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Dear Linda

BSkyB/ITV Merger Inquiry

While TUTV 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, TUTV 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 TUTV 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 It is, however, not clear which “current prices” the CC is considering. Sky's prices for packages of pay TV channels currently range from £16 to £45 per subscriber per month. When HD is considered, Sky's prices increase by a further £10 per subscriber per month. In practice, therefore, the CC's statement seems to be somewhat sweeping.

- 1.3 In contrast, in its Report of 27 April to the Secretary of State, the OFT concluded that:

“117. Here, there are existing constraints between free to air and pay TV which may be reduced as a result of the transaction. It is appropriate to take account of this in market definition.

118. This conclusion is not in conflict with the fact that in the BSkyB Chapter II case, the OFT determined that rivalry from free to air did not constrain BSkyB’s pricing to the competitive level and defined separate pay TV markets, including premium pay TV markets.”

- 1.4 As the CC will be aware, the OFT’s conclusions reflect a plethora of previous decisions by UK and European competition authorities in respect of broadcasting markets.

- 1.5 In the circumstances, it would be more accurate for the CC to 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 concludes that Sky has acquired the ability materially to influence policy relevant to the behaviour of ITV in the market place (paragraphs 11 and 12). The CC confirms that it:

“... took the policy of a company in this context to mean the management of its business, in particular in relation to its competitive conduct, including the strategic direction of the company and its ability to define and achieve medium-term objectives.” (Paragraph 11)

- 2.2 Following this, 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)

- 2.3 In light of these conclusions, the CC’s further conclusion below is untenable:

“We concluded [having looked at the possible impact of the acquisition on future competitive constraints] 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)

- 2.4 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. One aspect of that strategy is ITV's approach to the exploitation of DTT capacity which it controls (and which amounts to 37.5% of the commercially controlled DTT capacity). That DTT capacity could be made available to third parties (such as TUTV) and thereby strengthen the pay TV offerings on DTT which compete with Sky.
- 2.5 In its Report to the Secretary of State, the OFT noted the existence of high barriers to entry in respect of pay TV (see paragraphs 142, 144 and 182 of the OFT's Report). Given these high barriers to entry, Sky's pre-eminent position at all tiers of the pay TV supply chain and the currently limited extent of competition in pay TV in the UK, any lessening of competition in pay TV which results from restricted access to ITV's DTT capacity is likely to be substantial.
- 2.6 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, among other things, to inhibit the provision of DTT capacity by ITV to competing pay TV retailers, such as TUTV, 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. This would involve a divestiture to a low single figure percentage.
- 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

David Chance
Chairman