

**ACQUISITION BY BRITISH SKY BROADCASTING PLC
OF A 17.9 PER CENT STAKE IN ITV PLC**

Statement of issues

Background to the reference

1. The inquiry group (the Group) is required to decide:
 - (a) whether a relevant merger situation has been created; and, if so
 - (b) whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition (SLC) within any market or markets in the UK for goods or services; and
 - (c) whether, taking account only of any SLC and the admissible public interest consideration, the creation of that situation operates or may be expected to operate against the public interest.

The public interest consideration mentioned in (c) is 'the need in relation to every different audience in the UK or in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience'.

Jurisdiction

2. On 17 November 2006 British Sky Broadcasting plc (BSkyB) acquired a 17.9 per cent stake in ITV plc (ITV). The Group must decide whether, as a result of this acquisition, a relevant merger situation has been created in that two or more enterprises (BSkyB and ITV) have ceased to be distinct within the meaning of section 23 of the Enterprise Act 2002 (the Act). Enterprises cease to be distinct if they are brought under common ownership or common control. For the purposes of section 26 of the Act a person who is able, directly or indirectly to control or materially to influence the policy of a body, but without having a controlling interest in that body, may be treated as having control of it.
3. In determining whether BSKyB has acquired material influence, the Group will consider, in particular:
 - (a) the relevant statutory provisions of the Act, published guidance and relevant previous decisions of the Competition Commission and the Office of Fair Trading;
 - (b) other relevant legislation including the Broadcasting Acts, the Communications Act 2003 and the Companies Act 2006;
 - (c) whether BSKyB has now, or might have in the future, the ability to block special resolutions, and the possible implications of any such ability;
 - (d) the distribution of shareholdings in ITV and the patterns of attendance and voting at shareholders' meetings;
 - (e) the likelihood of BSKyB acquiring ITV board representation and the impact of it doing so;

- (f) the extent of existing and likely future commercial or technical arrangements between the two groups;
- (g) the likelihood of BSkyB increasing its stake in ITV to 19.9 per cent; and
- (h) any other factors relevant to BSkyB's ability to exercise influence over the policy of ITV.

Market definition

4. In order to inform its assessment of the competitive effects of the acquisition, the Group will explore as appropriate the definition of the economic market or markets affected by the acquisition (the relevant market(s)). In particular, the Group will consider whether:
- (a) the market for audiovisual services should be defined by:
 - (i) channel (eg ITV1, Sky One); or
 - (ii) platform (eg Digital Terrestrial Television (DTT), Direct to Home Television); or
 - (iii) business model (eg free-to-air, pay-TV); or
 - (iv) whether it is appropriate to consider the market to be a combination of the above;
 - (b) the market for content provision should be defined by:
 - (i) type of content (eg sports, movies, drama, news etc);
 - (ii) whether the content is considered to be 'premium' or not; and
 - (iii) the way in which the content is acquired (eg whether the content is produced in-house, commissioned, or obtained as a result of an auction process);
 - (c) the market for content rights should be defined by:
 - (i) whether the rights are premium sports rights, movie rights, or other premium rights; and/or
 - (ii) whether the rights are for live events only, or whether they cover rights more generally;
 - (d) the market for advertising should be considered to be:
 - (i) only a part of television advertising;
 - (ii) all television advertising; or
 - (iii) all advertising including television, radio, newsprint, outdoor and Internet; and
 - (e) the relevant geographic market(s) is/are regional, national or international.

The counterfactual

5. The Group will compare the expected effects of the acquisition against the situation which would have been likely to have occurred in the absence of the acquisition (the counterfactual). In particular, the Group will consider whether, in the absence of this acquisition:
 - (a) the most likely alternative would have been for a third party to have acquired an interest in some or all of ITV; or
 - (b) the most likely alternative would have been for ITV to have remained independent.

Competition

'Theories of harm'

6. Theories of harm are used to help focus the analysis of the possible effects of the acquisition. Based on initial evidence received, the Group has provisionally identified six possible ways in which the acquisition might result in an SLC (theories of harm) and which it would like to investigate further. The identification of such theories of harm should not be taken to imply that the Group has reached any conclusions, however preliminary. The Group will consider, in particular, the following theories of harm:
 - (a) Loss of current and potential competition in an 'all-TV' market—the acquisition might create or increase any unilateral market power of BSkyB and/or result in a reduction in strategic rivalry between ITV and BSkyB within an all-TV market. This might affect, for example, ITV's strategic decisions concerning the future development of the DTT platform (including the allocation of multiplex capacity), the future development of Freesat, or the future of content production and commissioning. It might also have an effect on competition for sports rights (see (d)).
 - (b) Loss of potential competition in a 'premium pay-TV' or a pay-TV market—the acquisition might reduce the likelihood of ITV, or a third party jointly with ITV, entering the (premium) pay-TV market and challenging BSkyB. BSkyB would provide various technical platform services to ITV or another entrant to the pay TV market (including, for example, the electronic programme guide and conditional access). Furthermore, the acquisition might result in existing ITV content or production capability not being made available on fair commercial terms to new entrants and limiting their ability to compete with BSkyB.
 - (c) Loss of potential competition in content production—the acquisition might reduce or eliminate BSkyB's incentives to develop its own content production facilities or to increase its commissioning of new content, thereby reducing competition in content production.
 - (d) Loss of competition in bidding for sports rights or other premium rights—the acquisition might reduce the intensity of any competition between ITV and BSkyB in the acquisition of premium rights, limit the opportunities for third parties to bid jointly with ITV or BSkyB, or deter third parties from partnering with ITV to bid jointly for premium rights because of the risk that BSkyB would obtain commercially valuable information. This might reduce the likelihood of third

parties acquiring premium rights, particularly sports rights, and successfully challenging BSkyB's position in the (premium) pay-TV market.

- (e) Coordinated effects in television advertising—the acquisition might provide ITV and BSkyB with the ability and incentive to share information and coordinate their behaviour in the advertising market. This might lead to adverse effects which might not be fully mitigated by the existing Contracts Rights Renewal mechanism, put in place following the creation of ITV.
- (f) Loss of competition in the provision of television news—the acquisition creates an ownership link between the two largest commercial television news production companies, ITN and Sky News. This might reduce competition to supply news to third parties such as Channels 4 and 5 and lead to lower quality of news for viewers.

The identification of these theories of harm does not preclude an SLC being identified on another basis.

- 7. The Group will consider the actual degree of influence conferred by the acquisition of a 17.9 per cent stake in ITV in assessing the theories of harm set out in paragraph 6(a) to (f).
- 8. One or more of these SLCs might cause some customers to face:
 - (a) an increase in price (eg for pay-TV subscription services or for advertising); and/or
 - (b) a reduction in service levels; and/or
 - (c) a reduction in innovation,compared with the levels that would have prevailed in the absence of the acquisition.

Related competition issues

- 9. The Group will take account of whether there are identifiable trends in the market that have had, or are likely to have, a significant effect on competition in any relevant market in the short to medium term. These might include, for example:
 - (a) the effects of digital switchover, including the impact of spectrum allocation;
 - (b) the effects of new technologies (eg improved compression techniques or high definition television) or the convergence of different technologies (eg television, Internet, telephony); and/or
 - (c) any major regulatory changes.
- 10. The Group will consider a number of issues when determining whether the acquisition may be expected to lead to an SLC on the basis of any of the above, or any other, theories of harm:
 - (a) whether, and if so to what extent, BSkyB and ITV have competed with each other historically, currently compete, or are likely to compete in the future in any of the relevant markets;

- (b) whether, and if so to what extent, BSkyB and ITV have historically faced, currently face or are likely to face actual and/or potential competition from other broadcasters or retailers (in particular the BBC, but also Channels 4 and 5, and new entrants such as BT Vision, TopUp TV and Tiscali TV);
- (c) whether, and if so to what extent, different platforms (eg satellite, cable, DTT or broadband) or different business models (eg free-to-air or pay-TV) compete with one another in the provision of audiovisual services to customers;
- (d) whether competition between BSkyB and ITV is consistent throughout the UK or differs on a regional or national basis in any of the relevant markets, and if so, what any differences might be;
- (e) the effects of competition in each of the relevant markets in terms of, for example:
 - (i) price (pay-TV subscriptions, costs of advertising, premium paid for sports rights);
 - (ii) range of programmes being offered by different broadcasters or retailers, on different platforms, or according to business model;
 - (iii) range of services being offered (eg Video on Demand, pay per view etc);
 - (iv) quality of services being provided;
 - (v) levels of innovation;
- (f) whether there are any significant costs restricting the ability of customers (whether viewers or advertisers) to switch between platforms, and the likely effect of the acquisition upon any such factors;
- (g) whether there are significant barriers to entry or expansion in any of the relevant markets. In particular, the Group would like to understand:
 - (i) the recent experiences of entry into the market for audiovisual services (eg by Tiscali, BT Vision or TopUp TV);
 - (ii) the nature and relevance of technological limitations in the supply of audiovisual services, particularly in relation to broadband television;
 - (iii) the relevance of ownership of, or access to content, including sports rights or movie rights, for ease of entry at the retail level. This might include the ability of entrants to acquire content or channels at a wholesale price;
 - (iv) the relevance of ownership of, or access to, capacity, for example in relation to the DTT multiplexes, for ease of entry at the retail level;
 - (v) the relevance of the practice of selling premium rights on an exclusive basis, and the extent to which this may limit competition;
 - (vi) the likelihood of key sports rights being acquired by different broadcasters or retailers and the importance of joint bidding;
 - (vii) the likelihood of future entry into any of the relevant markets, and the identity of the most credible entrants. In particular, the Group would like to understand the likelihood of ITV entering (premium) pay-TV (either alone or

in partnership with a third party), and the likelihood of BSkyB developing or acquiring a content production business;

Offsetting factors

11. The Group will explore whether any factors might offset any of the consequences of the acquisition, in particular:
 - (a) whether any potential lessening of competition in any of the relevant markets might be offset by:
 - (i) limitations on the cost of advertising arising from the implementation of the Contract Rights Renewal mechanism;
 - (ii) market power of the advertisers or media buyers; and
 - (iii) market power of the holders of sports rights;
 - (b) whether any identifiable trends in any relevant market have had, or may be expected to have a significant effect on competition in any relevant market in the short to medium term that may offset any effects of the acquisition; and
 - (c) whether new technologies might significantly affect competition in any relevant market in the short to medium term that may offset any effects of the acquisition.

Substantial lessening of competition

12. The Group will consider whether, taking account of all the above, the acquisition has resulted, or may be expected to result, in an SLC in any relevant market.

Plurality

Theories of harm

13. The public interest consideration specified by the Secretary of State is 'the need, in relation to every different audience in the UK, or a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of media enterprises serving that audience'.
14. Taking into account Ofcom's report for the Secretary of State pursuant to Section 44A of the Act, the Group will consider what is meant by plurality and how sufficiency of plurality might be measured. It will consider whether it should focus in particular on plurality in relation to the provision of news and/or current affairs, or whether it should consider plurality more widely, for example in relation to programming or different aspects of culture more generally.
15. The Group will investigate, in particular, the following aspect of plurality:
 - (a) The acquisition creates an ownership link between News Corporation, News International and BSkyB on the one hand and ITV and ITN on the other hand.
 - (b) The ownership link could allow BSkyB to influence the editorial approach, competitive strategy or funding of ITV's and ITN's provision of news and/or

current affairs, thus reducing the number of major independent suppliers of television and/or cross-media news and/or current affairs.

- (c) This could lead to a reduction in the plurality of provision of news and/or current affairs within the UK as whole or in relation to particular audiences.

This does not preclude any other theory of harm relating to plurality being identified.

Related plurality issues

16. The Group will consider whether, given section 58A(5) of the Act, it is appropriate to consider the quality and nature of control that can be exercised by BSkyB in relation to ITV and ITN as a result of its 17.9 per cent shareholding in ITV and ITV's 40 per cent shareholding in ITN, and if so what the quality and nature of that control is currently, and how that might change in the foreseeable future. In particular, the Group will consider the ability of BSkyB or its shareholders to influence the provision of news and/or current affairs supplied by ITV and ITN.
17. The Group will consider a number of other issues in assessing the theory of harm in relation to plurality set out in paragraph 15 or any other possible theory of harm, including:
 - (a) how best to define the concept of plurality, and sufficiency of plurality;
 - (b) the extent to which plurality of ownership is important in facilitating plurality of opinions;
 - (c) the current level of plurality within the UK as a whole and in relation to different audiences, and the extent to which that level of plurality is increasing or decreasing;
 - (d) whether relevant audience(s) should be defined by:
 - (i) genre: for example, an audience for national news, news more generally, news and current affairs, or a broader media audience;
 - (ii) media: for example, a television audience or a cross-media audience (including television, radio, newspapers and Internet); and
 - (iii) socioeconomic group, geographic area or age group;
 - (e) the nature of supply and demand for news and/or current affairs, including the relationship between Sky News and Channel 5, and the relationship between ITN and Channel 4, or any other broadcasters for whom Sky News or ITN provide news services;
 - (f) whether there are any other factors that might give grounds for concern about news/ current affairs, or about other issues such as programme content or culture more generally arising from a reduction in the number of independent media enterprises serving the same audience as a result of the relevant merger situation; and
 - (g) whether there are any factors, including regulatory constraints, that might mitigate any potential adverse effects.

Public interest

18. The Group will consider whether, taking account of any SLC and the admissible public interest consideration, the creation of the relevant merger situation operates or may be expected to operate against the public interest.

Possible remedies

19. Should the Group conclude that the acquisition has resulted, or may be expected to result in an SLC, it will consider whether remedies are appropriate and what remedies would effectively address the SLC. In doing so it will consider whether any relevant customer benefits may be expected to arise as a result of the acquisition, the nature of any such benefits and those customers most likely to receive those benefits.
20. If the Group concludes that the relevant merger situation operates against the public interest, it will need to decide what remedial action should be taken by the Secretary of State or by persons other than the Secretary of State, and, in either case, what action should be taken and what is to be remedied, mitigated or prevented.