Invitation to Comment on a proposed review of undertakings in lieu given by British Sky Broadcasting Group plc in 2001

30 January 2023

Introduction

1. On 8 May 2001, following the Office of Fair Trading (OFT) investigation into the proposed acquisition of British Interactive Broadcasting Holdings Ltd (BIB) by British Sky Broadcasting Group plc (Sky), the Secretary of State for Trade and Industry accepted undertakings in lieu of reference to the Competition Commission (CC) (the Undertakings) from Sky. The Undertakings require Sky to provide a clean feed of its channels to other parties without interactive services or icons.

2. In November 2019, Sky requested the Competition and Markets Authority (CMA) carry out a review of the undertakings on the basis that it considered them to be no longer appropriate. It considered the undertakings to be obsolete as a result of changes in interactive TV services, and the pay TV sector, which have taken place since 2001.[1]

3. The CMA is now considering whether to launch a review of the Undertakings. The CMA invites comments on whether this proposed review should be launched.

Legal framework

4. The CMA has a statutory duty under section 162 of the Enterprise Act 2002 to keep under review undertakings and orders. From time to time, the CMA must consider whether, by reason of any change in circumstance:

[1] In March 2020 the CMA was preparing to publish an Invitation to Comment (ITC) on a proposed review of the Undertakings. However, the impact of the Covid-19 pandemic on CMA resourcing resulted in the postponement of this work.

(a) undertakings are no longer appropriate and need to be varied, superseded or released; or

(b) an order is no longer appropriate and needs to be varied or revoked.

5. CMA Guidance document CMA11, *Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders* provides that the CMA will typically publish an Invitation to Comment in circumstances where it receives a request for a review. [2]

6. As the guidance sets out, this is generally a two-stage process: first the CMA decides whether to conduct a review, and then a review group (drawn from members of the CMA Panel) considers the substantive question of whether to vary the remedy. This consultation relates to the first stage (deciding to conduct a review).

Background

The merger investigation and Undertakings

7. In 2000, the OFT was notified of a proposed merger between Sky and BIB. Having examined this, the then Director General of Fair Trading advised the Secretary of State for Trade and Industry on 29 September 2000 that the transaction raised significant competition issues in the market for pay TV that would justify a reference to the Competition Commission. The Director General of Fair Trading advised that the issues could be addressed satisfactorily by an undertaking in lieu of a reference. This advice was accepted by the Secretary of State for Trade and Industry in the decision of 12 October 2000.

8. The OFT consulted on draft undertakings concerning a requirement on Sky to provide a clean feed of its channels to other wholesale parties. The OFT advised the Secretary of State for Trade and Industry on 25 April 2001 and the Undertakings were accepted by the Secretary of State for Trade and Industry on 8 May 2001.[3]

9. The clean feed requirement was designed to ensure that, where wholesale customers did not wish to use all or some of the interactive features available to Sky customers, those (non-functional) features would not be included as

[2] CMA11, paragraph 3.6

[3] The OFT (now the CMA) subsequently acquired the responsibility for monitoring, reviewing and enforcing the Undertakings under the Enterprise Act 2002 by Statutory Instrument SI 2006/354.

part of the channel feed. Instead, a channel feed with only relevant or no interactive icons would be provided by Sky.

The parties

10. Sky provides broadcasting, broadband internet services, and telephone services in the UK. It is the UK's largest digital subscription pay TV broadcaster. It was formed after the merger of Sky Television and British Satellite Broadcasting.

11. BIB was owned by a consortium consisting of companies involving the Hong Kong and Shanghai Banking Corporation, British Telecom, Matsushita and Sky. Launching in August 1999 under the brand name Open, it was acquired by Sky and rebranded as Sky Active in 2001. BIB provided a range of interactive services on Sky's TV platform with services linked to those of its consortium of owners.

Interactive services on pay TV

12. Interactive pay TV services at the time of the merger were new services designed to allow customers access to a range of features such as banking with Midland Bank (now part of HSBC), shopping with a limited number of providers including WH Smith, information, games, and email. They were provided on the Sky satellite TV platform which was separate from, and independent of, the internet which was expanding at the same time.

Competition concerns from the OFT's investigation

13. The merger considered by the OFT concerned the market for pay TV, with Sky being active in the provision of pay TV. BIB provided an interactive service on the Sky platform.

14. The OFT's concerns from the proposed transaction centred around the value of the joint combination of Sky's TV channels with the full range of BIB's interactive services and the potential for wholesale customers of Sky to be given an inferior transmission of its channels with non-functioning interactive icons still displayed. The OFT was concerned that this may indicate that a superior service was offered by Sky, and incentivise customers of other providers to switch to Sky.

15. These concerns arose from the combined market position that Sky had in the Pay TV market and the development of a range of interactive services by BIB.

Possible changes of circumstances

16. The CMA considers that a review of the Undertakings may identify a number of changes of circumstance. Consequently, the CMA considers at this time that it has a realistic prospect of finding at least one relevant change of circumstance during the course of a review. These possible changes of circumstance are:

- The standalone interactive services originally provided by BIB (e.g. those previously available via a dedicated 'Interactive Services Menu') are no longer available.[4] Furthermore, the interactive services available on Sky channels (e.g. via the red button) are far more limited than those under consideration at the time of the proposed merger and when the Undertakings were agreed. As such, the importance of interactive services to customers is significantly diminished, particularly because similar services, and a much wider range of more attractive alternative services are available through the internet on a variety of mobile and other devices, with Sky offering internet and broadband services to its retail customers separate to its interactive services.

- The pay TV market has undergone significant changes in the years since the Undertakings were given. There is an increased number of pay TV providers offering different types of pay TV and different transmission mechanisms to final customers including a range of online providers, with offers that include broadcast channels but also video-on-demand services. The providers include those such as BT, Virgin, and TalkTalk, as well as a range of other content providers such as Netflix, Amazon Prime Video, Disney+, Apple TV+, Discovery Plus and Paramount+. As a result of the presence and growth among these providers, we consider that the commercial incentives on Sky in relation to offering its channels to other providers and the commercial terms it seeks for these would be different from the incentives on it in 2001.

- The regulatory landscape has also changed since the Undertakings were given. Ofcom imposed a Wholesale Must Offer (WMO) requirement in 2010, but this was removed in 2015 so that there is now greater reliance on Sky's commercial incentives, coupled with market monitoring by Ofcom. The reasoning given by Ofcom in this decision included:

  "[W]e do not consider that it would be appropriate to impose regulation in relation to the supply of channels containing key

[4] For example: shopping, banking, general information, weather, and other similar services provided by BIB.

sports content at this time. Whilst we recognise that there may be concerns in principle given Sky's strong position in the market, in practice the evidence shows that Sky is supplying widely and we do not consider that the available evidence shows that terms of this supply may be prejudicial to fair and effective competition… We have therefore decided that it is appropriate to remove the WMO obligation.

"We already monitor the pay TV market closely and we will continue to do so, in particular with a view to determining whether the potential concerns identified in this statement arise in the future. We will continue to monitor the availability and distribution of key sports content, technological developments in pay TV services, subscriber numbers for these services, commercial agreements and relationships between competing pay TV retailers, retail packaging and pricing of key sports content, and the importance of particular content to subscribers in choosing their pay TV service.

"Should evidence emerge that Sky was engaging in practices which are prejudicial to fair and effective competition, we will reassess the need for ex ante regulation. In particular our expectation is that consumers should continue to have access to, and a choice of, packages and services containing Sky's key content. We would be concerned if there was evidence of Sky withholding its key content from competing retailers. Similarly, we would be concerned if there was evidence of Sky introducing unreasonable terms into its supply contracts and/or it requiring an agreement which included conditions designed to restrict a competitor's ability to compete as aggressively as it otherwise would…"[5]

As a result of this decision, Ofcom currently relies on Sky's commercial incentives and ongoing monitoring to ensure fair competition in the market. In the event the Undertakings were released, it would be open to Ofcom to take action using its powers under the Communications Act to address a future harm to competition resulting from the treatment of interactivity in the terms of the wholesale supply of pay TV channels.

[5] See Section 7 of Ofcom's Review of the pay TV wholesale must-offer obligation in 2015.

Prioritisation criteria

17. The CMA considers that on the basis of the information available to it, a review of the Undertakings would represent an administrative priority at the current time for the following reasons:

    (a) In relation to impact, the CMA considers that this is an important and valuable sector, with a large number of consumers using Pay TV services.

    (b) Concerning strategic significance, the CMA notes that this review is in line with its statutory duty to keep remedies such as this under review. It also notes that given the age of this particular remedy in such a significant sector, carrying out a review to determine whether the Undertakings remain appropriate would appear strategically significant and desirable.

    (c) The risk from the review appears low, and the information received from this Invitation to Comment should allow the CMA to understand the value of the Undertakings to stakeholders in the sector.

    (d) The resourcing requirement for this review appears moderate and proportionate to the size of the sector and the complexity of the Undertakings.

Stakeholder views

18. Following the request for a review from Sky, which is published alongside this Invitation to Comment, the CMA is seeking views from interested parties. The CMA would like to receive views both on the possible changes of circumstance identified above, and on whether carrying out such a review should be considered an administrative priority for the CMA.

19. The information received will assist the CMA in reaching a decision on whether or not to launch a review of the Undertakings. We emphasise that issues which are not directly relevant to the Undertakings are outside of the scope of this consultation.

20. Respondents should provide their views, supported with relevant evidence where possible, in writing to the CMA at:

    Email: remedies.reviews@cma.gov.uk (Subject line: BSB Remedy)

    Invitation to Comment: BSB Remedy
    Remedies, Business and Financial Analysis
    Area B8.02
    Competition and Markets Authority

25 Cabot Square
London
E14 4QZ

21. The CMA requests that all submissions be accompanied by a non-confidential version which the respondent would be willing to have published on the CMA website in the event that a formal review is launched. Responses should be received by the CMA by 5pm on Friday 17 February 2023. Following this consultation period, the CMA will assess all the information available in reaching a decision on whether or not to launch a formal review of the Undertakings.