DETERMINATION OF MERGER NOTIFICATION M/15/039- LIBERTY GLOBAL /TV3

Section 21 of the Competition Act 2002

Proposed acquisition by Liberty Global plc of sole control of the business of TV3 Television Network Limited

Dated 2 October 2015

Introduction

1. On 21 July 2015, in accordance with section 18(1) of the Competition Act 2002, as amended[1] ("the Act"), the Competition and Consumer Protection Commission ("Commission") received a notification of a proposed acquisition whereby Liberty Global plc ("Liberty Global"), through its wholly-owned indirect subsidiary Virgin Media Limited ("Virgin Media"), would acquire sole control of TV3 Television Network Limited ("TV3 Television")[2] from Doughty Hanson & Co. IV ("Doughty Hanson").

The Proposed Transaction

2. The proposed transaction is to be implemented pursuant to a share purchase agreement ("SPA") between Tullamore Finco Limited ("Tullamore Finco") and Virgin Media, dated 3 July 2015, whereby Virgin Media would acquire 100 per cent of the shares of Tullamore Beta Limited ("Tullamore Beta"). TV3 Television is a wholly-owned indirect subsidiary of Tullamore Beta, which is currently a wholly-owned subsidiary of Tullamore Finco. Tullamore Finco is ultimately majority-owned and controlled by Doughty Hanson.[3]

[1] It should be noted that the Competition and Consumer Protection Act 2014 made a number of important amendments to the merger review regime set out in the Competition Act 2002.

[2] Channel 6 Broadcasting Limited ("Channel 6 Broadcasting"), the operating company for the 3e channel (formerly Channel 6), is a wholly-owned subsidiary of TV3 Television, and was acquired by TV3 Television in 2008. References hereafter to TV3 Television should be read as including Channel 6 Broadcasting and the operation of 3e. See <http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/M08021--TV3-Television-Network-Limited--Kish-Media-Limited.aspx>.

[3] TV3 Television states, in correspondence to the Commission dated 30 September 2015, that Tullamore Finco is owned jointly by Tullamore Alpha Limited ("Tullamore Alpha") (89.3%) and Tullamore Luxco S.a.r.l. ("Tullamore Luxco") (10.7%). Tullamore Alpha and Tullamore Luxco are both wholly-owned subsidiaries of Tullamore Omega Limited ("Tullamore Omega"). Tullamore Omega is owned by Tullamore S.a.r.l. (90%) and TV3 Television management (10%). In turn, Tullamore S.a.r.l. is a wholly-owned subsidiary of DHC Luxembourg IV S.a.r.l. which is itself owned and controlled by four Doughty Hanson nominee entities: Doughty Hanson IV Nominees One Limited, Doughty Hanson IV Nominees Two Limited, Doughty Hanson IV Nominees Three Limited and Doughty Hanson IV Nominees Four Limited. […].

The Undertakings Involved

The Acquirer - Liberty Global

3. Liberty Global, headquartered in London UK, is a public limited company listed on the NASDAQ Global Select Market. Liberty Global is involved primarily in operating cable networks mainly in Europe, namely in Austria, Belgium, the Czech Republic, Germany, Hungary, Ireland, the Netherlands, Poland, Romania, Slovakia, Switzerland, and the United Kingdom.[4] Liberty Global also operates cable networks in Chile and Puerto Rico. For the year ended 31 December 2014, Liberty Global had approximately 27.3 million customers worldwide and supplied approximately 56 million subscription services.[5]

4. Within the State, Liberty Global, through its wholly-owned subsidiary UPC Communications Ireland Limited ("UPC"), owns and operates cable networks as well as a multichannel multipoint distribution service ("MMDS").[6]

5. Liberty Global is also involved in supplying television programme content within Ireland, albeit to a limited extent, through its joint venture with Discovery in All3Media.[7]

6. For the year ended 31 December 2014, Liberty Global's worldwide turnover was approximately €[…] billion,[8] of which approximately €[…] million was generated within the State.

The Target - TV3 Television

7. TV3 Television, headquartered in Tallaght Dublin, is a private company involved primarily in the operation of television channels. TV3 Television owns and operates the TV3, TV3+1, TV3HD and 3e television channels. These channels are broadcast within the State under license from the Broadcasting Authority of Ireland ("BAI"). (BAI licences are described below in paragraphs 32-37.) TV3 Television's channels are available on a variety of broadcasting platforms including:

   - Digital terrestrial television ("DTT") on Saorview.
   - Satellite on BSkyB Ireland ("Sky").
   - Cable on UPC.

---

[4] Liberty Global's cable network is also active in Northern Ireland, operating under the Virgin Media brand.

[5] Notification page 16.

[6] MMDS is a point-to-multipoint broadcasting service that UPC offers pursuant to licences for rights of use in the 2.6 GHz band issued by the communications regulator, the Commission for Communications Regulation. All MMDS licenses (including UPC's MMDS licence) will terminate on 18 April 2016. See <https://www.comreg.ie/_fileupload/publications/ComReg1331.pdf>. The Commission understands that UPC will imminently begin to wind down its MMDS service.

[7] The joint venture is owned 50/50 by Liberty Global and Discovery. Liberty Global states that, for the year ended 31 December 2014, sales revenue in the State from distribution/licensing of television content by All3Media was approximately €[…]. All3Media also generated revenue of €[…] in the year ended 31 December 2014 and expects to generate revenue of €[…]. For more information on All3Media see <http://www.all3media.com>.

[8] Calculated using and ECB average annual exchange rate for 2014 or €1 = US$ 1.3285.

- MMDS on UPC.

- Internet Protocol Television ("IPTV") on eVision.

8. TV3 Television is involved in the production of television content to be shown on its own channels within the State. [9]

9. TV3 Television also operates 3Player, a catch-up "video on demand" ("VOD") service.[10]

10. For the year ended 31 December 2014, TV3 Television's worldwide turnover was approximately €53.8 million, of which €[…] million was generated within the State.

The Vendor – Doughty Hanson

11. Doughty Hanson, headquartered in London UK, is a private equity group that invests in private equity across a variety of sectors, in real estate and in technology ventures.[11] Doughty Hanson acquired TV3 Television in 2006.[12]

12. Doughty Hanson owns and controls three portfolio companies in addition to TV3 Television that generate turnover within the State, namely:

- LM Windpower – a manufacturer of rotor blades for wind turbines headquartered in Denmark.[13]

- Zobele Group – a manufacturer of personal and domestic cleaning products headquartered in Italy.[14]

- TMF Group – a supplier of business outsourcing services headquartered in the Netherlands.[15]

Rationale for the Proposed Transaction

13. In the notification, the parties state that:

> *"The addition of TV3 Group to Liberty Global will create opportunities from Liberty Global's perspective to improve TV3's content offering and to enable it to compete against parties such as RTÉ and Sky as well as newer VOD entrants in Ireland such as such as Netflix, Aer TV, You Tube, Apple TV, Google Play Store, Roku, and Rovi."*

> *"The Proposed Transaction will put TV3 on a more sustainable financial standing as TV3 will have a long term investor with an incentive to help the business grow. With Liberty Global's support, a successful TV3 will be able to improve its*

---

[9] TV3 states that […]. Notification page 31.
[10] 3Player was launched online on www.tv3.ie in 2011, on UPC in 2012 and on Sky in 2013.
[11] For more information on Doughty Hanson see <http://www.doughtyhanson.com>.
[12] See <http://www.tca.ie/EN/Mergers--Acquisitions/Merger-Notifications/M06028--Doughty-Hanson--TV3.aspx>.
[13] See <http://www.lmwindpower.com>.
[14] See <http://www.zobele.com>.
[15] See <https://www.tmf-group.com/en>.

content offering and compete against parties such as RTÉ and BskyB. This will help maintain TV3 as a strong Irish broadcaster ensuring greater media diversity than might otherwise be the case."[16]

Third Party Submissions

14. Three written submissions were received by the Commission. The concerns expressed in written submissions were that:

    i. The proposed transaction would enable the merged entity to harm competing broadcasting platforms, and also advertisers and viewers, by imposing prohibitive commercial terms for broadcasting the TV3, TV3+1 and 3e channels.

    ii. The proposed transaction would create an incentive for the merged entity to change its licensing arrangements with the BAI in order to restrict the ability of competing broadcasting platforms to broadcast the TV3, TV3+1 and 3e channels.

    iii. The proposed transaction would create an incentive for the merged entity to disadvantage competing television channels through disadvantageous placement of competing channels on UPC's Electronic Programme Guide ("EPG")[17].

    iv. TV3 HD and TV3+1 channels should be available free to air ("FTA") on Saorview, rather than only via subscription services such as cable, broadband and satellite.[18]

15. The Commission, as part of its review of the proposed transaction, has taken account of the points raised in the third party submissions, in particular with respect to the concerns raised about potential harm to competing broadcasting platforms and competing television channels. The Commission considers that any competitive effects concerning the placement of TV3 HD and TV3+1 channels on Saorview are not specifically related to the proposed transaction and is consequently outside of the Commission's remit in its review of the proposed transaction.

Market Enquiries

16. The Commission conducted market enquiries which involved contacting a number of competing broadcasting platforms, as well as suppliers of television channels and advertisers.

[16] Notification page 13 and 14.
[17] An EPG provides television viewers with continuously updated menus displaying scheduling information for current and upcoming television programmes.
[18] Saorview is a subscription-free digital television service that is received with an aerial and a Saorview receiver. For more information on Saorview see <http://www.saorview.ie>.

17. Some respondents raised concerns, similar to those highlighted in the written third party submissions, that the merged entity might have the ability and the incentive to restrict the access of rival broadcasting platforms to TV3 Television's channels, for example by imposing prohibitive commercial terms for broadcasting one or more or TV3, TV3+1 and 3e.

18. In the course of its investigation, the Commission consulted with the BAI and the Commission for Communications Regulation both of which have specific regulatory responsibilities in relation to the broadcasting of television programmes. The purpose of these contacts was to inform the Commission generally about the television broadcasting sector

Requirement for Further Information

19. The Commission required further information from the parties to assist with its investigation into the likely effects of the proposed transaction. Therefore, on 31 August 2015, the Commission served Requirements to provide Further Information pursuant to section 20(2) of the Act on both Liberty Global and TV3 Television.

20. Liberty Global and TV3 Television both duly complied with the Requirements for Further Information on 11 September 2015. Issuing the Requirements for Further Information extended the deadline within which the Commission had to conclude its assessment of the proposed transaction in Phase I. The "appropriate date" was thus amended, as per section 19 (6)(b)(i) of the Act, to 11 September 2015.

Industry Background

The Television Broadcasting Sector

21. The television broadcasting sector can be described as a supply chain involving television content, television channels, broadcasting platforms and television viewers (see Figure 1 below).

22. Television content refers to (i) the production and recording of programmes (e.g., drama, comedy and documentaries) for subsequent broadcast and viewing and (ii) the production of live programmes (e.g., news, cultural and sporting events).

23. Television channels acquire the rights to television content and arrange this content into a schedule of programmes to be shown at particular times. This form of television broadcasting is called "linear" television. Non-linear television services, as described further in paragraph 31, are available to viewers at times other than scheduled linear services.

24. Television broadcasting platforms provide the infrastructure whereby television content is broadcast to viewers. The main television broadcasting platforms[19] are:

a) Digital terrestrial television (“DTT”).

b) Satellite (also referred to as Direct to Home or “DTH”).

c) Cable.

d) Internet Protocol Television (“IPTV”).

e) The internet more generally.

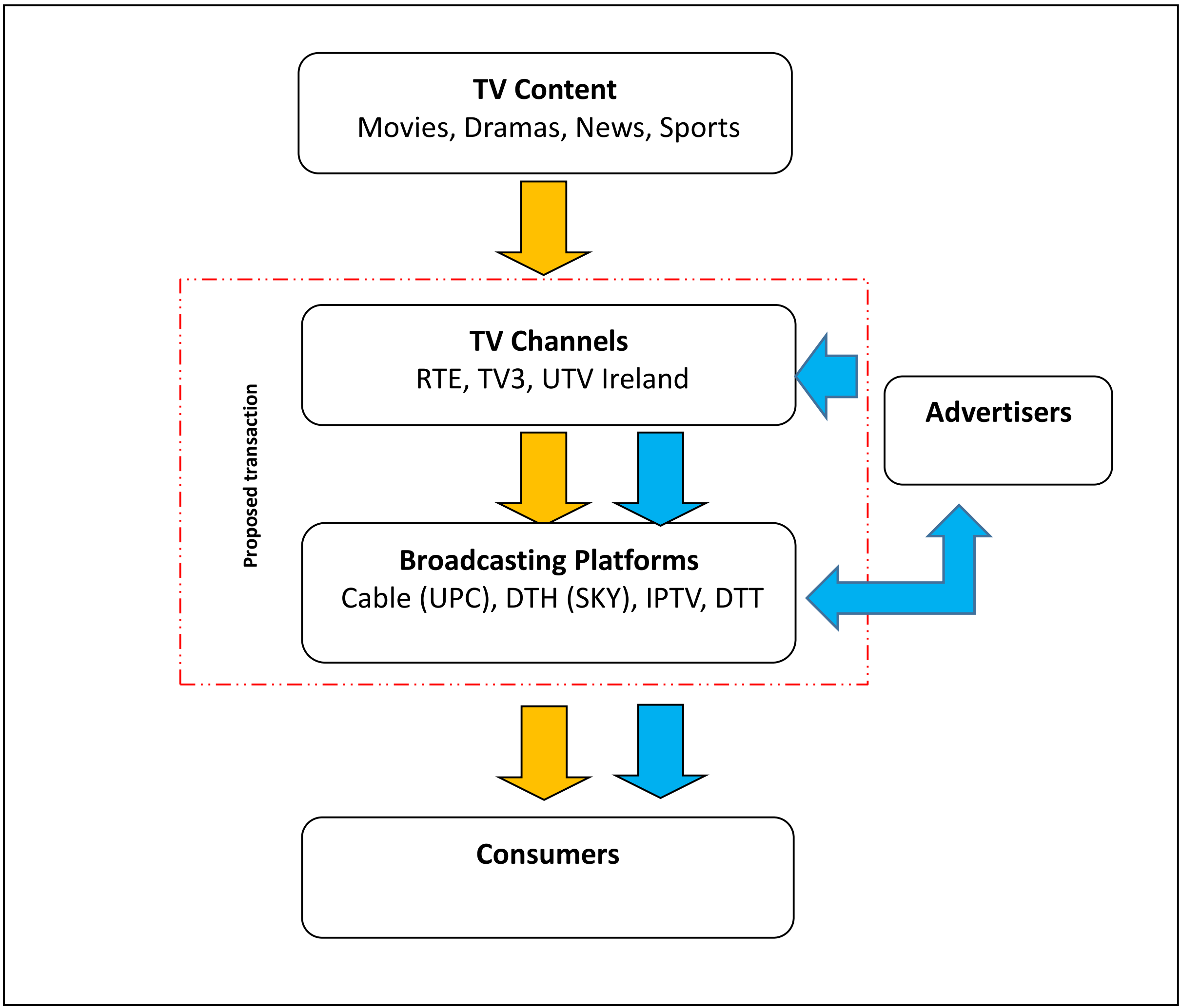
f) Mobile technologies e.g., 3G and 4G mobile phones.

25. Television viewers are the final consumers of television programmes and advertisements broadcast on television.

26. Television channels offer television advertising space to enable individuals, firms and organisations (including broadcasting platforms) to promote products or services on television for a fee. Television advertising revenue is a significant source of funding for commercial television channels.

[19] In Comp M. 6880 Liberty Global/Virgin Media the European Commission identified these six main technical means of delivering audio-visual content to end users.

Figure 1: Television Broadcasting Sector



Commercial Relationships

27. The key commercial relationships in the television broadcasting sector concern the rights to broadcast and rights to access television content. For example:

   a) Television channels negotiate with content producers to acquire rights to include programmes in their television channel schedules.

   b) Broadcasting platforms negotiate carriage agreements with television channels to establish which channels (for both linear and non-linear television programmes) will be broadcast.[20]

   c) Whereas Saorview offers programmes FTA, other platforms require viewers to pay subscriptions to access programmes.

28. These commercial relationships are internal, rather than arms-length, where there is vertical integration between (i) a content provider and a television channel or (ii) a

[20] Rights to broadcast non-linear programmes are also referred to as ancillary rights.

television channel and broadcasting platform (as would occur in this instance upon implementation of the proposed transaction).

29. Another important commercial relationship within the television broadcasting sector concerns the sale of advertising space on television. Television channels generate revenue from selling television advertising "impacts" on their television channels.[21]

Linear and Non-Linear Television

30. As described above in paragraph 23, linear television refers to television programmes which are broadcast and viewed at a scheduled time. This has historically been the normal way in which viewers watch television programmes.

31. Non-linear television refers to other ways in which television content can be viewed as an alternative or in addition to scheduled broadcasts. Non-linear television is dynamic and technically innovative with respect to the timing and delivery of content to viewers.[22] Examples of non-linear television services include Pay per View ("PPV") and VOD services such as TV3's 3Player or Plus1 services such as TV3+1.

Regulation of Television Broadcasting in Ireland

32. The BAI, established on 1 October 2009 under the Broadcasting Act 2009 ("Broadcasting Act"), regulates content across all broadcasting within the State. The Broadcasting Act 2009 sets out a range of general and specific objectives for the BAI, including the licensing of television channels in the State.[23] Two types of licence are issued by the BAI:

a) Television programme service contract ("TPS contract") - under section 70 of the Broadcasting Act.

b) Content provision contract ("CP contract") - under section 71 of the Broadcasting Act.

Television Programme Service Contract

33. TV3 Television is licensed by the BAI to provide a FTA national commercial television service in accordance with the terms of a TPS contract as specified in section 70 of the Broadcasting Act.[24] A TPS contract includes the following obligations on television channels and broadcasting platforms:

---

[21] An "impact" can be defined as one viewing of an advertisement by one member of the relevant audience group.

[22] For example a report prepared by Athena Media for the BAI in 2010 stated the following about non-linear services, and in particular on-line services "*the key shift change for broadcasting is from linear to non-linear with audiences /users wanting content on demand 'what you want, when you want it, where you want it,' which they can share and use in an online life*." Irish Broadcasting Landscape: Economic and Environmental Review for the Broadcasting Authority of Ireland by Athena Media, page 120. See <http://www.bai.ie/wordpress/wp-content/uploads/20110323_StratEconAnlysRpt_vFINAL_AC.pdf>.

[23] The BAI assumed the roles previously held by the Broadcasting Commission of Ireland (BCI) and the Broadcasting Complaints Commission (BCC). For more information on the BAI see <http://www.bai.ie >

[24] Section 70(5) specifically provided for the continuance in force "as if entered into under this section" of a pre-existing TPS contract between TV3 and the Broadcasting Commission of Ireland. TV3 Television, in its RFI response dated 11 September 2015, states that 3e is included as part of its television programme service contract:

> *"TV3 and 3e operate under one licence from the Broadcasting Authority of Ireland (the "BAI") which is a S.70 licence under the Broadcast Act 2009. When TV3 Group acquired Channel 6 Broadcasting Limited, the Television Programme Service Contract*

a) Section 70(1) of the Broadcasting Act requires that the holder of a TPS contract must offer its contracted television programme service as a FTA service.

b) Section 77(4) of the Broadcasting Act requires that broadcasting platforms[25] must carry the TPS contracted FTA channels (such as TV3 Television's channels).

c) Section 77(11) of the Broadcasting Act requires that the holder of a TPS contract (such as TV3 Television) must offer all appropriate broadcasting platforms access to its contracted FTA channels (i.e., channels covered by the TPS contract).[26]

34. The "must carry and must offer" obligations described above in paragraph 33(a) and (b) are subject to commercial negotiation between television channels and broadcasting platforms, but are also subject to the requirement in section 77 (11) of the Broadcasting Act that a television channel provider shall:

> *"… ensure that their must-offer services are at all times offered for re-transmission (subject to agreement as to fair, reasonable and non-discriminatory terms of use) by means of any appropriate network that is available for reception in an intelligible form by members of the public in the whole of or in part of the State."*

35. It is important to note, however, that the "must carry and must offer" obligations, summarised in paragraph 33(a) and (b) above apply only to linear television rights and not to non-linear television rights. The significance of this in the Commission's assessment of the proposed transaction is apparent in paragraphs 53-73.

36. Section 77 (14) of the Broadcasting Act also requires that a broadcasting platform "*shall prioritise the positioning of the must-offer service*" in the broadcasting platform's EPG.

Content Provision Contract

37. Television channels that are not licensed under Section 70 are licensed under Section 71 of the Broadcasting Act by means of a CP Contract between the BAI and the licensee. A CP Contract imposes fewer obligations on television channels than a TSP contract. Most significantly, there is no requirement under a CP Contract to provide a FTA service, nor are there 'must offer' or EPG positioning obligations, such as those described above in paragraphs 33 and 36.

between TV3 Television Network Limited and the BAI was amended to cover 3e, the Channel 6 Broadcasting business. As part of the S.70 licence and under the BAI contract, 3e carries public service obligations around the level of Irish programming, subtitling provided and news and current affairs. The 3e Programme Policy Statement in the Eighth Schedule to the BAI Agreement describes programming commitments of 3e further to its public service obligations. Changes to the 3e Programme Policy Statement require BAI approval. On that basis, as a S.70 channel, TV3 considers 3e to have equivalent must offer must carry obligations."

[25] Subject to certain exceptions specified in section 77(1).

[26] Section 77 (1) (a) of the Broadcasting Act states: *"In this Part "appropriate network" means an electronic communications network provided by a person ("appropriate network provider") which is used for the distribution or transmission of broadcasting services to the public."* Section 77(11) of the Broadcasting Act requires that an appropriate network is "*available for reception in an intelligible form by members of the public in the whole of or in part of the State."*

Competitive Effects Analysis

38. The only horizontal overlap in the activities of the parties within the State is in the market for the production of television content, but this is of insignificant proportions. There are vertical relationships between the parties with respect to: the licensing by TV3 of television broadcasting rights on Liberty Global's UPC cable network; access by TV3 Television to the UPC network and the acquisition of television content and UPC advertising on TV3 Television's channels.

39. The Commission's analysis of the proposed transaction has considered the competitive effects that might arise as a result of the horizontal overlap and vertical relationships between Liberty Global and TV3 Television. This involved an analysis of:

(i) Relevant product and geographic markets i.e. the markets where competitive effects are most likely to arise, and

(ii) The horizontal overlap between the activities of Liberty Global and TV3 Television;

(iii) The implications for the merged entity and competing television channels and broadcasting platforms, in particular the extent of vertical effects that might arise following the implementation of the proposed transaction.

40. The purpose of this analysis is to assess whether the proposed transaction will lead to a substantial lessening of competition within the State.

Market Definition

41. The Commission defines markets to the extent necessary depending on the particular circumstances of a given case. For the reasons explained below, in this instance, it is not necessary for the Commission to define precise product or geographic markets because the Commission's conclusions would remain the same regardless of whether:

a) The market for the supply of television content is segmented to distinguish between:

i. Captive and non-captive content,[27] or

ii. Content categories (e.g., films, sports, news, and others programmes).

b) The market for the supply of television channels is distinguished into separate markets for:

[27] The European Commission, in *Case M.7194-Liberty Global/ Corelio/ W&W/ De Viljer Media,* with reference to C*ase M. 7282 Liberty Global/Discovery/All3Media* and earlier decisions, has distinguished between non-captive television content, i.e., television content which is produced for the supply to third parties, and captive television, i.e., content produced by vertically integrated firms for use on their own TV channels. However, the European Commission left open the question of further defining markets by type of content. See <http://ec.europa.eu/competition/mergers/cases/decisions/m7194_20150224_20600_4264271_EN.pdf>.

i. FTA and pay-TV markets,[28] or

ii. Standard and premium channels,[29] or

iii. Linear and non-linear television services.[30]

c) The market for the supply of broadcast platforms is distinguished into separate markets on the basis of technologies, such as cable and the other platforms (listed above in paragraph 24).

d) The market for television advertising is distinguished

i. From other advertising, or

ii. Into separate FTA and pay-TV markets.

42. The choice of geographic market (e.g., within the State or on the island of Ireland) will not materially alter the competitive impact of the proposed transaction in the State. Consequently, the Commission is of the view that the issue of the appropriate geographic market can be left open in this instance.

43. However, for the purposes of reviewing the proposed transaction the Commission has examined the possible competitive effects of the proposed transaction in the narrowest geographic market possible, namely the State.

44. The Commission has considered the possible competitive effects within the State of the proposed transaction in relation to (i) the supply of television content, (ii) the supply of television channels and the (iii) supply of broadcasting platforms. Even under this restrictive assumption, the proposed transaction would not result in a substantial lessening of competition, as discussed below.

Horizontal Effects

45. The only horizontal overlap in the activities of the parties within the State is in the production of television content. As described in paragraphs 5 and 8, Liberty Global and TV3 Television are involved only to a very limited extent in the production of television content.

[28] The European Commission, in *Case M.4504 SFR/Télé 2, Case M.5932 NewsCorp/BSkyB* and *Case M.6990 Vodafone/Kabel Deutschland,* has distinguished between markets for FTA and Pay TV channels, in part on the basis of differences in business model (the former emphasising advertising revenue and the latter subscription revenue). See
<http://ec.europa.eu/competition/mergers/cases/decisions/m4504_20070718_20600_en.pdf>
<http://ec.europa.eu/competition/mergers/cases/decisions/m5932_20101221_20310_1600159_EN.pdf> and
<http://ec.europa.eu/competition/mergers/cases/decisions/m6990_20130920_20310_3307840_EN.pdf>.
In *Case M.6866 Time-Warner/CME*, however, the European Commission did not make such a distinction. See
<http://ec.europa.eu/competition/mergers/cases/decisions/m6866_20130614_20310_3185851_EN.pdf>.

[29] Premium channels are those that require an additional charge over and above the charge for standard channels.

[30] The European Commission in Case M.4504 SFR/Télé 2 France and *Case M.5121 News Corp/Premiere* left open the question of separate markets for linear and non-linear television.

46. Given the limited extent of this overlap[31] and the significant number of competing content providers in the market[32], the Commission considers that the proposed acquisition will not give rise to horizontal competition concerns.

Vertical Effects

47. As stated in paragraph 38, there are three areas of vertical overlap in the activities of the parties:

a) TV3 Television acquires television content from Liberty Global for broadcast on its television channels;[33]

b) TV3 Television licences its linear and non-linear broadcasting rights to Liberty Global for distribution on its cable network;

c) TV3 Television sells and Liberty Global acquires advertising space on TV3 Television's channels.[34]

48. The Commission's analysis of the proposed transaction focuses primarily on the vertical competitive effects with respect to the relationship between TV3 Television as a channel provider and Liberty Global as a broadcasting platform and, within that context, the impact of advertising revenues on the merged entity's incentives following the completion of the proposed transaction.

49. The Commission's review of vertical competitive effects focuses on television broadcast rights and in particular and how the proposed transaction might affect:

- Competition between the merged entity and competing television channels.

- Competition between the merged entity and competing broadcasting platforms.

50. Chapter 5 of the Commission's Merger Guidelines[35] sets out the framework for the Commission's analysis of such vertical effects:

---

[31] As noted in paragraph 5 above, Liberty Global is active on the market for TV production in the State through its joint venture, All3Media. […].

[32] Producers of television content include in-house divisions of television broadcasters and independent production companies. For example, RTÉ and Setanta Sports both have television studios which could be hired and it is also possible to also record television programmes in theatres and to use outside broadcast trucks. There are also a number of suppliers of post-production services active in the State.

[33] The vertical relationship between Liberty Global and TV3 Television in relation to content for television programmes is not significant given Liberty Global's limited involvement in the production of television content in the State as described in paragraph 5. In addition, given the significant number of other suppliers of television content and the presence of competing broadcasting platforms which acquire television content, the Commission considers that the proposed transaction will not give rise to vertical competition concerns with respect to the acquisition of television content. The impact of the proposed transaction on the market for the acquisition of content is not discussed further in the Determination

[34] There is a vertical relationship between Liberty Global and TV3 Television in the market for television advertising to the extent that TV3 Television sells and Liberty Global acquires advertising space on TV. However, given the variety of advertisers in the State and the presence of competing broadcasting platforms who offer advertising space, the Commission considers that the proposed transaction will not give rise to vertical competition concerns with respect to a market for television advertising. The impact of the proposed transaction on the television advertising market, or a wider advertising market, is not discussed further in the Determination.

[35] Guidelines for Merger Analysis, adopted by the Competition and Consumer Protection Commission on 31 October 2014 (the "Merger Guidelines"). See <http://www.ccpc.ie/sites/default/files/CCPC%20Merger%20Guidelines_1.pdf>.

i. Input foreclosure, whereby the merged entity harms downstream competitors - i.e., in this instance whether the merged entity, upon completion of the proposed transaction, reduces or eliminates the ability of competitor broadcast platforms, to acquire broadcasting rights for the merged entity's television channels, and

ii. Customer foreclosure, whereby the merged entity harms upstream competitors – i.e., in this instance whether the merged entity, upon completion of the proposed transaction, reduce or eliminate the ability of competing television channels to have their television channels broadcast on the merged entity's broadcasting platform.

51. As discussed below, a credible theory of harm for either input or customer foreclosure requires that, the merged entity will have (i) the ability and (ii) an incentive to foreclose competitors downstream (i.e., broadcasting platforms in this instance) or upstream (i.e., television channels in this instance), as a result of the implementation of the proposed transaction. The ability to foreclose competitors requires that the merged entity has market power in one or both markets. The incentive to foreclose competitors depends on the expected return to the merged entity from doing so.

52. Both input and customer foreclosure theories of harm are discussed below first with respect to the less regulated non-linear services and then with respect to linear television services which are subject to regulation by BAI.

Non-Linear Television Services – Input Foreclosure

53. As indicated in paragraph 35, the 'must carry and must offer' obligations arising from a TPS contract do not apply to non-linear television rights and so those obligations cannot be relied on to preclude input-foreclosure in relation to non-linear television services. As highlighted in third party submissions, and also mentioned in the Commission's market enquiries, input foreclosure would involve the merged entity harming competing broadcasting platforms by blocking or otherwise restricting the access of competing broadcasting platforms to broadcast TV3 Television channel's content. For example, the merged entity could change the licensing arrangements for some or all of TV3 Television's channels from a TPS contract to a Contract for Service contract covering non-linear television services. If this were to happen, TV3 would be contractually free to impose prohibitive commercial terms for, or to withhold certain television broadcasting rights from broadcasting platforms that currently compete with Liberty Global or new entrant broadcasting platforms that would compete in the future.

54. Chapter 5 of the Commission's Merger Guidelines states:

> *"The ability of a merged entity to harm a downstream competitor through input foreclosure depends on various factors. … foreclosure will be more likely to harm a downstream competitor if the input cannot be readily substituted with other inputs. …The incentive to foreclose downstream competitors depends, all things being equal, on the balance between (i) reduced profits from discontinued*

upstream sales of inputs to downstream competitors and (ii) increased downstream profits from the sale of the merged entity's products."[36]

55. Table 1 sets out the market shares of television channel providers within the State calculated as the proportion of time allocated by viewers to different television channels.[37]

Table 1: Television Channel Market Shares in the State - 2014

Channels (Grouped by Provider)	Share of Viewing
RTE 1, RTE1+1, RTE 2	27%
TV3, TV3+1, 3e	13%
Sky	6%
BBC1 and BBC2	6%
UTV Ireland	3%
Channel 4 and Channel 4 Northern Ireland	2%
TG4	2%
E4 and E4+1	1%
All Others[38]	41
Total	100%[39]

Source Information supplied by the parties[40]

56. The market shares in Table 1 indicate that TV3 Television's channels are well established and have market shares larger than those of other established competitors such as Sky

[36] See <http://www.ccpc.ie/sites/default/files/CCPC%20Merger%20Guidelines_1.pdf>. Page 26.
[37] Market shares are estimated on the basis of surveys of actual viewing behaviour for both linear and non-linear television. For information on survey methodology see <http://www.tamireland.ie/technology/measurement>.
[38] These include for example, At the Races, Comedy Central, Dave, Discovery Channel, MTV, Nickelodean, Setanta Ireland, TLC and many other channels, all of which have a market share of less than 1%.
[39] This figure is subject to rounding of the individual entries above.
[40] The figures in the table are based on AGB Nielsen TV Consumption Report 2014. Notification page 36.

and BBC. The Commission's market enquiries indicate some support for the position that TV3 Television's channels would be "must have" channels for a broadcasting platform within Ireland. The size of market share of the TV3 Television's channels suggests that TV3 Television is a more attractive target than (i) other possible acquisitions, particularly for a new entrant into the television channel sector or (ii) establishing new television channels. In this regard, Liberty Global states:

> *"[…]"*[41]

57. However, these factors do not, in themselves imply that a substantial lessening of competition as a result of input foreclosure would be likely to occur following the implementation of the proposed transaction.

58. While TV3 Television's channels have a significant share of viewing, it is unlikely that this would be sufficient for TV3 Television to have either the ability or incentive to engage in input foreclosure subsequent to the implementation of the proposed transaction.[42] There are also a number of market features that suggest that TV3 Television would not be in a position to engage in input foreclosure following completion of the proposed transaction.

59. First, following implementation of the proposed transaction, competing broadcasting platforms would continue to have access to other channels (including those offered by RTÉ which would exert a significant constraint on the merged entity with a share of viewing of 27%).

60. Second, some respondents to the Commission's market enquiries noted that if TV3 were to restrict competing broadcasting platforms' access to its channels, this would result in a reduction in the number of viewers which, in turn, would adversely affect TV3 Television's advertising revenues. They questioned whether such a strategy would be viable as it would necessarily imply that the foregone advertising revenue would need to be offset by increased revenues from subscriptions to broadcasting platforms for pay-TV channels. They also questioned whether the current TV3 Television content would be of sufficient range and quality that competing broadcasting platforms would be willing to pay higher prices for broadcasting rights for TV3 Television's channels to compensate for the inevitable loss of advertising revenue.

61. Third, on the basis of information supplied by the parties and from its market enquiries, it seemed clear to the Commission that the potential foregone advertising revenue is of such significance for TV3 Television that it would act as a disincentive to the merged entity to engage in an input foreclosure strategy. TV3 Television states that it generates […] turnover (approximately €[…] in 2014) from non-linear television rights acquired by broadcasting platforms.[43] This […] suggests that the merged entity would not be in a position to engage in input foreclosure of non-linear television rights on the basis of existing low demand.

[41] Liberty Global in its RFI response of 11 September 2015.

[42] The European Commission in *Case M.7194-Liberty Global/ Corelio/ W&W/ De Viljer Media* cleared with conditions a merger involving a target firm involved in the supply of television channels which had a national market shares similar to that of TV3 Television within the State. However, various factors pertinent to that decision, including a particular language-target audience, are not applicable to the proposed transaction.

[43] Notification page 36. This figure includes €[…] earned from sales on non-linear rights to UPC.

62. Finally, in correspondence with the Commission, […][44] […]. TV3 Television also states that:

> *"The vast majority of TV3 and 3e content is available through a free online catch-up service, 3Player. … Not only is TV3 non-linear content not sufficiently "must have" to give rise to a foreclosure effect, it is available to the end customers free of charge through the alternative medium of the 3Player."*[45]

63. Liberty Global states also that […]:[46]

> *"[…]."*[47]

64. The Commission has also reviewed TV3 Television documents that indicate that […].[48]

Non-Linear Television Services – Customer Foreclosure

65. Customer foreclosure would involve the merged entity harming competing television channels by either not acquiring broadcasting rights from competing channels or otherwise disadvantaging competing television channels relative to TV3 Television's channels (for example, by using its cable platform to promote TV3 Television's channels and relegate competitor channels).

66. Chapter 5 of the Commission's Merger Guidelines states:

> *"The ability of a merged entity to harm an upstream competitor through customer foreclosure depends on a number of factors. For example, harm to competitors is more likely if the merged entity is a significant customer and hence a significant source of sales revenue for the upstream competitor than if the merged entity is but one of many customers. … The incentive to foreclose upstream competitors depends, all things being equal, on the balance between (i) increased production costs, if any, from no longer purchasing inputs from the foreclosed upstream competitor and (ii) increased prices and profits from upstream and/or downstream transactions."*[49]

67. While Liberty Global's UPC is by far the largest cable broadcasting platform provider in the State, this does not in itself imply that UPC has sufficient market power with respect to television channels or television viewers to engage in customer foreclosure. Evidence from information supplied by the parties and the Commission's market enquiries indicates there is competition between broadcasting platforms of differing technologies, both upstream for television channels and downstream for viewers.

68. Competition between broadcasting platforms is illustrated in Table 2 which shows market shares for different broadcasting platforms as a proportion of the total number of households receiving television content. While UPC has a significant share (25%),

[44] TV3 Television RFI response of 11 September 2015.
[45] *ibid*.
[46] Liberty Global states as follows , in its RFI response of 11 September 2015:
"[…]."
[47] Liberty Global RFI response of 11 September 2015.
[48] Correspondence between the Commission and TV3 Television dated 28 and 29 September 2015.
[49] See <http://www.ccpc.ie/sites/default/files/CCPC%20Merger%20Guidelines_1.pdf>. Page 26.

other significant broadcasting platforms will remain following completion of the proposed transaction which would exert a constraint on the merged entity.

Table 2: Broadcasting Platform Market Shares in the State - 2014

Provider	Platform Type	Share (Sept 2014)
UPC Ireland	Cable	25%
BSkyB Ireland	Satellite	46%
Other Satellite	Satellite	16%
Saorview	DTT	10%
eVision	IPTV	2%
Magnet	IPTV	0%
Total		100

Source: information supplied by the Parties[50]

69. One means of disadvantaging competitors, highlighted in some third party submissions, would involve the placement of channels on the UPC cable EPG, (e.g., to place TV3 Television channels in the most prominent positions in the EPG and to place competing channels in less prominent positions). The Commission's market enquiries did not highlight EPG positioning as a concern and it is not obvious to the Commission that viewers would not remember, or be unable to identify, the location of their preferred channels. Furthermore, given that UPC is not in a dominant position with respect to all broadcasting platforms in the State, the merged entity would have neither the ability nor the incentive to disadvantage competing channels. For example, making competing channels difficult to locate would reduce the quality of the merged entity's broadcasting platform relative to other platforms from the perspective of the viewer and/or the competing television channels and could encourage viewers and/or channels to switch away from UPC.

70. It is also the case, as stated in paragraph 36 (c), that section 77(14) of the Broadcasting Act requires broadcasting platforms to prioritise the positioning of TPS contracted FTA channels, such as TV3 Television's channels. This might place TV3 Television's channels in an advantageous position relative to competing channels. However, any such advantage would not be the result of, nor be affected by, the proposed transaction. […].

[50] The figures in the table are based on AC Nielsen data. Notification page 37. This total figure is subject to rounding.

Linear Television Services

71. As indicated in paragraph 33, TV3 Television holds a TPS contract which imposes 'must carry and must offer' obligations pursuant to the Broadcasting Act, as described in paragraph 34. Those 'must carry and must offer' obligations would be unaffected by the implementation of the proposed transaction. […].

72. TV3 Television's 'must offer' obligation means that, on request, it must offer its channels for carriage over any appropriate network in the State. Accordingly, TV3 Television cannot refuse a request from any appropriate network to carry the TV3 Television's channels in the State (subject to agreement as to fair, reasonable and non-discriminatory terms of use). Consequently the merged entity would not have the ability to implement an input foreclosure strategy with respect to the linear television services offered by TV3 Television.

73. Further, the Commission considers that the arguments raised above in relation to customer foreclosure apply equally to linear and non-linear television services (as discussed above in paragraphs 65-70, i.e., the merged entity will have neither the ability nor incentive to pursue a customer foreclosure strategy.

Conclusion

74. In light of the above, the Commission considers that the proposed acquisition will not result in a substantial lessening of competition in any market for goods or services in the State.

Ancillary Restraints

75. The SPA between Tullamore Finco and Virgin Media contains a number of restrictive obligations on Tullamore Finco. None of these restrictive obligations exceeds the maximum duration acceptable to the Commission. Given the particular nature of the proposed transaction, the Commission considers that these obligations are directly related to and necessary for the implementation of the proposed transaction.[51]

[51] In this respect, the Commission follows the approach adopted by the EU Commission in paragraph 20 of its "Commission Notice on restrictions directly related and necessary to concentrations" (2005). For more information see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XC0305(02)&from=EN>.

Determination

The Competition and Consumer Protection Commission, in accordance with section 21(2)(a) of the Competition Act 2002, has determined that, in its opinion, the result of the proposed acquisition whereby Liberty Global plc, though its indirect wholly owned subsidiary Virgin Media Limited, would acquire sole control of TV3 Television Network Limited will not be to substantially lessen competition in any market for goods or services in the State and accordingly, that the acquisition may be put into effect subject to the provisions of section 28C(1) of the Competition Act 2002.

For the Competition and Consumer Protection Commission

Gerald FitzGerald
Member
Competition and Consumer Protection Commission