



Decision

Proposed acquisition of negative joint control of Digital UK Limited by Channel 5 (C-030)

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Jersey Competition Regulatory Authority
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1. Summary

1.1 Channel 5 Broadcasting Limited (**Channel 5**) proposes to acquire negative joint control of Digital UK Limited (**DUK**). The proposed transaction has been notified to the Jersey Competition Regulatory Authority (the **Authority**) for approval pursuant to Article 21 of the Competition (Jersey) Law 2005 (the **2005 Law**).

1.2 The Authority has determined that the proposed transaction will not lead to a substantial lessening of competition in any relevant market and hereby approves the notified transaction.

2. The Notified Transaction

2.1 On 15 October 2021, the Authority received an application from Channel 5 Broadcasting Limited for the proposed acquisition of negative joint control of DUK.

2.2 Currently, the BBC, ITV and Channel 4 each has negative joint control¹ over DUK, a not-for-profit joint venture run on members' contributions. The transaction would add Channel 5 to the membership of DUK, with each of the four national public service broadcasters having equal negative control rights. The addition of Channel 5 will secure DUK extra funding from another party with similar objectives in the area of free to air broadcasting.

2.3 The Authority registered the application on its website with a deadline for comments of 29 October 2021. No submissions were received.

3. The Parties

Channel 5 (the Purchaser)

3.1 Channel 5 is a free to air television network operating in the UK and Jersey. It is the smallest of the UK's public service broadcasters and is registered in England and Wales (company number 03147640). It is owned by the US media company ViacomCBS. Apart from operating free to air television channels in the UK, they also provide My5 and Milkshake! Video-On-Demand (**VOD**) services.

3.2 As a linear channel and VOD service operator, there is a vertical relationship between Channel 5 and DUK on the basis that Channel 5 is active in the commissioning, creation and the supply of content on linear channels and VOD services. DUK facilitates the reception of these free to air

¹ Negative joint control occurs where minority shareholders hold decisive influence, for example through the exercise of veto rights in relation to key strategic matters. This may occur where two or more undertakings are able to exercise decisive influence jointly and therefore share control.

channels and VOD services and operates Logical Channel Numbers and Electronic Programme Guide policies in respect of these.

DUK (the Target)

3.3 DUK is a limited company incorporated in England and Wales (company number 05422613). DUK is a joint venture between the BBC, ITV and Channel Four Television Corporation, each of which exercises equal negative control rights over DUK.

3.4 The British Broadcasting Corporation (**BBC**) is established by British Royal Charter (company number RC000057). ITV Broadcasting Limited (**ITV**) is incorporated in England and Wales (company number 00955957). The Channel Four Television Corporation (**Channel 4**) is incorporated in England and Wales (company number 01533774).

3.5 DUK is a full function joint venture² which was formed in 2005 to facilitate the Digital Switch Over (the **DSO**). The company was refocused in 2013 to operate on a lasting basis. It has a market-facing presence, contracts in its own name with third parties and holds Ofcom regulated Electronic Programme Guide (**EPG**) licences associated with Freeview services.

3.6 Currently the BBC, ITV and Channel 4 each has negative joint control over DUK. Each of them has veto rights over key strategic decisions and can therefore determine and control the strategic direction of DUK. As a result of the transaction Channel 5 will be added to this arrangement and will also acquire negative joint control alongside the other parties.

4. Requirement for Authority Approval

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

4.2 On completion of the Notified Transaction, Channel 5 will acquire joint negative control of DUK and the transaction therefore constitutes a merger as defined in the 2005 Law.

4.3 According to Article 20(1) of the 2005 Law, a person must not execute certain mergers or acquisitions except and in accordance with the approval of the Authority. In particular, in relation to this transaction, Article 4 of the Order provides that where one or more of the parties to the

² A joint venture will generally be full function where it has sufficient resources to operate independently on a market, performing all the functions normally carried out by undertakings operating in the same market, with its own management and access to resources such as staff, assets and finance; and there is a lasting change in the structure of the undertakings concerned.

proposed merger has an existing share of 40% or more of the supply or purchase of goods or services of any description supplied to or purchased from persons in Jersey, and if neither of the two exceptions apply, then the merger must be notified to the Authority for approval under Article 20(1) of the 2005 Law.

4.4 Article 4 of the Order is satisfied as DUK is estimated to facilitate the provision by third parties of the primary source of TV in at least 40% of homes in Jersey. Therefore, in accordance with Article 20(1) of the 2005 Law, the approval of the Authority is required prior to the completion of the Notified Transaction.

5. Market Definition and Effect on Competition

5.1 Under Article 22(4) of the 2005 Law, the Authority must determine if the merger would substantially lessen competition in Jersey or in any part of Jersey. As an initial step, the Authority 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.

5.2 When defining a market, the Authority may take note of its own previous decision-making practice and/or market definitions applied by other competition authorities. These previous decisions are not precedents and are not binding, either on the merging parties or on the Authority. Competition conditions may change over time, changing the market definition, and market definition will always depend on the prevailing facts.³

Views of the Parties

Product Market

5.3 The role of both DUK is to facilitate interoperability / interconnection for receipt by televisions and other devices of free to air television signals which are broadcast on an unencrypted basis in the UK by broadcasters such as the BBC, ITV, Channel 4 and others. DUK does this via the DTT network and it also facilitates the provision of additional services (such as Freeview Play) via the internet.

5.4 The Parties maintain there is no precedent for a market definition of 'facilitating the receipt of TV signals' and they do not consider this to be an appropriate way of assessing the competition effects of the Transaction.

³ 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. Article 60 of the 2005 Law requires the Authority to attempt to ensure that so far as possible questions arising in relation to competition are dealt with in a manner that is consistent with the treatment of corresponding questions arising under European Union law in relation to competition within the European Union.

5.5 Instead, the Parties view their services as part of the market for the retail supply of TV services more widely, and suggest that this is the relevant product market for assessing the competitive effect of the transaction on end users. This is because they enable viewers to receive signals broadcast by third party broadcasters and play a part in the wider public service broadcasting infrastructure in the UK and Channel Islands.

5.6 However, the Parties acknowledge that their services do not fit into the traditional definition of the market because they are only responsible for facilitating the receipt of underlying broadcasts, neither has any control over the signals broadcast over the DTT network, satellite or IP delivery, and neither plays any role in TV content creation.

5.7 The Parties therefore propose that the Authority may leave the precise definition of the relevant product market open since the Transaction will not substantially lessen competition in Jersey on any reasonable basis.

Geographic Market

5.8 The geographic market for retail TV services has generally been held to be national in scope (in this case, including the UK and Channel Islands), or at most, covering a linguistically homogenous region within Europe (such as the UK and Ireland). For the purposes of the Transaction, the Parties suggest the precise definition of the relevant geographic market can remain open since the Transaction will not substantially lessen competition in Jersey on any reasonable basis.

Effect on competition

5.9 The Parties highlight the fact the Transaction simply concerns Channel 5 acquiring joint negative control in a pre-existing joint venture that already features the UK's other larger public service broadcasters. The Transaction will support and further the pro-competitive objectives of DUK, in particular to ensure that free to air channels remain accessible to consumers in an easy to use digital terrestrial format and with appropriate prominence. They consider that there is no risk of the Transaction having an effect on competition in Jersey, and there is no realistic prospect of the Transaction leading to an increase in prices, a reduction in choice or service levels or any reduced incentive to innovate.

Authority Consideration

5.10 The Authority notes the Decision of the European Commission of 13 October 2021 to approve this Transaction under Article 6(1)(b) of the EU Merger Regulation⁴ (the **Commission Decision**).

5.11 The Commission Decision describes the business activities of the undertakings as:

⁴ https://ec.europa.eu/competition/mergers/cases1/202143/M_10184_7974173_44_3.pdf

- BBC: public service broadcaster providing a wide range of TV and radio channels as well as iPlayer and other on-demand services which are accessible to licence fee payers throughout the UK through a variety of platforms and devices.
- ITV: integrated producer broadcaster, creates, owns and distributes high-quality content on multiple platforms globally. It broadcasts a large portfolio of commercial channels including the main ITV channel, which is a designated PSB channel.
- Channel 4: publicly-owned and commercially-funded UK public service broadcaster which operates a portfolio of channels accessible on a free to view basis via a variety of platforms and devices.
- Channel 5: free to air TV network in the UK operating free to air television channels as well as video on demand services. Channel 5 is also a shareholder in YouView, which provides a hybrid DTT-IP service retailed by BT Group and Talk Talk, Channel 5 is indirectly wholly owned by ViacomCBS Inc., the latter being solely controlled by National Amusements.

5.12 The European Commission concluded that the transaction fell within the scope of paragraph 5(a) and 5(b) of their Notice on a simplified procedure⁵ for treatment of certain concentrations under Council Regulation (EC) No 139/2004 and thus decided not to oppose the Transaction and declare it compatible with the internal market and with the EEA Agreement.

5.13 There is no reason to consider that there would be a different effect on competition in Jersey to that in Europe given the geographic scope of the activities of the Parties to the Transaction.

5.14 Given that the only change is in the acquisition of negative joint control of Digital UK by Channel 5, and on the basis of the Commission Decision to clear the Transaction, there are no competition concerns arising from this Transaction.

6. Decision

6.1 On this basis, the Authority concludes that the change in control of DUK will not substantially lessen competition in Jersey or any part of Jersey; and the transaction is therefore approved under Article 22(1) of the 2005 Law.

10 November 2021

By Order of the Jersey Competition Regulatory Authority

⁵ [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC1214\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013XC1214(02)&from=EN)