

**NTL Communications Corp  
and  
Newcastle United PLC**

A report on the merger situation



COMPETITION COMMISSION

# **NTL Communications Corp and Newcastle United PLC**

A report on the merger situation

**Presented to Parliament by the Secretary of State for  
Trade and Industry by Command of Her Majesty  
July 1999**



## Members of the Competition Commission as at 30 June 1999

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Mr J D S Stark  
Professor A Steele

Miss P A Boys (*Secretary*)

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<sup>1</sup>These members formed the Group which was responsible for this report under the chairmanship of Mr P G Corbett.

# Report and Conclusions

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## Background

1. On 17 December 1998 NTL Communications Corp (NTL), formerly known as NTL Incorporated the then ultimate parent company of Premium TV Limited (Premium TV), a wholly-owned subsidiary, announced that Premium TV had entered into an agreement with Cameron Hall Developments Limited (Cameron Hall), the majority shareholder in Newcastle United PLC (Newcastle United), to acquire 9 million shares representing 6.3 per cent of Newcastle United's issued share capital at a price of 111.7p per share. In conjunction with the acquisition of these shares, Cameron Hall also entered into an irrevocable commitment (the irrevocable commitment) with Premium TV that if Premium TV made a general offer for the remaining issued share capital of Newcastle United at the same price, Cameron Hall would accept that offer in respect of the balance of its shares in Newcastle United, representing 50.8 per cent of the issued share capital. Newcastle United made a parallel and corresponding announcement on the same day.

## The reference

2. On 9 April 1999 the Secretary of State for Trade and Industry referred to us for investigation and report the acquisition of Newcastle United by NTL. Our terms of reference are set out in Appendix 1.

3. It appeared to the Secretary of State (part A of the terms of reference) that it was or might be the fact that arrangements were in progress or in contemplation which, if carried into effect, would result in the creation of a merger situation, as defined in section 64(8) of the Fair Trading Act 1973 (the Act), in that:

- (a) enterprises carried on by or under the control of NTL would cease to be distinct from enterprises carried on by or under the control of Newcastle United (a body corporate incorporated in the UK); and
- (b) the value of the assets to be taken over exceeded £70 million.

4. It also appeared to the Secretary of State (part B) that it was or might be the fact that a merger situation qualifying for investigation, as defined in section 64(8) of the Act, had been created in that:

- (a) enterprises carried on by or under the control of NTL had within the four months preceding the date of the reference ceased to be distinct from enterprises carried on by or under the control of Newcastle United (a body corporate incorporated in the UK); and
- (b) the value of the assets taken over exceeded £70 million.

### **Arrangements in progress (merger in contemplation)**

5. The first question we were required to answer was whether arrangements are in progress which, if carried into effect, would result in the creation of a merger situation qualifying for investigation (see paragraph 3 above).

6. On 21 April, however, NTL issued an announcement that, after considering the findings of the then Monopolies and Mergers Commission (MMC) on the proposed merger of British Sky Broadcasting Group plc (BSkyB) and Manchester United PLC,<sup>1</sup> it did not intend to make the offer for the issued share capital of Newcastle United in respect of which it held the irrevocable commitment. In a letter dated 23 April 1999, NTL confirmed to us that the irrevocable commitment had lapsed and that, having regard to the content of the MMC report on the BSkyB and Manchester United case, it had no present intention of making an offer for Newcastle United. It further requested that the reference of the merger situation in contemplation be abandoned and that the reference of any existing merger situation should not proceed. Separately, Newcastle United wrote to us in similar terms. The texts of NTL's press notice and of the letters are set out in Appendix 2.

7. In view of this development it appeared to the Commission that the proposal by NTL to make arrangements such as were mentioned in part A of the terms of reference had been abandoned. Consequently the Chairman of the Commission sought the Secretary of State's consent to lay aside part A of the terms of reference. The Secretary of State's consent was obtained on 24 June 1999 and part A was duly laid aside. We have, therefore, pursued no investigations into part A of the terms of reference.

### **Possible completed merger**

8. The only questions we must address, therefore, are in respect of part B of the reference, which could not be laid aside in the manner described in paragraph 7: whether a merger situation qualifying for investigation has been created and, if so, whether that operates or might be expected to operate against the public interest.

9. In evidence NTL has said that its 6.3 per cent shareholding does not enable it to have any influence over Newcastle United, giving it:

- (a) no power to influence proceedings at shareholders' meetings as it is able neither to pass nor to veto resolutions;
- (b) no right to board representation; and
- (c) no management or other control or influence over Newcastle United.

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<sup>1</sup>*British Sky Broadcasting Group plc and Manchester United PLC: a report on the merger situation*, The Stationery Office, Cm 4305, April 1999.

Newcastle United made the same points. It has also said that a shareholding of 6.3 per cent could not in any circumstances give rise to an ability materially to influence the policy of Newcastle United. Both companies also point to the existence of two shareholdings of larger size than those of NTL (we were told that these are Cameron Hall, with 50.8 per cent; and Shepherd Offshore Plc, with 8.1 per cent); and Newcastle United has confirmed that it does not, and has no plans to, consult NTL on any matter on which the board may or must make a decision (other than in relation to any matter requiring a decision by all shareholders). It has further stated that the board of Newcastle United does not have regard to the views of NTL in carrying on the business.

10. It might be argued that our terms of reference require us to report on whether a merger situation qualifying for investigation was created at the time the reference was made to us, as a result of the irrevocable commitment which provided NTL with an option to acquire up to a 50.8 per cent shareholding in addition to the 6.3 per cent stake which it still holds. The irrevocable commitment also imposed various obligations on Cameron Hall, the majority shareholder in Newcastle United. These were principally that it would vote against any resolutions which might alter the share and capital structure of Newcastle United or the rights attaching to Newcastle United shares, and also that Cameron Hall would not during a specified period transfer, or solicit a purchaser for, its Newcastle United shares which were subject to the irrevocable commitment. It might, therefore, be argued that because of the irrevocable commitment or the combination of that and NTL's 6.3 per cent shareholding, NTL was able materially to influence the policy of Newcastle United and thus a merger situation qualifying for investigation existed at the time the reference was made.

11. Both NTL and Newcastle United submitted that no such situation existed for a number of reasons, principally that NTL had no right to board representation and that the irrevocable commitment gave NTL no additional rights in advance of completion of any takeover offer, which in any case NTL was not obliged to make. Newcastle United told us that because the position on any offer by NTL was remote and conditional, it could not regard NTL as 'a majority shareholder in waiting' and its board did not, therefore, defer to NTL in relation to its day-to-day business or its strategic business. NTL also pointed out that the directors of Newcastle United would be legally obliged to have regard to the interests of Newcastle United rather than those of any one shareholder, an obligation reinforced by the provisions of the Stock Exchange's Listing Rules, in particular Rule 9.34 which provides that a listed company with a controlling shareholder (in this case Cameron Hall) must be capable at all times of carrying on its business independent of such controlling shareholder. In addition NTL's view was that even if, contrary to this obligation, the board of Newcastle United were to try to have regard to the views of NTL, it would be extremely difficult for it to do so. Given the absence of any other NTL investments in football clubs, NTL was not likely to have a view on the vast majority of matters considered by the board.

12. We note that our terms of reference require us to consider whether the creation of the merger situation qualifying for investigation operates or may be expected to operate against the public interest. This would suggest that we need only consider the current or expected future public interest effects of a merger situation. We have no reason to believe that, even assuming a merger situation might have existed in the brief period when NTL had the benefit of the irrevocable commitment, any such historic situation now operates or may be expected to operate against the public interest.

13. As to the current situation, given all the circumstances, including especially the termination of the irrevocable commitment and the existence of other major shareholders, we do not believe that NTL is now in a position to influence the policy of Newcastle United. We conclude that there is now no merger situation qualifying for investigation. Consequently, there is no foundation on which any public interest assessment can be made. In view of this

conclusion we have not considered it necessary to determine whether or not the assets test is met.

## **Conclusion**

14. We conclude that no merger situation qualifying for investigation currently exists and if a merger situation existed at an earlier date, we do not consider that it now operates or may be expected to operate against the public interest.

P G CORBETT (*Chairman*)

P MACKAY

J B K RICKFORD

P A BOYS (*Secretary*)

30 June 1999