

# **Submission to Competition Commission regarding the acquisition by BSkyB of a 17.9 per cent stake in ITV**

## **Channel Four Television Corporation**

### **Introduction**

Channel 4 welcomes the opportunity to submit its views on the Competition Commission's (CC's) provisional findings regarding the acquisition by BSkyB of a 17.9 per cent stake in ITV. This submission has been prepared in response to the CC's Notice of Provisional Findings and Notice of Possible Remedies both published on 2 October 2007 and the Provisional Findings Report published on 4 October 2007.

### **Channel 4's views on the CC's provisional findings**

As a general point, Channel 4 supports the CC's finding that the acquisition by BSkyB of a 17.9 per cent stake in ITV has resulted in the creation of a relevant merger situation, that this situation has resulted or may be expected to result in a substantial lessening of competition (SLC), and that the acquisition therefore operates against the public interest.

We have a small number of comments to make on the detailed reasoning contained within the CC's Notice of Provisional Findings and Provisional Findings Report which we set out below.

#### Finding of material influence

We note the CC's finding that, as a result of the acquisition, BSkyB has acquired material influence over ITV primarily due to BSkyB's ability to block special shareholder resolutions. The analysis of ITV voting history, set out in the CC's Appendix D, clearly suggests that the 17.9 per cent shareholding would be likely to give BSkyB the 25 per cent of votes required to block a special shareholder resolution. For instance, the average voter turnout from the five previous general meetings (67.4 per cent) would result in BSkyB having 26.6 per cent of the votes at a general meeting. While the minimum vote turnout (62.6 per cent) would result in BSkyB having 28.6 per cent of the votes.

In addition to this, we consider that BSkyB is likely to be able to exert influence over ITV's strategy that is disproportionate to its shareholding. As the CC noted, BSkyB's voting position is likely to be significantly strengthened by its industry expertise. BSkyB's is the only major shareholder in ITV with significant media industry knowledge and this is likely to give it an ability to exercise authoritative opposition to ITV strategy and raises the likelihood that BSkyB will be able to influence other shareholders to vote in line with it. In our view this enhances BSkyB's ability to exert material influence over ITV and this should be taken into account when considering possible remedies (as discussed below).

## News supply

In its provisional findings, the CC concluded that there was unlikely to be a SLC in relation to the wholesale supply of news programming. As the CC noted, this was one of the areas that Channel 4 was particularly concerned about and we are therefore disappointed that the CC concluded there was unlikely to be a competition risk in relation to wholesale news supply.

We continue to believe that the acquisition raises a serious concern in relation to the ongoing competition in the wholesale supply of news programming. In its provisional findings, the CC concluded that BSkyB's shareholding in ITV would be likely to lead to a SLC by giving BSkyB the ability to influence ITV's strategy. Given BSkyB has the ability to influence ITV's strategy, we believe BSkyB would have the ability to influence ITV's ongoing support for ITN, the primary commercial competitor to BSkyB's own wholly owned news provider Sky News. Any consolidation of control in wholesale commercial news supply or weakening of wholesale news suppliers would have a detrimental effect on Channel 4 given its PSB obligations to provide high quality, distinctive news programming.

### **Channel 4's views on the possible remedies**

In its provisional findings, the CC concluded that BSkyB's shareholding in ITV would be likely to lead to a SLC by giving it the ability to influence ITV's strategy. We consider that it is essential therefore that the CC recommends to the Secretary of State a remedy that will prevent BSkyB influencing the strategy of ITV in any way.

The CC has invited views on three broad remedial options to address the SLC identified in its provisional findings. The options being considered are:

- (a) *Divestiture of the whole of BSkyB's shareholding in ITV.*
- (b) *Divestiture of such part of BSkyB's shareholding in ITV that it would cease to have material influence over ITV.*
- (c) *Behavioural remedies to accompany partial divestiture remedies.*

As set above, we welcome the finding that the merger situation may be expected to result in a SLC. We therefore consider it appropriate that the CC is considering remedies that could be effective in addressing the potential SLC at this time.

Given the inevitable lack of transparency in the decision making processes of management and its relationship with large shareholders, our view is that behavioural remedies alone cannot be expected to prevent BSkyB having the ability to influence ITV's strategy as long as BSkyB holds 17.9 per cent of ITV shares and, as the CC sets out in Appendix D, has the ability to block special shareholder resolutions. On this point, we agree with the CC's provisional position (set out in paragraph 8) of not considering behavioural remedies on their own as one of the possible remedies. Our view is therefore that some level of divestment of BSkyB's stake in ITV will be required to ensure BSkyB is prevented from influencing ITV's strategy.

Channel 4 considers that any such divestment needs to be proportionate, with the sole objective of addressing the concern that BSkyB is able to influence ITV's strategy through its shareholding. We do not believe that divestiture of the whole of BSkyB's shareholding is required in order to address the SLC. In terms of the level of divestiture that would need to take place in order to address the SLC, we consider that this needs to be a significant enough stake to ensure that BSkyB no longer has material influence over ITV but no more. At a minimum, the level of divestiture needs to ensure that BSkyB clearly has less than 25% of the shares that are habitually cast at General Meetings of ITV, so that BSkyB is not able to block a special shareholder resolution.

The analysis of ITV voting history, set out in Appendix D of the provisional findings, suggests a relatively small divestment would reduce BSkyB's shareholding below the level required to block a special shareholder resolution. For instance, given the average voter turnout from the five previous general meetings (67.4 per cent), a shareholding below 16.8 per cent would be unable to block a special resolution. Given the minimum vote turnout from the five previous general meetings (62.6 per cent), a shareholding below 15.7 per cent would be unable to block a special resolution. However, we feel that the level of divestment needs to be such that BSkyB's shareholding is comfortably below the level required to block a special resolution given ITV's voting history, so should be greater than the levels suggested by these voter turnout figures.

Partly this is due to the risk that BSkyB will be able to exert influence over ITV's strategy that is disproportionate to its shareholding (as discussed in paragraphs 3.54 and 3.55 of the provisional findings). We therefore believe that the CC should take this into account when determining the level of divestiture required.

Channel 4 believes that BSkyB should be required to divest a sufficient proportion of its stake in ITV to ensure that it is not able to influence ITV's strategy through its shareholding. We note that the CC's guidance states that remedies that aim to restore all or part of the market structure that existed prior to a merger are likely to be a direct way of addressing the adverse effects of a SLC. Prior to the merger, the largest shareholder in ITV was Fidelity with a shareholding of 11 per cent, and therefore we consider that divestiture by BSkyB to this level may be an appropriate remedy to address the SLC. However, our overarching position in relation to potential remedies is that divestment of some level is required to address the SLC and ensure that BSkyB cannot influence ITV's strategy.

The CC has also asked for views on any other measures that may be needed to make effective either a full or partial divestiture of BSkyB's shareholding in ITV and to ensure that no new competition concerns would arise. The CC has suggested that these may include measures relating to the purchaser, the method or the timing of divestiture.

We consider that there is a potential concern in relation to the purchaser(s) of any divested stake. There is a risk that a partial divestiture is ineffective and/or raises new competition concerns if the divested stake is sold to a party or parties with whom BSkyB has an existing or potential close relationship. This would raise concerns that the stake was being held by such party or parties with a view to future cooperation with BSkyB, whether formally or informally. In this event, BSkyB would still be able to exert a material influence over the strategy of ITV. In this context we refer to recent press reports that BSkyB had not originally intended to purchase its

full stake in ITV, but to collaborate in that purchase with an un-named private equity investor – and only made the full purchase alone when the intended collaborator pulled out (see *“Sky raid had private equity ally”*, The Guardian, October 8, 2007).

We understand it is the CC’s standard approach to divestiture remedies that the divested stake is sold to a “suitable purchaser” and that such a purchaser must be approved in advance by the CC. We would advocate the use of this approach in this case. We consider that the important criteria for accessing potential purchasers are independence (i.e. that the potential purchaser has no significant connection with BSkyB, or the prospect of one) and absence of competition concerns (i.e. the divestment does not itself create new potential competition concerns independent of the role of BSkyB).