Review of merger undertakings given by British Sky Broadcasting Group plc in 2001

Provisional Decision

16 May 2023

Competition & Markets Authority

The Competition and Markets Authority has excluded from this published version of the Provisional Decision information which it considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✄].

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Summary

1. The Competition and Markets Authority (CMA) is reviewing undertakings in lieu of reference to the Competition Commission (CC) given by British Sky Broadcasting Group plc (Sky) in 2001 (the Undertakings).

2. The Undertakings were given following an Office of Fair Trading investigation into a proposed transaction by which Sky would increase its shareholding of British Interactive Broadcasting Holdings Ltd (BIB) from 32.5% to 80.1%.

3. The Undertakings require Sky to provide a clean feed of its channels to other broadcasters without interactive service icons.

4. In November 2019, Sky requested (the Request) that the CMA carry out a review of the Undertakings on the basis that Sky considered the Undertakings 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.

5. From 30 January 2023 to 17 February 2023[1] the CMA carried out a public consultation on whether to launch a review of the Undertakings. The CMA then carried out a further public consultation between 10 March 2023 and 31 March 2023 seeking views and evidence relevant to whether there has been a relevant change in circumstances which means that the Undertakings should be varied or released. As part of this consultation, the CMA proactively requested views from a key stakeholders. No responses were received to either consultation or to the CMA's requests for views.

6. The CMA has provisionally decided that the Undertakings are no longer appropriate by reason of relevant changes of circumstances relating to the availability of the relevant interactive services, the market structure and the regulatory landscape, and, consequently, that the Undertakings should be released.

7. Section 1 of this document sets out more details of the CMA's current understanding of the factual and legal background, the relevant market and the Undertakings. Section 2 sets out the CMA's findings on the existence and effect of relevant changes in circumstance. Section 3 sets out the CMA's Provisional Decision on whether the Undertakings should be released, and also details of a new public consultation on that Provisional Decision.

[1] The CMA's consideration of the Request was delayed as a result of the Covid 19 pandemic and the consequent need to prioritise other matters.

1. Background

1.1 On 8 May 2001, the Secretary of State for Trade and Industry accepted undertakings in lieu of reference to the Competition Commission (CC) (the Undertakings) from British Sky Broadcasting Group plc (Sky). This followed an Office of Fair Trading (OFT) investigation into a proposed transaction by which Sky would increase its shareholding of British Interactive Broadcasting Holdings Ltd (BIB) from 32.5% to 80.1%. The Undertakings require Sky to provide a clean feed of its channels to other broadcasters without interactive service icons.

1.2 In November 2019, Sky sent the Request to the CMA seeking a review of the undertakings on the basis that Sky considered the Undertakings to be no longer appropriate. The Request set out changes in circumstances by reason of which Sky considered the Undertakings to be obsolete. These changes in circumstances included changes in interactive TV services, and the pay TV sector, which have taken place since 2001. The CMA's consideration of the Request was delayed as a result of the Covid 19 pandemic and the consequent need to prioritise other matters.

1.3 From 30 January 2023 to 17 February 2023 the CMA carried out a public consultation (the ITC) on whether to launch a review of the Undertakings. The CMA received no responses to the ITC. In light of this the CMA considered whether it had obtained sufficient evidence, through preliminary engagement with external stakeholders including Sky and the sector regulator Ofcom alongside the CMA's own research and analysis, to have established a realistic prospect of finding at least one relevant change in circumstances that may mean that the Undertakings are no longer appropriate. The CMA concluded that it had. The CMA also assessed a review of the Undertakings against its published prioritisation criteria and found the carrying out of this review to meet those criteria. Accordingly, on 10 March 2023 the CMA published its decision to launch a review of the Undertakings.

1.4 The review is focused on assessing whether and to what extent the obligations in the Undertakings remain appropriate, and does not constitute a broader analysis of the sector or any other issues.

1.5 Following the launch of the review, as noted above, the CMA carried out a further public consultation between 10 March 2023 and 31 March 2023 (the launch decision consultation). That consultation sought views and evidence relating to whether there has been a relevant change in circumstances which means that the Undertakings should be varied or released. As part of that public consultation the CMA also proactively requested views from key stakeholders.[2]

1.6 The CMA received no responses to the launch decision consultation.

Legal framework

1.7 The CMA has a statutory duty under sections 92 and 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:

(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.

1.8 The precise nature of the CMA's consideration of any change of circumstances will depend entirely on the individual circumstances affecting a particular undertaking or order. However, the change of circumstances must be such that the undertaking or order is no longer appropriate in dealing with the competition problem and/or adverse effects which it was designed to remedy, if it is to lead to either variation or termination.[3]

1.9 The process the CMA follows when conducting reviews of undertakings and orders is set out in CMA Guidance document CMA11, Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders.

The 2001 transaction and the Undertakings

1.10 In 2000, the OFT was notified of a proposed transaction between Sky and BIB. Having reviewed this transaction, 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 concerns in the market for pay TV that would justify a reference to the CC. 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 a decision of 12 October 2000.[4]

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[2] Namely: TalkTalk, Virgin Media O2, BT and Ofcom.
[3] CMA11, paragraph 2.5
[4] [ARCHIVED CONTENT] Proposed acquisition by British Sky Broadcasting Group plc of control of British Interactive Broadcasting Holdings Limited - The Office of Fair Trading (nationalarchives.gov.uk)

1.11 Following a public consultation, on 25 April 2001 the OFT advised the Secretary of State for Trade and Industry to accept the Undertakings given by Sky that it would provide a clean feed of its channels to other broadcasters which took a feed of Sky channels and with whom Sky competed downstream.

1.12 The clean feed requirement was designed to ensure that other broadcasters unable to use Sky's interactive services would not have these interactive services advertised on the channel feed. Instead, a clean channel feed with only relevant (i.e with no interactive icons) material would be provided by Sky.

1.13 The Undertakings were formally accepted by the Secretary of State for Trade and Industry on 8 May 2001.[5]

The parties

1.14 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 in 1990.

1.15 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 pay TV services

1.16 Interactive pay TV services at the time of the proposed transaction were new services designed to allow customers access to a limited range of features such as banking with Midland Bank (now part of HSBC), shopping with a small number of providers (e.g. 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.

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[5] 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.

Competition concerns from the OFT's investigation

1.17 The proposed transaction 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.

1.18 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 broadcasting customers of Sky who competed with Sky downstream as providers of Pay TV 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.

1.19 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.

2. Changes in circumstance

2.1 Through its research, the CMA identified three potential relevant changes of circumstance. It consulted on them in its ITC and again in its launch decision consultation. These are:

- availability of the relevant interactive services
- market structure
- regulatory landscape.

Availability of the relevant interactive services

2.2 The standalone interactive services originally provided by BIB (e.g. those previously available via a dedicated 'Interactive Services Menu') are no longer available.[6] In addition, the interactive services available on Sky channels (e.g. via the red button) are more limited than those under consideration at the time of the proposed transaction and when the Undertakings were agreed. In addition, 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. Given these circumstances, the CMA provisionally concludes that the importance of the relevant interactive services is significanly diminished.

Market structure – supply side

2.3 The pay TV market has undergone significant changes in the years since the Undertakings were given. There are two main elements of this change:

(a) There are now an increased number of providers of pay TV in the UK which provides customers with a greater range of pay TV options and choice in terms of the nature of the content available and the packages in which that content can be accessed. Providers include broadband and content providers such as BT, Virgin Media O2, and TalkTalk, as well as a range of other content providers such as Netflix, Amazon Prime Video, Disney+, Apple TV+, Discovery Plus and Paramount+. In addition there are a range of online video content providers that may also compete to

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

some extent with the established pay TV providers for consumers' attention.

(b) These providers are using different business models and transmission methods that allow consumers to view this content more easily and in different ways, as well as on a broader range of devices and at a wider range of times.

2.4 As a result of the presence and growth of these new providers and the increased variety of ways in which consumers can view pay TV and this content, the CMA provisionally concludes that the supply side of the pay TV market has changed considerably since 2001, with consumers now facing a larger range of options for viewing content and ways in which to view it. Consequently, the CMA provisionally finds that Sky now faces a significantly increased competitive constraint on its activities from the range of rival pay TV and broader content providers than was the case in 2001. The CMA finds, provisionally, that the extent of this change is such that Sky would no longer be incentivised, commercially, to seek to damage the Sky content that it sells to rival providers for use on their pay TV platforms by failing to provide a clean feed version of this content.

Regulatory landscape

2.5 The regulatory landscape has also changed since the Undertakings were given, including the establishment of Ofcom in 2003. In this context, we also note that Ofcom imposed a Wholesale Must Offer (WMO) requirement in 2010. However, this was removed in 2015 and there is now greater reliance on Sky's commercial incentives, coupled with market monitoring by Ofcom. The reasoning given by Ofcom in its decision to remove the WMO requirement included:

> "[W]e do not consider that it would be appropriate to impose regulation in relation to the supply of channels containing key 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…"[7]

2.6 As a result of its decision, Ofcom currently relies on Sky's commercial incentives and Ofcom's ongoing monitoring to ensure fair competition in the market. In the event the Undertakings were released, the CMA provisionally finds that it would be open to Ofcom to take action using its powers under the Communications Act 2003 to address a future harm to competition resulting from the treatment of interactivity in the terms of the wholesale supply of pay TV channels.

Representations and conclusion on changes in circumstance

2.7 The CMA has received no further information in relation to the changes in circumstance described above, nor any indication of other changes to consider relevant to the Undertakings, and no representations that the Undertakings remain appropriate.

2.8 The CMA provisionally concludes that the impact of the changes in circumstance set out above are directly relevant to the Undertakings. In addition, in practice those changes render the Undertakings no longer

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

appropriate with reference to the competition concerns identified by the OFT original investigation (see paragraphs 1.17 to 1.19 above) because:

(a) the impact of the combination of Sky's TV channels with the limited legacy range of BIB's interactive services is not as strong as that in 2001 due to the changes in the supply of pay TV, with increased competitive constraints in the sector;

(b) the potential for broadcast customers of Sky to be given an inferior transmission of its channels with non-functioning interactive icons still displayed, with the result that customers of other providers are incentivised to switch to Sky, has decreased. This is due to the changes in the supply side of the sector and the growth of alternative services (see paragraphs 2.2 to 2.4 above);

(c) the combined position that Sky had in the Pay TV market, and the development of a range of interactive services by BIB, have also been impacted by the above changes in the supply side and reduction in availability of the original interactive services in question; and

(d) notwithstanding the above, any potential residual competition problems could now be addressed by Ofcom through its regulatory powers under the Communications Act 2003.

3. Provisional Decision and consultation

3.1 In light of the above, the CMA's Provisional Decision is that the Undertakings are no longer appropriate by reason of the three relevant changes in circumstance identified in Section 2 above and that, as such, the Undertakings should be released.

Notice of intention to release the Undertakings

3.2 As envisaged in paragraph 3.29 of guidance document CMA11, and required under Schedule 10 of the Enterprise Act 2002, the CMA hereby gives notice of its intention to release the Undertakings. The reasoning for this notice is set out in this Provisional Decision document.

Stakeholder's views sought

3.3 The CMA is now seeking views from interested parties on its Provisional Decision.

3.4 Respondents should provide their views on this Provisional Decision and the above notice of intention to release the Undertakings, supported with relevant evidence where possible, in writing to the CMA at:

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

3.5 The CMA intends to publish all submissions received. Please ensure any submission provided to the CMA that contains any confidential material is accompanied by a non-confidential version which the CMA will publish on its website at the time that its final decision is published.

3.6 Responses should be received by the CMA by **5pm on Tuesday 6 June 2023.** Following this consultation period, the decision makers will assess the available evidence in order to make a final decision on whether to retain, release or vary the Undertakings.