



Case M1568G

Proposed acquisition of Freesat (UK) Ltd by Digital UK Limited
through Digital UK Trading Ltd.

Decision

Guernsey Competition & Regulatory Authority

1 July 2021

Guernsey Competition and Regulatory Authority
Suite 4, 1st Floor, La Plaiderie Chambers
La Plaiderie, St Peter Port
Guernsey, GY1 1WG
Tel: +44 (0)1481 711120
Web: www.gcra.gg

Summary

1. The proposed transaction involves the acquisition by Digital UK Limited (**DUK**), through its wholly owned subsidiary, Digital UK Trading Ltd, of the entire issued share capital of Freesat (UK) Ltd (**Freesat**).
2. The transaction has been notified to the Guernsey Competition and Regulatory Authority (**GCRA**) pursuant to Section 16(1) of the Competition (Guernsey) Ordinance 2012 (the **2012 Ordinance**).
3. The GCRA has determined that the proposed acquisition will not lead to a substantial lessening of competition in any relevant market and therefore approves the notified transaction.

The Notified Transaction

4. On 3 June 2021, the Authority (**GCRA**) received an application from DUK (**the Purchaser**) for the acquisition, through its wholly owned subsidiary, Digital UK Trading Ltd, of the entire share capital of Freesat (the **Target**).
5. The British Broadcasting Corporation (**BBC**), ITV plc (**ITV**) and Channel Four Television Corporation (**Channel Four**) have negative joint control over the Purchaser. BBC and ITV currently exercise negative joint control over the Target. As a result of the transaction, Channel Four will also acquire negative joint control over the Target, which it will exercise with BBC and ITV.
6. The GCRA registered the application on its website with a deadline for comments of 5pm on Thursday, 17 June 2021. No submissions were received.

The Parties

7. For the purposes of this decision, references to the Purchaser are to Digital UK Ltd notwithstanding that the proposed share acquisition is by its wholly owned subsidiary, Digital UK Trading Ltd. DUK is a UK registered private company limited by guarantee (registration number: 05422613) and is a full function joint venture between BBC, ITV and Channel Four Television Corporation, each of whom exercises negative control over DUK.
8. DUK's core business is providing technical services that facilitate the reception of free to air broadcasts of Freeview over the digital terrestrial television and the operation of Freeview play services (a video on demand service).
9. The joint controllers of DUK are:
 - a. The BBC, which is an entity established by Royal Charter. BBC is a leading public service broadcaster providing a range of TV and radio channels and on-demand services for licence-payers, but also other Pay and FTV channels.
 - b. ITV, which is a UK registered public limited company (registration number: 04967001). ITV is a content producer and broadcasts various public service and commercial channels and

distributes its content on multiple platforms, including by way of subscription video on demand.

- c. Channel Four, which is a statutory corporation. Channel Four is a publicly owned and commercially funded public service broadcaster that commissions the production of media content and operates various free to view (FTV) channels, on various platforms.

10. The Target is Freesat (registration number: 06250097), a UK registered private company (Freesat). Freesat is a full function joint venture between BBC and ITV.

11. Primarily, Freesat provides a satellite broadcasting platform for free to view television (both linear and on demand) and radio, as well as facilitating access to subscription video on demand.

Guernsey: Requirement for GCRA Approval

12. Pursuant to s.61(1)(b)(i) of the 2012 Ordinance, a merger or acquisition occurs for the purposes of this Ordinance when: *“an undertaking [...] directly or indirectly acquires or establishes control of another undertaking”*.

13. As explained above, Channel Four will through this transaction acquire negative joint control over Freesat (through DUK).

14. The notified transaction is therefore a merger, as defined by the 2012 Ordinance.

15. Under s.13(1) of the 2012 Ordinance, certain mergers must be notified to, and approved by the GCRA before they can be put into effect. Regulation 1 of the Regulations provides that mergers must be notified to the GCRA for clearance if:

- a. The combined Channel Islands turnover of the undertakings involved in the merger exceeds £5 million, and
- b. Two or more of the undertakings involved in the merger have Guernsey turnover exceeding £2 million.

16. According to information provided by the notifying parties, the combined and individual applicable turnover of the Parties in the Channel Islands and Guernsey exceeds these thresholds (with due regard to the turnovers of their connected undertakings). On this basis, the GCRA's approval is required before the acquisition is executed.

Market Definition

17. Under s.13 of the 2012 Ordinance, the GCRA must determine if the merger would substantially lessen competition within any market in Guernsey for goods or services.

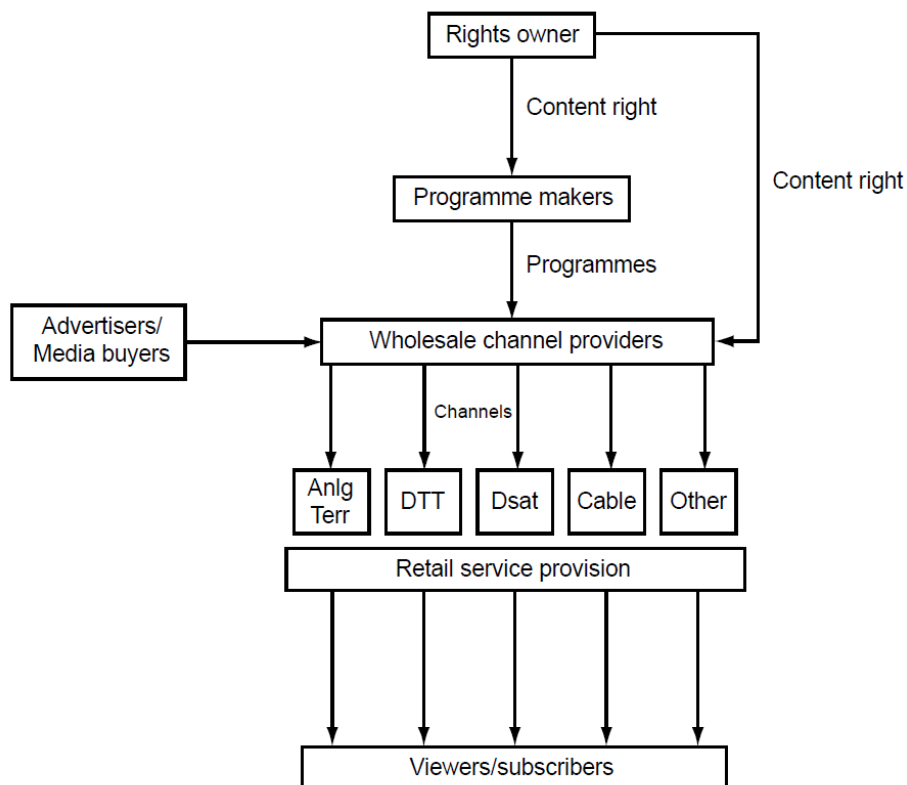
18. As an initial step, the GCRA will identify the markets which are likely to be affected by the merger since market definition provides a framework within which the competitive effects of a merger can be assessed.
19. When defining a market, the GCRA may take note of its own previous decision-making practice and/or market definitions applied by other competition authorities. However, these previous decisions are not precedents and are not binding, either on the merging parties or on the GCRA. Competition conditions may change over time, changing the market definition. Market definition will always depend on the prevailing facts¹.

Views of the Parties

20. DUK has identified the following TV supply and value chain based upon the following diagram from a 2007 Competition Commission investigation,² showing: content acquisition and production; content distribution; and the retailing of content and equipment.

FIGURE 1

The television supply chain



Source: CC based on Ofcom diagram.

¹ 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

² Competition Commission, Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc (14 December 2007), at 2.20.

21. Based on the above diagram, DUK identifies these market levels as follows:

- a. TV content and licensing: being the production and licensing of TV content, which would include players such as BBC and ITV.
- b. Wholesale supply of TV Channels: the wholesale supply of that content within channels and which would include players such as ITV, Channel Four and ITV.
- c. Retail supply of TV Services to viewers/consumers.

22. Within the above chain, DUK identifies the services of DUK and Freesat as falling within the retail level of the market, because they facilitate the receipt by televisions and other devices of FTV television signals broadcast via the various distribution channels (and over which signals they have no control). Since it does not regard the facilitation of the receipt of signals itself as a relevant market, it indicates that these DUK/Freesat services are merely part of a broader relevant market being the retail supply of TV services. Nevertheless, DUK acknowledges that such DUK/Freesat services do not neatly fit within this retail supply of TV services. It further contends that, in any event, the GCRA may leave the market definition open, since the transaction will not substantially lessen competition on any reasonable basis.

23. DUK contends that the geographic market for retail TV services is the United Kingdom, the Channel Islands and the Isle of Man.

GCRA Consideration

24. For the reasons set out below, the precise product and geographic market definition can be left open in this case, since the Notified Transaction will not give rise to a substantial lessening of competition on any plausible basis.

Effect on Competition

25. For the following reasons, the Authority considers that the merger is unlikely to give rise to horizontal or vertical concerns:

- a. The European Commission has approved this transaction on the basis that there are no horizontal or vertical overlaps between Channel Four and Freesat.³ There is no basis for analysing the same transaction differently in Guernsey nor should the transaction have materially different effects in Guernsey from any it might have in the European Union.
- b. The change in the nature of the joint control over Freesat, with the introduction of Channel Four as a joint controller with both ITV and BBC, would appear unlikely to provide the opportunity or incentive for changed behaviour by the jointly controlled DUK/Freesat operation. In that respect, Channel Four would appear to have interests largely aligned to ITV and BBC given its FTV programming and its public service broadcaster status.

³ https://ec.europa.eu/competition/mergers/cases1/202120/m10187_126_3.pdf (Decision in Case M.10187 - BBC / ITV / Channel 4 / Freesat) and https://ec.europa.eu/commission/presscorner/detail/en/MEX_21_2141 (Relevant EU Commission Press Release).

- c. There would appear to be limited pre-existing competition (or switching) between Freesat and DUK.
- d. Key Freesat/DUK functions, such as management of Electronic Programme Guides (EPG) and programme ordering of broadcast channels, are provided on a FRAND basis, regulated by OFCOM licence conditions, and this will continue after the transaction.
- e. A recent OFCOM consultation and related materials⁴ have identified significant decreases in audiences for traditional broadcast TV, significant shifts towards internet delivered media services, including a significant rise in VOD/SVOD (subscription video on demand), by significant providers other than BBC, ITV and Channel Four and flat/declining broadcast advertising revenues for traditional broadcasters. Within this broader dynamic market context, it is unlikely that this transaction would have substantial adverse effects.

Decision

26. Based on the preceding analysis, the GCRA concludes that the acquisition will not substantially lessen competition within any market in Guernsey for goods or services.

27. The GCRA is also satisfied that the merger would not be to the prejudice of:

- (a) consumers or any class or description thereof;
- (b) the economic development and well-being of the Bailiwick; or
- (c) the public interest.

53. The merger is therefore approved under s.13 of the 2012 Ordinance.

1 July 2021

By Order of the Board of the GCRA

⁴ OFCOM, Small Screen: Big Debate Consultation: The Future of Public Service Media (8 December 2020). Mediatique Ltd, Future models for the delivery of public service broadcasting (December 2020) – a report commissioned by OFCOM.