

CW/01138/09/14

04 February 2015

Brigitte Trafford
Chief Corporate Affairs Officer
Virgin Media Limited
Griffin House
161 Hammersmith Road
London
W6 8BS

Jonathan Oxley
Group Director, Competition

Direct line: 020 7981 3647

jonathan.oxley@ofcom.org.uk

BY EMAIL

Dear Brigitte,

Competition Act investigation into the sale of live UK audio-visual media rights to Premier League matches – Case: CW/01138/09/14 - Application for interim measures under section 35 of the Competition Act 1998 - Dismissal Letter

Introduction

This investigation was opened on 17 November 2014 following a complaint made to Ofcom by Virgin Media on 16 September 2014¹ (the “Complaint”). Ofcom is investigating whether the object or effect (actual or potential) of the joint selling arrangements of the Premier League (“PL”) for live UK audio-visual media rights to Premier League matches is the restriction or distortion of competition in breach of the Chapter I prohibition of the Competition Act 1998 (the “Act”) and/or Article 101 of the Treaty on the Functioning of the European Union (“Article 101”).

Under the PL’s rules the PL clubs have agreed to jointly sell, via the PL, the audiovisual rights to make live broadcasts of matches. The PL and the PL clubs are implementing that rule in relation to matches in the 2016/17 to 2018/19 seasons (the 2016/2019 Rights) though an ITT issued on 12 December 2014 (the “ITT”). The ITT provides that the first round of bids for the 2016/2019 Rights must be made on 6 February 2015.

On 12 January 2015 Ofcom provided an update confirming that it had held state of play meetings with the Premier League, Virgin Media, BT Group plc and Sky Plc and that we expected to publish a further update in March 2015.

¹ On 11 November 2014 the CMA agreed, pursuant to the Competition Act 1998 (Concurrency) Regulations 2014 S.I. 2014 No.536, that Ofcom should exercise its concurrent functions under Part I of the Act in respect of this case

The interim measures application

In its interim measures application of 28 January 2015 (the “Application”) Virgin Media argues (in summary):

- The sale of 2016/2019 Rights under the terms set out in the ITT restricts competition, leading to: (a) significant harm to subscribers of premium sports channels; and (b) harm to the public interest as a result of the damage to competition and to consumers.
- The outcome of the Auction will be known before Ofcom reaches the next stage of its investigation in March.
- The outcome of the Auction will determine the ownership of, and the amounts paid for, the 2016/2019 Rights, leading to contracts being entered into between PL and successful bidders.
- The existence of those contracts would adversely impact Ofcom’s ability to remedy any breach of the Act and/or Article 101 established as a result of the investigation.

Virgin Media therefore requests that Ofcom issue an interim measures direction, pursuant to section 35 of the Act, to require PL to suspend the Auction until Ofcom has made a decision in March 2015 as to how to proceed with the investigation.

The legal framework

The first two clauses of Section 35 of the Act provide:

- (1) *Subject to subsections (8) and (9), this section applies if [Ofcom] has begun an investigation under section 25 and not completed it (but only applies so long as [Ofcom] has power under section 25 to conduct that investigation).*
- (2) *If [Ofcom] considers that it is necessary for it to act under this section as a matter of urgency for the purpose—*
 - (a) of preventing significant damage to a particular person or category of person, or*
 - (b) of protecting the public interest,**it may give such directions as it considers appropriate for that purpose.*

If we consider that the tests in Section 35 are met then we may grant interim measures at our discretion. In exercising this discretion, we would have regard to other relevant considerations including the impact on PL and the PL clubs of granting a proposed interim measures direction and relevant third party interests.

In considering the Application we have had regard to the following guidance: Ofcom's Enforcement Guidelines², the CMA Enforcement Guidelines³; Enforcement (OFT 407)⁴ and Involving third parties in Competition Act investigations (OFT 451)⁵.

We understand that the Auction is scheduled to commence on 6 February 2015. We are therefore addressing this request on an urgent basis. We have also had regard to the need to consult on the reasons for our decision on the Application. We have therefore considered the appropriate course of action within the limited time available.

We note in this context that Virgin Media did not choose to bring an application for interim measures when it made its complaint on 16 September 2014, or immediately following the announcement of the date of the Auction in the ITT issued on 12 December 2014.

Decision

We have considered the submissions set out in the Application. We have also considered submissions received from Virgin Media on our Provisional Dismissal Letter and submissions received from PL on the Application and the Provisional Dismissal Letter. The arguments as to the potential harm to subscribers, consumers and competition made in the Application are consistent with the arguments made in the Complaint. In summary it is argued:

- There will be significant harm to subscribers to premium sports channels because the approach to the sale of the 2016/2019 Rights in the ITT will lead to an output restriction and reduced price competition. The high cost of the 2016/2019 Rights will be passed on to subscribers in retail prices of packages including premium sports channels.
- The public interest needs to be protected because the approach to the sale of the 2016/2019 Rights in the ITT: (a) eliminates competition between the rights holders, distorts competition between broadcasters, restricts the number of games broadcast, and leads to excessive retail prices; and (b) damages consumers by leading to excessive retail prices, unmet demand and lack of choice.

We have decided for the following reasons that it is not necessary for Ofcom to act urgently to prevent significant harm or to protect the public interest. The Auction is part of a set of arrangements for the sale of the 2016/2019 Rights. We have opened an investigation under section 25 of the Act to consider whether those arrangements may breach the Chapter I prohibition and/or Article 101. That investigation is ongoing. We therefore do consider it is possible that the Auction, as part of the arrangements under investigation, restrict competition and potentially lead to harm to consumers and/or the public interest.

² http://stakeholders.ofcom.org.uk/binaries/consultations/draft-enforcement-guidelines/annexes/Enforcement_guidelines.pdf

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288636/CMA8_CA98_Guidance_on_the_CMA_investigation_procedures.pdf

⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284436/oft407.pdf

⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284401/oft451.pdf

However, the 2016/2019 Rights concern matches that will start to be played in August 2016. There will therefore be a significant gap, of around 17 months, between the Auction and the broadcasting of the relevant matches. The potential harm to consumers and the public interest relates in significant part to the prices and content of premium sports channels that contain the matches being broadcast. Any harm to consumers and competition will therefore mainly concern the retailing of premium sports channels from around August 2016.

We have taken into account the timing of the 2016/2017 season in determining the appropriate timetable for our investigation. We are aiming to reach the next stage in our process in March 2015. If we ultimately find that there is an infringement we would then need to consider the appropriate remedy, including any directions in relation to the 2016/2019 Rights sold under the Auction. We do not consider that the existence of contracts entered into between PL and purchasers would prevent Ofcom from imposing an appropriate remedy at the relevant time to prevent harm to consumers from occurring. Ofcom has the necessary powers to require the PL and the PL clubs to take actions within the time available. Indeed, the PL has stated to us that there is no basis for Virgin Media's assertion that Ofcom would be hamstrung in its ability to intervene post auction. The PL has also confirmed to Ofcom that it will put in place arrangements in contracts with purchasers to address the consequences of a potential infringement decision.

If any remedy imposed did mean that new arrangements had to be made in respect of the 2016/2019 Rights, then Ofcom would have to be satisfied that any such new arrangements by PL considered the interests of consumers and the public interest in making PL matches available for broadcast from August 2016.

In any event it is not clear that a direction to delay the Auction for a period of 1-2 months would substantially alter the concerns raised by Virgin Media in respect of consumers and competition. As explained above, we do not consider the existence of contracts would in themselves impede Ofcom's ability to impose an appropriate remedy. The substance of the request for interim measures is at present therefore that the Auction is delayed for a short period. If it is the case that Ofcom decides to issue a Statement of Objections all parties would need to consider their respective positions on how to manage the risks arising.

Finally, we note the issue of exemption criteria under sections 35(8) and 35(9). Ofcom could not impose interim measures if PL had produced evidence that satisfied Ofcom on the balance of probabilities that, in the event of Ofcom reaching a basic infringement conclusion, Ofcom would also reach the conclusion that the suspected agreement is exempt as a result of section 9(1) of the Act and/or Article 101(3). In the light of the above we have not had to reach a conclusion on this matter. We note however that PL has elected not to set out detailed submissions on the exemption criteria in response to our investigation at this stage.

A copy of this letter will be published today on Ofcom's competition bulletin.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Jonathan Oxley'.

Jonathan Oxley