst Comcast's offer is for 100% of the shares in Sky, under these circumstances, the offer will be conditional upon the receipt of valid acceptances in respect of Sky shares which, together with Sky shares that Comcast has acquired or may agree to acquire (pursuant to the offer or otherwise), carry in aggregate more than 50% of the voting rights normally exercisable at a general meeting of Sky. The offer will thus be conditional on a minimum acceptance condition of 50% plus one share.

2. The transaction has been notified to the Jersey Competition Regulatory Authority (**JCRA**) for approval pursuant to Article 21 of the Competition (Jersey) Law 2005 (the **2005 Law**).

3. The JCRA has determined that the proposed acquisition will not lead to a substantial lessening of competition in any relevant market and hereby approve the notified transaction.

The Notified Transaction

4. On 8 May 2018, the Channel Islands Competition and Regulatory Authorities[1] (**CICRA**) received a joint application from Comcast and Sky for the proposed acquisition.

5. CICRA registered the application on its website with a deadline for comments of 23 May 2018. No submissions were received.

The Parties

6. Comcast Corporation (the **Purchaser**) is a public company, incorporated in Pennsylvania, United States of America (Entity 3039985).

7. Sky Plc (formerly known as British Sky Broadcasting Group Plc or BSkyB) (the **Target**) is a public limited company, incorporated in England and Wales (Company Number 02247735).

Requirement for JCRA Approval

8. Under Article 2(1)(b) of the 2005 Law, a merger[2] occurs where a person who controls an undertaking acquires direct or indirect control of the whole or part of another undertaking.

9. On completion of the notified transaction, Comcast will acquire sole control over Sky. The minimum acceptance condition is set at 50% plus one share, whilst Comcast's offer is for 100% of the shares in Sky. The notified transaction therefore constitutes a merger as defined by the 2005 Law.

[1] The JCRA and GCRA co-ordinate their activities with respect to competition law enforcement in the Channel Islands. For the purposes of this document, the JCRA and GCRA are together referred to as CICRA, and all references to CICRA should therefore be read as references to each of the JCRA and GCRA unless the context otherwise requires.

[2] For brevity, mergers and acquisitions are referred to as 'mergers' in this document.

10. According to Article 20(1) of the 2005 Law, a person must not execute certain mergers or acquisitions except with and in accordance with the approval of the JCRA. Article 2 of the Competition (Mergers and Acquisitions) (Jersey) Order 2010 (the **Order**) provides that if the merger or acquisition would create an undertaking with a share of 25% or more of the supply or purchase of goods or services of any description supplied to or purchased from persons in Jersey, or enhance such a share held by an undertaking, then the merger must be notified to the JCRA for approval under Article 20(1) of the 2005 Law.

11. Sky retails audio-visual services to Jersey over 'direct to the home' (**DTH**) satellite, being the means of distributing satellite television signals directly to the consumer's home where such signals are received via a satellite dish. Sky has a share of supply of retail TV services to end users in the UK (and it is assumed, therefore, to persons in Jersey) exceeding 25% and Comcast has a share of supply of the same market to persons in Jersey[3]. In addition, Comcast is active in relation to the supply or purchase of services upstream of the retail supply of TV services (being the supply of TV advertising airtime and the wholesale supply of TV channels).

12. The notified transaction therefore requires the approval of the JCRA prior to its execution.

Market Definition

13. Under Article 22(4) of the 2005 Law, the JCRA must determine if the merger would substantially lessen competition in Jersey or in any part of Jersey. To this end, CICRA will identify the markets which are likely to be affected by the merger and then assess whether competition in these markets will be substantially lessened[4].

Views of the Parties

14. The Parties have submitted that the relevant markets for the purpose of considering whether the proposed transaction results in a substantial lessening of competition are:
    a) Production and supply of TV content
    b) Wholesale supply of TV channels on a national basis
    c) Retail provision of TV services on a national basis
    d) Supply of advertising airtime on TV channels on a national basis

Production and Supply of TV Content

15. Comcast produces and supplies commissioned TV content, as well as licensing pre-produced film and other TV content to a range of broadcasters in Europe. Sky has limited activities in the production and supply of audio-visual content through its distribution arm.

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3 Standalone data for a hypothetical Jersey-only market covering the supply of audio-visual services to end users is not available and, to the extent necessary, Comcast regards the UK as being a suitable proxy. Comcast does not record turnover for Jersey separately in respect of this market.

4 In many cases, a market may already have been investigated and defined by CICRA or another competition authority. CICRA may take note of market definitions applied by other competition authorities, although these are not precedents. Competition conditions may change over time, changing the market definition. Market definition will always depend on the prevailing facts.

16. Neither party supplies content to TV broadcasters in Jersey, however the relevant territory for distribution rights granted to UK broadcasters commonly extends to Jersey, so content made available to customers at the retail level in the UK is often available to retail customers in Jersey. Neither party acquires any TV content from suppliers in Jersey.

Wholesale Supply of TV Channels

17. Comcast is active to a limited degree in the UK as a wholesale provider of basic pay-TV channels. Sky supplies a range of channels to third parties active in the retail provision of TV services, in particular those under the Sky brand.

18. Sky's channels are made available on a wholesale basis to retail providers in the UK. None of those UK retailers of audio-visual services which carry Sky channels ([✂]) are active in Jersey. [✂].

19. Comcast's wholesale supply of TV channels takes place to broadcasters in the UK and certain of these TV channels are also available to audiences in Jersey.

Retail Provision of TV Services

20. Sky is active in the UK in the retailing of its own and third party pay TV channels and video on demand (VOD) programming to end customers. Sky also broadcasts a limited number of Free To Air (FTA) channels. Comcast's only activities in direct retailing of TV services to end users comprise *hayu*, a pay-monthly subscription to access reality TV shows, and direct sales to clients from licensing the CNBC linear channel.

21. Comcast had [✂] retail sales of *hayu* in Jersey [✂], and Sky only makes three of its FTA channels available to customers in Jersey.

Supply of Advertising Airtime on TV Channels

22. The parties are both active as upstream providers of TV advertising airtime. As regards Jersey, [✂]. On Sky AdSmart, there have been [✂] campaigns from advertisers that have specifically targeted Jersey audiences, mostly as part of larger campaigns. [✂] of these campaigns exclusively targeted households in Jersey but were booked by UK media agencies. The revenues generated from these campaigns were [✂].

CICRA Consideration

23. CICRA notes that the definition proposed by the Parties is consistent with previous European cases, however in this case, the precise product and geographic markets can be left open since the transaction will not give rise to a substantial lessening of competition in Jersey on the basis of any reasonable market definition.

Effect on Competition

24. The parties' activities result in a number of horizontally and vertically affected markets in the UK as a result of the proposed transaction. Standalone data for a hypothetical Jersey-only market is not available and, to the extent necessary, the UK is taken as a proxy for estimating Jersey market shares.

Horizontal Effects

25. After defining the relevant market, CICRA estimates the respective market shares of the competitors in that market, both before and after the proposed transaction. These shares can be used as an indication of the overall level of market concentration which will be brought about as a result of the merger.

26. European Guidelines provide that where the combined market share of the merging undertakings does not exceed 25%, the concentration may be presumed not to impede effective competition[5].

27. The list below summarises the product markets in the UK in which the parties horizontally overlap, and estimate their combined market share is 20% or more:

- Acquisition of distribution rights for TV content for inclusion in TV channels
- Wholesale supply of TV channels
- Retail provision of TV services

28. A horizontal merger may impede effective competition in a market by removing competitive constraints on one or more firms, which consequently would have increased market power without resorting to coordinated behaviour (non-coordinated effects). This is more likely in circumstances where, for example, the merging firms have large market shares or consumers' ability to switch supplier is limited.

Acquisition of Distribution Rights for TV Content

29. Sky [✂].

30. Comcast, [✂].

31. The parties maintain that, whilst Sky may have a significant share for the acquisition in certain segments, the proposed transaction does not materially alter the competitive landscape, nor increase Sky's bargaining position.

Wholesale Supply of TV Channels

32. Sky and, to a limited extent, Comcast is active in the wholesale supply of TV channels to TV broadcasters and other distributors in the UK. [✂].

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[5] Article 60 of the 2005 Law provides that so far as possible questions arising in relation to competition must be dealt with in a manner that is consistent with the treatment of corresponding questions arising under EU competition law.

33. There are a number of competing channel wholesalers, and an even greater number of competing channels, which will continue to exercise significant competitive constraints on the merged entity.

Retail Supply of TV Services

34. Sky and, to a limited extent, Comcast are both active in the retail supply of TV services. The market for supply of retail TV services to end users in the UK is therefore technically horizontally affected (based on total revenue shares). However, due to Comcast's *de minimis* retail offering, the Parties propose that the transaction does not give rise to competition concerns in this regard.

35. In summary, the parties maintain that the proposed transaction does not give rise to any material competition concerns in any of the areas above:

    i) For the acquisition of TV content and the retail supply of TV services to end users: whilst Sky is an active acquirer of TV content and supplier of retail TV services, Comcast's activities in these areas are *de minimis*. Consequently, the increment in share resulting from the proposed transaction is negligible, such that the proposed transaction will have no material impact on the competitive landscape in these areas.

    ii) For the wholesale supply of TV channels, the increment from Comcast's activities is modest, in markets where a wide range of well-resourced and motivated competitors, offering a wide range of TV channels, will continue to be active following the transaction. Consequently, ample competitive constraints will remain in all affected markets in this area following the proposed transaction.

Vertical Effects

36. Vertical mergers are mergers where one party has a 'vertical' relationship with the other (for example, as a supplier to or customer of that party). The focus of control of these types of merger focuses on the ability and incentive to foreclose an actual or potential rival's access to supplies or markets as a result of the merger and whether such a strategy would have a significant detrimental effect on competition either up or downstream.

37. European Guidelines[6] state that competition concerns are unlikely to arise in respect of non-horizontal mergers where the market share post-merger of the new entity in each of the markets concerned is below 30%.

38. The list below summarises the product markets in the UK in which one or more of the parties is engaged in business activities in a relevant market, which is upstream or downstream of a relevant market in which the other parties is engaged, and any of their individual or combined

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[6] Guidelines on the assessment of non-horizontal mergers under Council Regulation on the control of concentrations between undertakings (2008/C 265/07)

market shares at either level is 30% or more, regardless of whether there is or is not any existing supplier / customer relationship between the parties.

- Licensing and acquisition of distribution rights for TV content
- Wholesale supply of TV channels
- TV advertising

39. The parties maintain that for each of the vertically affected markets, the proposed transaction does not give rise to upstream or downstream foreclosure concerns because:

    i) Comcast's relatively modest position at all levels of the value chain in Europe means that the merged entity would not have the ability to engage in a profitable foreclosure strategy post-merger;

    ii) A sufficient number of strong competitors would remain active at each level of the TV value chain post-merger, such that the merged entity would not have the commercial incentive to adopt a foreclosure strategy; and

    iii) In view of competition within the relevant vertically affected markets, any hypothetical foreclosure strategy would in any event have no detrimental effect on competition in the relevant markets.

Conclusion

40. On the basis of the information available and provided by the notifying parties, the JCRA concludes that given the *de minimis* level of activity of Comcast in any relevant market in Jersey, it follows that the effect on competition, if any, of this proposed merger will occur wholly outside of Jersey and so the JCRA finds that the proposed merger will not lessen competition substantially in Jersey.

Decision

41. Based on the preceding analysis the JCRA concludes that the acquisition will not substantially lessen competition in Jersey or any part of Jersey

42. The merger is therefore approved under Article 22(1) of the 2005 Law.

1 June 2018 **By Order of the Board of the JCRA**