

23 October 2007

Linda Jablonski  
Inquiry Co-ordinator  
Competition Commission  
Victoria House  
Southampton Row  
London  
WC1B 4AD

Dear Linda

### **BSkyB/ITV Merger Inquiry**

While Setanta broadly agrees with the CC's conclusion that Sky's acquisition of 17.9% of the shares in ITV will result in a substantial lessening of competition arising from a loss of rivalry in the all-TV market between ITV and Sky, for the reasons set out below, Setanta believes that the CC's provisional findings should be varied (as contemplated in paragraph 4 of the Notice of Provisional Findings).

#### **1. Market definition**

1.1 Setanta notes the CC's conclusion that:

*“At current prices, ITV and BSkyB operate within a UK market for all-TV which included both pay-TV and FTA services.”*

1.2 As the CC will be aware, the OFT's Report of 27 April to the Secretary of State, and a plethora of previous decisions by UK and European competition authorities in broadcasting cases, noted that, whilst FA services place some constraint on pay TV services, there are nevertheless discrete pay TV markets.

1.3 For the reasons summarised in section 2 below, the merger results in a substantial lessening of competition in pay TV markets connected with the acquisition and subsequent exploitation of key sports rights on a pay TV basis.

Setanta Sports  
4th Floor  
8 Waterloo Place  
London SW1Y 4BE  
UK

**T:** +44 (0) 207 766 8484  
**F:** +44 (0) 207 766 8485  
**E:** info@setanta.com

[www.setanta.com](http://www.setanta.com)

Registered Office:  
Setanta Transmissions (UK) Ltd, 4th Floor  
8 Waterloo Place, London SW1Y 4BE  
Company No. 5120884

1.4 In the circumstances, the CC should acknowledge that, notwithstanding the fact that free to air TV competes, to some extent, with pay TV, there are nevertheless discrete pay TV markets.

## 2. **Joint bidding and strengthening a competitor's existing offering**

2.1 The CC expressly concludes that:

*“BSkyB’s importance and stature as an industry player, together with its position as the largest shareholder, would give additional weight to its views. This could encourage the board [of ITV] to accommodate BSkyB’s views to avoid conflict”.* (Paragraph 12)

*“We thought it likely that BSkyB would influence ITV’s strategy.”* (Paragraph 18)

*“Given its interests as a competitor and despite its interests as a shareholder, BSkyB would have the incentive to reduce ITV’s investment in content in order to reduce the competitive constraint of FTA on BSkyB.”* (Paragraph 18(a))

*“The acquisition may lead to BSkyB influencing investment in ITV’s strategy in relation to sports rights.”* (Paragraph 22)

2.2 In light of these conclusions, the CC’s further conclusions below are *non sequiturs*:

*“We concluded that there was unlikely to be an SLC arising from a loss of potential rivalry from a pay TV offer ... strengthened by ITV.”* (Paragraph 21)

*“We concluded that the acquisition was not likely to lead to an SLC arising from ... a reduction in joint bidding between ITV and third parties ... for sports rights.”* (Paragraph 22)

2.3 As the CC acknowledges, Sky will be able to use its position as the largest shareholder and its importance and stature as an industry player to influence ITV’s strategy and, in particular, influence ITV’s strategy in relation to the acquisition of sports rights. One aspect of that strategy is ITV’s approach to joint bids with third parties, such as Setanta, which would strengthen such third parties’ pay TV offerings. It is simply not credible to state that Sky will influence ITV’s strategy in respect of the acquisition of sports rights but not in respect of joint bids for such rights.

2.4 **[Redacted – confidential].**

- 2.5 In its Report to the Secretary of State, the OFT noted the existence of high barriers to entry (see paragraphs 142, 144 and 182 of the OFT’s Report). **[Redacted – confidential]**.
- 2.6 Given these high barriers to entry, Sky’s pre-eminent position in respect of the acquisition of rights for premium sport pay TV channels and the currently limited extent of competition in the provision of premium pay TV sports channels, any lessening of competition in respect of key sports rights which results from the merger is likely to be substantial.
- 2.7 Thus, the CC should vary its provisional findings so as to acknowledge that, following the merger, Sky has the ability and incentive to influence ITV in order to inhibit joint bids for sports rights by ITV and third parties, such as Setanta, and that this results in a substantial lessening of competition.

### **3. Remedies**

- 3.1 One of the remedies being considered by the CC is the “*divestiture of such part of BSkyB’s shareholding in ITV that it would cease to have material influence over ITV*”. In this context, the CC notes that previous partial divestiture remedies have resulted in reductions to “*just below 10% and just below 15%*”. In practice, if the CC were to require Sky to divest its shareholding in ITV from 17.9% to just below 15%, it would implicitly be claiming that the assessment of material influence is an unfeasibly exact science and that, in this case, Sky’s material influence over ITV turns solely on its ability to block special resolutions.
- 3.2 The CC has acknowledged that Sky will be able to use its position as the largest shareholder to influence ITV’s strategy. In order to avoid such influence, Sky must divest to a level at which it would cease to be ITV’s largest shareholder and not be likely to re-acquire that status. **[Redacted – confidential]**.
- 3.3 The CC also inquires about “*behavioural remedies to accompany partial divestiture remedies*” and, in this context, refers to “*voting behaviour and the solicitation or acceptance of board representation*”. In practice, if Sky remains the largest shareholder in ITV it will, as a result of that position and its status and importance as an industry player, be able to influence ITV’s strategy irrespective of undertakings concerning its voting behaviour and board representation. As a consequence, whilst such undertakings would reduce Sky’s influence over ITV, they would not remedy the problem in the absence of an adequate divestiture as described in paragraph 3.2 above.

Yours sincerely

Richard Brooke