

BSKYB/ITV INQUIRY

VIRGIN MEDIA'S RESPONSE TO THE COMPETITION COMMISSION'S PROVISIONAL FINDINGS

1. INTRODUCTION

1.1 Virgin Media welcomes the opportunity to comment on the Competition Commission's ("CC") provisional findings in relation to BSkyB's acquisition of a 17.9 per cent shareholding in ITV (the "Acquisition"). Virgin Media agrees with the CC's assessment that the Acquisition confers on BSkyB the ability materially to influence the policy of ITV, and that the Acquisition has resulted in a substantial lessening of competition operating against the public interest. In this connection Virgin Media sets out below some further observations on the CC's findings on material influence and market definition. However, in Virgin Media's view the CC has incorrectly concluded that the Acquisition may not be expected to have an adverse effect on plurality.

1.2 This memorandum addresses three areas of the CC's provisional findings:

- (a) section two considers the CC's assessment of material influence;
- (b) section three sets out Virgin Media's comments on the CC's analysis of market definition; and
- (c) section four addresses the CC's findings on the applicable law and substantive assessment of plurality.

2. MATERIAL INFLUENCE

2.1 Virgin Media fully supports the provisional finding of the CC that the Acquisition has conferred on BSkyB the ability materially to influence ITV, but considers that the additional points set out below are also relevant.

2.2 The CC has reached its provisional conclusion that BSkyB has the ability materially to influence ITV on the basis that:

- (a) the size of BSkyB's holding both in absolute and relative terms is such that on the basis of past voting patterns it would be likely to be able to block special resolutions proposed by the company's management; and
- (b) 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 to accommodate BSkyB's views to avoid conflict.¹

2.3 Each of the above points is considered below. In summary, however, Virgin Media considers that the CC has understated the importance of the latter point.

Ability to block a special resolution

2.4 Virgin Media agrees with the analysis of the CC supporting its finding that BSkyB would be likely to be able to block special resolutions proposed by ITV's management, and also agrees that ITV would have to take this expectation into consideration in deciding whether it can formulate policy in the reasonable expectation that a special resolution would be passed.² Virgin Media considers that this would, of itself, confer on BSkyB the ability

¹ See paragraph 3.59 of the provisional findings.

² See paragraph 3.43 of the provisional findings.

materially to influence ITV. That this is the case was recognised in the *Southern Water* case.³ Nevertheless, as the CC identified, this is only one of the factors leading to the conclusion that BSKyB would be able materially to influence ITV.

ITV's incentive to accommodate BSKyB's views

- 2.5 In addition to the ability to block a special resolution, which will inevitably provide a strong incentive for the board and management of ITV to have regard to the views and objectives of BSKyB, there are a range of alternative ways in which BSKyB may be expected to influence the strategic commercial behaviour of ITV.
- 2.6 In its conclusions on material influence the CC identifies BSKyB's importance and stature as an industry player, together with its position as the largest shareholder, as factors giving additional weight to its views. Virgin Media agrees with this analysis but considers that the CC's consideration of these issues understates the degree to which these factors will confer on BSKyB the ability to influence the overall strategy and commercial direction of ITV.
- 2.7 The CC identified⁴ that the ITV board would be likely to avoid conflict with a large shareholder for fear of that shareholder becoming a "disruptive shareholder". In this regard, the CC had in mind BSKyB voting against resolutions, publicly opposing the declared strategy of the ITV board in the press either directly or in possible alliance with other shareholders.
- 2.8 Virgin Media agrees that this is a very real risk. Indeed, there have been a number of recent examples where actions of high profile activist shareholders (with shareholdings considerably smaller than that which BSKyB has in ITV) have had a very material impact on the strategy and direction of major companies. These include:
- (a) The Children's Investment Fund forcing the resignation of the CEO and Chairman of Deutsche Börse⁵;
 - (b) Nelson Peltz, with less than a 3 cent stake, forcing Cadbury Schweppes to undertake what has been described as a "U-turn" and pursue options to split up its business⁶;
 - (c) The Children's Investment Fund sparked the battle for control of ABN Amro when it called for the sale or break-up of the Dutch bank⁷;
 - (d) most recently, Knight Vinke, a long-term activist fund, holding less than one per cent of HSBC, has very publicly been calling for an independent strategic review of the bank. New Star, which owns a large shareholding in HSBC, has recently lent its support to Knight Vinke.⁸
- 2.9 This increase in shareholder activism means that, more than ever before, the management and boards of public companies are required to consult with and have regard to the views of minority shareholders.

³ *Southern Water plc and Mid-Sussex Water Company: a report on the merger* situation, July 1990 (Cm 1126) which was specifically referenced by the CC at paragraph 3.41, footnote 59 of the provisional findings.

⁴ See paragraph 3.55 of the provisional findings.

⁵ See, for example, "Investor threatens German LSE bid", 16 January 2005, www.bbc.co.uk, and "Germany told law could end investor activism" – Financial Times online, published 15 October 2007.

⁶ See, for example, "Investors who pack a powerful punch" – Financial Times online, published 26 September 2007.

⁷ See, for example, "Activists on the prowl for ravaged assets" – Financial Times online, published 10 September 2007.

⁸ See, for example, "New Star supports HSBC critics" – The Times Thursday October 18th 2007.

- 2.10 Whilst the examples given above are instances of very public activism on the part of minority shareholders, Virgin Media considers that most contact between shareholders (particularly larger minority shareholders) and the board and management of large companies which may have an effect on the direction and strategy of a company, takes place away from the public eye. As set out in previous submissions,⁹ large shareholders will regularly seek meetings with the board, management and senior executives of companies in which they have a stake with a view to understanding the strategic direction of the company and with the objective of, if necessary, influencing that direction. The results of the CC's own questionnaire to shareholders showed that most shareholders have frequent and regular meetings with management and that BSKyB may be expected to have frequent meetings with management of ITV (if it is treated no differently from other shareholders).¹⁰
- 2.11 Virgin Media is strongly of the view that this is the way in which a minority shareholder is most likely to achieve changes to the strategy and commercial direction of a public company. Indeed, independent empirical evidence observes that:
- "...shareholder activism is predominantly executed through private interventions as opposed to shareholding proposals at a company's annual meeting, or filings of proxy statements."¹¹*
- 2.12 Whilst the incentives of the board and management of ITV to play close attention to the views of BSKyB will be strengthened by its ability to act as a disruptive shareholder, its ability to influence other shareholders and its stature as an industry player, in the vast majority of cases, BSKyB will not need specifically to resort to any of these measures in order to exert its influence over ITV. In practice, BSKyB's ability to gain access to the board and management of ITV on a regular basis to make its views clear will be more than sufficient to ensure that in formulating its commercial strategy, ITV pays close regard to BSKyB's views and objectives. Accordingly, rather than being the case that this "could" encourage the board to accommodate BSKyB's views to avoid conflict,¹² these factors almost certainly would have this effect. Accordingly, even absent the likely ability of BSKyB to block a special resolution, this incentive on the part of ITV to avoid conflict with a large minority shareholder will be sufficient, of itself, to cause the Acquisition to confer on BSKyB the ability materially to influence ITV.
- 2.13 In summary, Virgin Media agrees with the finding of the CC that the Acquisition has conferred on BSKyB the ability materially to influence ITV. In this regard Virgin Media considers that the likelihood of BSKyB being able to block a special resolution is sufficient on its own to reach this finding. In addition Virgin Media agrees that the ITV board would have an incentive to accommodate BSKyB's views to avoid conflict. In practice, however, Virgin Media considers that the empirical evidence shows that the importance of this factor is even greater than identified by the CC. Further, Virgin Media considers that, even absent the likely ability of BSKyB to block a special resolution, the ITV board would still have sufficient incentive to accommodate BSKyB's views that the Acquisition would confer on BSKyB the ability materially to influence ITV.

⁹ [Redacted]

¹⁰ See Appendix D, Annex 3, paragraphs 3 and 4 of the provisional findings.

¹¹ See "Returns to shareholder activism" by March Becht (and others) in conjunction with the London Business School Centre for Corporate Governance, working paper 138/2006, 4th December 2006 [Redacted]

¹² See paragraph 3.59 of the provisional findings.

3. **THE CC'S FINDINGS ON MARKET DEFINITION IN RELATION TO AUDIOVISUAL SERVICES**

3.1 The CC's findings in relation to market definition in respect of audiovisual services do not note the views of Virgin Media.¹³ Accordingly, Virgin Media sets out in summary form below some important observations on market definition which it would urge the CC to reflect in its final report.

3.2 The key point from Virgin Media's perspective is that market definition should be considered in the context of the competition issues that are being considered with the consequence that different approaches to market definition can be appropriate in different competition contexts. Moreover, as the CC's guidelines emphasise:

*"..the CC does not regard market definition as an end in itself, but rather as a framework within which to analyse the effects of a merger on competition. The definition of the relevant market is a useful tool for analysing the competitive constraints faced by the parties to the merger from other firms supplying the market."*¹⁴

3.3 Self-evidently, the issue for the CC is how the merger situation affects the competitive constraints faced by BSkyB, rather than market definition per se. The fact that conclusions in relation to market definition must be considered within the context of the matter being considered is of particular relevance in the present case given that, in previous competition investigations involving pay-TV, it has almost invariably been the case that a distinct pay-TV market has been identified.

3.4 Turning to the facts of the present case, Virgin Media considers that the following points are worthy of particular emphasis in assessing market definition and in considering the competitive effects of BSkyB's acquisition of material influence over ITV:

- on the one hand, BSkyB is the largest pay TV operator by a substantial margin, whose dominant position in the retail pay-TV market is reinforced by its position as the largest wholesaler and purchaser of pay-TV channels and its position and conduct in purchasing sports and movie rights. On the other, ITV is the largest commercial FTA broadcaster and it has made a major contribution to the success of Freeview;
- given BSkyB's dominance in pay TV markets – including viewing, wholesale channel supply and procurement – it is important to preserve the remaining competitive constraints it faces from FTA, including Freeview. As set out in the CC's provisional findings report, these FTA constraints are important, albeit that they do not replicate the constraints that would arise if competition in pay TV markets were effective. Indeed, the CC acknowledges that:

"It is possible that if BSkyB were to face stronger competition from pay-TV retailers, prices would fall to an extent that FTA services no longer presented a constraint." (Footnote 78 to the provisional findings)

This is because TV viewing markets are "highly differentiated" (as acknowledged by the CC¹⁵) and other pay TV operators such as Virgin Media are close rivals to BSkyB (as acknowledged by the CC¹⁶). Competition as regards the supply and procurement of pay TV channels and rights also has a major bearing on

¹³ [Redacted]

¹⁴ See paragraph 2.1 of Merger References: CC Guidelines.

¹⁵ See paragraph 4.31 of the provisional findings.

¹⁶ See paragraph 4.20 of the provisional findings.

competition between pay TV platforms, because these platforms depend on the pay TV channels and rights they can offer (and the terms they have to accept to secure access to these channels/rights) to attract new subscribers.

- 3.5 Virgin Media considers that further elaboration of the above points in the CC's final report would assist interested parties in understanding the CC's assessment of competitive constraints and market definition in relation to the supply of audiovisual services.

4. PLURALITY

- 4.1 As set out in more detail below, Virgin Media considers that the CC has misinterpreted the relevant legal framework within which it is required to conduct the assessment of plurality under section 58(2C)(a) of the Enterprise Act 2002. As a result, the CC has not, in its provisional findings, addressed itself to the question, as it is required to under section 58(2C)(a), of the sufficiency of plurality of persons remaining following the Acquisition. The CC must remedy this in its final report. This section is split into two sections:

- (a) the first section deals with the errors of law in the CC's analysis of section 58A(4) and (5); and
- (b) the second section considers the factual issues which the CC should properly have considered in conducting the required assessment of sufficiency of plurality.

Assessment of legal framework

- 4.2 Virgin Media does not agree with the CC's analysis and interpretation of sections 58A(4) and (5) of the Enterprise Act 2002 (as inserted by the Communications Act 2003). **[Redacted]**¹⁷, **[Redacted]** the CC states that it is "appropriate" to apply a "qualitative assessment" of control "regardless of" the correct interpretation of the statutory provisions.¹⁸ Virgin Media considers that such an approach may render the CC's conclusions on plurality issues *ultra vires*.

- 4.3 In this connection, the CC's references to the Explanatory Notes to the Communications Act and the DTI Guidance do not support the interpretation adopted by the CC.

Section 58A(4)

- 4.4 The CC analyses (at paragraph 17 of Appendix I to the provisional findings) section 58A(4) as follows:

"Our preliminary view is that section 58A(4) serves as an anti-avoidance provision to ensure that the plurality assessment required by section 58(2C)(a) can be carried out for all mergers, 'including those involving an increase in the levels of control of such media enterprises ... even though the number of enterprises may in fact be unchanged'. The DTI Guidance (paragraph 7.13) further clarifies that: 'This means that the Secretary of State can assess whether, as a result of the merger, there will be sufficient plurality of persons with control of enterprises serving the relevant audience even though the number of enterprises serving that audience may be unchanged.'"

- 4.5 As a starting point, Virgin Media agrees that it is clear that the provisions of section 58A(4) are intended to capture the circumstances where an enterprise moves through the various levels of control. However, in carrying out its analysis of section 58A(4), the CC makes two fundamental errors:

¹⁷ **[Redacted]**

¹⁸ Paragraph 22 of Appendix 1 of the provisional findings.

- (a) it concludes that section 58A(4) applies **only** to circumstances where an enterprise moves through the levels of control, despite the clear terms of the statute, explanatory notes and DTI Guidance;
- (b) it concludes that section 58A(4) does not create a deemed presumption of reduction in plurality despite the clear terms of the statute, explanatory notes and DTI Guidance.

The reasons why these conclusions are inconsistent with the clear terms of the statute, explanatory notes and DTI Guidance are set out below.

Section 58A(4) applies to all mergers.

- 4.6 The terms of section 58A(4) are that it applies "**wherever** in a merger situation two media enterprises serving the same audience cease to be distinct". Virgin Media considers that this makes it clear that the provision applies to **all** merger situations irrespective of how they arise (i.e. including those arising through moving between the levels of control).
- 4.7 Virgin Media considers that it is, therefore, clear that section 58A(4) applies to the Acquisition, as it is a merger situation where two media enterprises serving the same audience have ceased to be distinct (see paragraph 3.61 of the provisional findings).
- 4.8 Given the clarity of the provisions of the Act, Virgin Media considers that it is not necessary to look at other sources in order to assist with the interpretation of a statutory provision. Nevertheless, Virgin Media would observe that its view is supported by the Explanatory Notes to the Communications Act and in the DTI Guidance. The Explanatory Notes state:

*"where a merger situation... involves two media enterprises serving the same audience, then there is deemed to be a reduction in the number of such enterprises for the purposes of the plurality assessment in subsection (2C)(a). This means that **all** such mergers, **including** those involving an increase in levels of control of such media enterprises, may be scrutinised..."* (Paragraph 804 of the Explanatory Notes)

- 4.9 The DTI Guidance states that:

*"**All** such mergers, **including** those involving an increase in levels of control if such media enterprises, may be examined for the purposes of subsection (2C)."* (Paragraph 7.13 of the DTI Guidance)

- 4.10 Virgin Media considers that the phrase "*all such mergers, including*" can refer to nothing other than all mergers including, but not limited to, those involving a move between the levels of control.
- 4.11 Accordingly, the CC's apparent provisional conclusion that section 58A(4) applies **only** to mergers involving a change between the levels of control is, put simply, wrong as a matter of law.

Section 58A(4) is a deeming provision

- 4.12 The CC sets out at paragraph 5.10 of its provisional findings the interpretation previously set out by Ofcom and Virgin Media of the deeming provision of section 58A(4). The CC does not address this issue, but instead states, at paragraph 5.11 of its provisional findings that:

"We do not think that, in assessing the effect of the acquisition on plurality, section 58A(4) requires us to assume that there has been a full merger..."

- 4.13 Virgin Media notes that the CC has considered a different issue from that which Virgin Media (and Ofcom and others) has previously stated that section 58A(4) is designed to address. Neither Virgin Media nor Ofcom suggested that Section 58A(4) required the CC to "assume" there had been a full merger. Section 58A(4) provides that, where a merger situation comes within the scope of section 58A(4) which, for the reasons set out above, the Acquisition does, there is **deemed** to be a greater degree of plurality prior to the creation of the merger situation than after it. It is a separate question, to be considered under section 58(2C)(a), whether there is "*a sufficient plurality of persons with control of the media enterprises serving that audience.*"
- 4.14 This straightforward interpretation of the Act does not lead to the confusion which results from the CC's strained interpretation of section 58A(4) (as set out by the CC at paragraph 5.12) as to the relationship between section 58A(4) and section 58A(5). Indeed the relationship is clear – section 58A(4) relates to whether there has been a reduction in plurality, such that section 58(2C)(a) is relevant, and section 58A(5) relates to the assessment of the sufficiency of plurality.
- 4.15 In this regard, there can be no doubt as to the obligatory deeming nature of section 58A(4). The words of the Act could not be clearer: "*the number of such enterprises serving that audience shall be assumed to be more immediately before they cease to be distinct than it is afterwards.*" **[Redacted]**, it is unarguable that section 58A(4) is a deeming provision. This fact is reiterated by the Explanatory Notes and the DTI Guidance:

"there is deemed to be a reduction in the number of such media enterprises for the purposes of the plurality assessment in subsection (2C)(a)." Paragraph 804 of the Explanatory Notes. (Emphasis added).

"then there is deemed to be a reduction in the number of media enterprises serving that audience for the purposes of the plurality assessment in subsection (2C)." Paragraph 7.13 of the DTI Guidance. (Emphasis added).

Conclusion on section 58A(4)

- 4.16 Virgin Media disagrees with the CC that this is a difficult matter of interpretation. It could not be simpler. It is clear from the terms of section 58A(4), including the explanatory notes that:
- (a) section 58A(4) applies to **all** merger situations involving media enterprises serving the same audience and applies to the Acquisition; and
 - (b) in such circumstances, there is a clear deeming provision that the CC must consider that the merger situation has resulted in a reduction in plurality.
- 4.17 Virgin Media notes that the provisional findings do not address either of these two points, and considers that a failure to remedy this in its final report would leave the CC's report open to a challenge on the ground of error of law.

Section 58A(5)

- 4.18 Applying a straightforward interpretation to section 58A(4) makes the purpose of section 58A(5) and the distinction between the two sections plain.
- (a) section 58A(4) – deals with whether there is a plurality assessment to be carried out under section 58(2C)(a); and
 - (b) section 58A(5) – deals with the question of who controls media enterprises for the purposes of assessing whether there is a sufficient plurality of persons with control of media enterprises.

- 4.19 In its provisional findings, the CC puts forward three possible interpretations of section 58A(5):
- (a) *"At first sight, section 58A(5) appears to provide that once a media enterprise falls to be treated as under the ownership or control of another for the purposes of section 26 of the Act, it must also be treated as under the control of that company for the plurality assessment, without consideration of the quality or nature of control actually attained."*
 - (b) *"An alternative interpretation is that section 58A(5) is applicable not just... to the merging enterprises... but ... to other players in the market."*
 - (c) *"An alternative interpretation is that section 58A(5) is applicable not at all to the merging media enterprises (to which subsection (4) applies) but instead to other players in the market."*
- 4.20 The CC sets out a number of factors which point to either (b) or (c) being the correct interpretation of this subsection and then without setting out its reasons for choosing (c) over (b) and despite a lack of analysis as to why this is the case, concludes that *"we concluded that section 58A(5) is applicable not to the merging enterprises (to which subsection (4) applies) but to other media enterprises serving that audience"*¹⁹.
- 4.21 It is an established principle of statutory interpretation that the literal meaning of an enactment should be followed. The standard text on Statutory Interpretation, Bennion, defines the "literal meaning" as:
- "one arrived at from the wording of the enactment alone. Without consideration of other interpretative criteria."*²⁰
- 4.22 Bennion goes on to state that *"mere speculation will not justify departure from the literal meaning. There must be real doubt before the question will even be entertained..."* Bennion goes on to quote Lord Haldane LC:
- "...a mere conjecture that Parliament entertained a purpose which, however natural, has not been embodied in the words it has used, if they be literally interpreted, is no sufficient reason for departing from the literal construction"*²¹
- 4.23 The CC identifies the literal meaning of section 58A(5) at paragraph 18 of Appendix I. As set out below, Virgin Media notes that the provisional findings do not advance any clear arguments that Parliament intended section 58A(5) to be applied such that it did not apply to the merging parties. Virgin Media considers that the CC has given section 58A(5) a strained construction, by giving it a meaning other than its grammatical meaning.²²
- 4.24 Virgin Media considers that the correct interpretation of section 58A(5), from a plain reading of the terms of the Act (and also the factors listed by the CC in Appendix I) is a combination of (a) and (b). In other words, section 58A(5) applies not only to the merging parties, but also to the other players in the market. As previously stated, this makes sense given the fragile nature of plurality. Where there is a link of control between media enterprises, they cannot be considered to be independent and therefore need to be considered together when assessing whether there is a sufficient plurality of persons in the market following the Acquisition.

¹⁹ Paragraph 5.12 of the provisional findings.

²⁰ Bennion – Statutory Interpretation (4th edn), Section 285

²¹ Lumsden v IRC [1914] AC 877 at 892

²² Bennion – Statutory Interpretation (4th edn), Section 157

- 4.25 The CC sets out, at paragraph 19 of Appendix I of its provisional findings, a number of factors which appear to be the only arguments it puts forward to support its conclusion that section 58A(5) applies only to media enterprises **other** than the merging enterprises. However, none of the factors referred to by the CC supports the view that section 58A(5) applies only to media enterprises other than the merging enterprises, and all of them are consistent with the ordinary reading of section 58A(5) that it applies **not just** to the merging parties. This is consistent with the purpose of section 58A(5) of ensuring "*the authorities can look at the substance of who controls media enterprises when carrying out a plurality assessment*"²³. In particular:
- (a) Paragraph 19(a) of Appendix I states that paragraph 805 of the Explanatory Notes to the Communications Act (set out above) supports the view that News International can be included in the CC's analysis. Virgin Media wholeheartedly agrees with this assessment. The ordinary reading of this guidance is that it applies to all media enterprises – there is no express or implied limitation which might exclude the relationship between the merging parties.
 - (b) Paragraph 19(b) sets out paragraph 806 of the Explanatory Notes. The CC attempts no analysis of the meaning of this extract from paragraph 806 and omits the final sentence, which begins "*apart from the merging enterprises*". There is nothing in the extract quoted by the CC which suggests that it does not apply to the merging parties. Indeed, the use of the words "*plurality of media as a whole*" demonstrates the applicability of this section to **all** media enterprises, including the merging parties. This assessment is confirmed by the commencement of the next sentence with the phrase "*apart from the merging enterprises*" which distinguishes this sentence which refers only to other media enterprises from the previous one which applies to the market as a whole.
 - (c) Footnote 9 in Appendix I (a reference to Hansard) is quoted to support the CC's conclusion that Section 58A(5) does not apply to the merging parties. However, this Hansard reference is concerned with the sufficiency test in section 58(2C)(a) and not to section 58A(5) (or indeed 58A(4)). In other words, Lord Puttnam is describing the need to carry out a case by case analytical assessment of the sufficiency of remaining plurality having applied sections 58A(4) and (5).
 - (d) Paragraph 19(c) of Appendix I sets out paragraph 807 of the Explanatory Notes which states that section 58A(5)(b) is intended to apply to media players other than the merging parties. Virgin Media agrees with the CC that this is the case. Section 58A(5)(b) is intended to allow the CC to look at the control structures across the market even where the entities have not been "brought" under common ownership or control. This reflects the binary nature of plurality and the need to consider together as one all entities ultimately controlled by the same person in assessing sufficiency of plurality. However, this assessment does nothing to affect the meaning of section 58A(5)(a) (see the use of the joining word "or" between sections 58A(5)(a) and (b)) which very clearly applies to situations "*where media enterprises would fall to be treated under common ownership or common control for the purposes of section 26*". The only way the CC could exclude the Acquisition from this section would be to reach the conclusion that the Acquisition does not fall within section 26, when it has elsewhere found that it does²⁴.
 - (e) Paragraph 19(d) of Appendix I sets out paragraph 7.6 of the DTI Guidance that the Secretary of State will consider matters on a case-by-case basis. Once again, this does not support the CC's interpretation that this somehow "trumps" the provisions of the statute on how the authorities should consider control for the purposes of plurality. The question the Secretary of State (and the CC) is being asked to judge

²³ Communications Act 2003 Explanatory Notes, paragraph 805.

²⁴ See paragraph 3.61 of the provisional findings.

is the sufficiency of plurality (see paragraph 58(2C)(a)). This must be looked at on a case-by-case basis within the statutory framework set out by the Act. In other words, the CC should be assessing, considering all commonly owned or commonly controlled media enterprises together, whether there remains a sufficiency of plurality following the Acquisition.

- (f) The CC states in paragraph 19 that the words "*subject to subsection 4*" in section 58A(5) mean that the section does not apply to the merger situation being considered. This appears to be the only reasoning that the CC relies upon to conclude that Section 58A(5) does not apply to the merging parties. Indeed, at paragraph 5.12 of the provisional findings, the CC makes clear that its provisional findings are that "*section 58A(5) is applicable not to the merging enterprises (to which subsection (4) applies) but to other media enterprises serving that audience.*" The CC appears to have equated "*subject to*" with "*except for*". Given that, in interpreting modern Acts of Parliament, the rule of interpretation is that Parliament intended to use the words contained in the Act and not other words, it is not open to the CC to substitute one set of words for another in this way. If Parliament had intended this to be an exclusion, rather than a caveat, it would have made this clear. A far more natural interpretation of the phrase "*subject to subsection 4*" is that it is intended to preserve what the CC and BSKyB have pointed to as the anti-avoidance effects of subsection 4. If it were not for this wording, there might be confusion in the situation where a media enterprise was moving through the levels of control over another media enterprise. Subsection 5 implies that in such a situation the entities would be treated as being under the control of one person both before and after the move up through the levels of control. The effect of the caveat (note that it is not an exclusion) in subsection 5 is to allow subsection 4 to deem a reduction in plurality in such a situation, whilst preserving the authorities' obligation to consider the media enterprises as being under the control of one person both before and after the change in the level of control.
- (g) The CC also suggests that the words "*would fall to be treated*" and "*are otherwise in the same ownership or under the same control*" indicates that this does not refer to the merging parties. As regards the second of these two phrases, this is only contained in subsection (5)(b) which, as set out above, Virgin Media agrees applies only to other media enterprises. As regards the words "*would fall to be treated*", the CC has not set out why this would not capture the Acquisition, which itself "*would fall to be treated*" under section 26, as indeed the CC has found.

- 4.26 Accordingly, as set out above, none of the "reasons" set out in the CC's provisional findings for reaching its interpretation of section 58A(5) excludes the application of the section to the merging parties. Indeed, the CC admits that, "*at first sight*", this is the natural interpretation on the face of the Act (see paragraph 18 of Appendix I). Having identified the clear meaning of the words in the Act, the CC then seeks, contrary to the rule in *Pepper v Hart* to look behind these clear words to interpret the statute in a different way. Even in so doing, the CC sets out a number of reasons taken from the Explanatory Notes and DTI Guidance that are, as set out above, consistent only with the natural interpretation apparent from the face of the Act. The CC relies on only one factor, the inclusion of the words "*subject to subsection (4)*" in section 58A(5) to exclude the Acquisition from the meaning of this section. As set out above, these words do not amount to an exclusion and the CC is not entitled to infer an exclusion where such an exclusion is not explicit on the face of the Act.
- 4.27 The perversity of the CC's interpretation can be demonstrated by a simple example. If it is assumed for the sake of this example, that BSKyB were allowed to retain its 17.9 per cent shareholding in ITV (although it was determined that BSKyB had material influence over ITV), and BSKyB then took a similar stake in another media enterprise and the CC was required to consider the effects on plurality, the CC's interpretation of section 58A(5)

in those circumstances would mean that ITV **would** be treated as being under the same control as BSkyB and News International. Accordingly, it makes no sense that the same does not apply in relation to the transaction which gives rise to the link between ITV, BSkyB and News International. Such a situation would clearly be perverse. The presumption in section 58A(5) is designed to protect the fragile nature of plurality. It would be perverse if this were to apply to all media enterprises except for the merging parties.

Conclusion on interpretation of section 58A

- 4.28 In Virgin Media's view the CC has misinterpreted sections 58A(4) and (5) of the Enterprise Act. It appears to have reached this view as a result of its desire to avoid the literal and logical interpretation of these sections and instead to apply the equivalent of a "substantial lessening of plurality" test to determine whether the plurality consideration set out in section 58(2C)(a) is relevant to the Acquisition. Plurality is different from the competitive assessment and different rules apply. Such an interpretation is, therefore, not appropriate. The CC appears to reinforce its misinterpretation with the surprising statement at paragraph 22 of Appendix I of its provisional findings that "regardless of" the correct interpretation of these sections of the Act, it is entitled to conduct a qualitative assessment if it sees fit to do so.
- 4.29 Virgin Media considers that the interpretation of these sections is straightforward:
- (a) section 58A(4) clearly applies to **any** merger situation involving two media enterprises serving the same audience (including those arising from an enterprise moving through the levels of control). This is clear from the terms of the Act and the Explanatory Notes and DTI Guidance. It therefore applies to the Acquisition.
 - (b) section 58A(4) clearly **deems** a reduction in plurality in such situations such that section 58(2C)(a) is engaged. This is clear from the terms of the Act and the Explanatory Notes and DTI Guidance. There is therefore deemed to be a reduction in plurality as a result of the Acquisition²⁵.
 - (c) section 58A(5)(a) clearly applies to two or more media enterprises which would fall to be treated as under common ownership or common control under section 26 of the Act. Paragraph 3.61 of the provisional findings confirms the CC's finding that BSkyB has acquired material influence over ITV within the meaning of section 26. Section 58A(5) therefore applies to the Acquisition.
 - (d) section 58A(5) **deems** that in situations falling within subsections 58A(5)(a) and (b), the CC **shall** treat all such media enterprises as under the control of one person. The CC must therefore treat BSkyB, ITV and News International as all under the control of one person.
 - (e) the relationship between subsections (4) and (5) is clear. Subsection (4) is a deeming provision, which determines whether section 58(2C)(a) is relevant to the merger situation. Subsection (5) deals with the way in which the authorities should assess sufficiency of plurality. The CC's confusion over the interrelation of the sections serves to demonstrate the need to construe the sections in accordance with their straightforward and ordinary meaning.
- 4.30 Virgin Media has seen nothing in the CC's provisional findings that appears to justify a disagreement with these logical steps. In this regard, Virgin Media does not consider that it is reasonable for the CC to rely on a joint Opinion from leading Counsel instructed by BSkyB to inform its conclusion (see Paragraph 21 of Appendix I). If the CC has any difficulties (as it has admitted in this case) as to the correct interpretation of a statutory

²⁵ The CC should note that this does not require the CC to "*assume there has been a full merger*".

provision, the appropriate and reasonable course of action would have been to seek its own advice, rather than relying on the advice of one of the merging parties.

Assessment of sufficiency of plurality following the Acquisition

- 4.31 As set out above, Virgin Media considers that the CC has misinterpreted the relevant provisions of section 58A. As a result, the CC's analysis of plurality contained at paragraphs 5.45 to 5.59 of the provisional findings considers the wrong question, effectively adopting a "substantial lessening of plurality" test. Virgin Media has no objection to the CC including this discussion in the section of its findings on whether the Acquisition gives rise to an SLC on the market for national television news programme supply. However, in respect of the assessment of plurality, the CC is required to assess the sufficiency of plurality remaining following the Acquisition taking account of the effects of section 58A(4) and (5).
- 4.32 Virgin Media reiterates its view that the assessment of plurality is different from the competitive assessment and different rules apply. In the provisional findings the CC fails properly to consider the public interest consideration in section 58(2C)(a) of the Act:

"the need, in relation to every different audience in the United Kingdom, or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience."

- 4.33 For the purposes of the plurality assessment, the CC is obliged by section 58A(5) to treat BSkyB, News International and ITV as under the control of one person. The CC must then assess the sufficiency of plurality remaining in relation to each audience and geographic area served by BSkyB, News International and ITV.
- 4.34 Virgin Media agrees with much of the CC's statement of the facts in paragraphs 5.15 to 5.44 of the provisional findings, subject to the comments made below. The CC has not, however, carried out an assessment of the sufficiency of plurality remaining following the Acquisition in the light of these facts. On the basis of the facts set out by the CC, Virgin Media considers that, were it to so do, the CC would reach the same view as Virgin Media that insufficient plurality of persons would remain following the acquisition effectively to counterbalance the combined group's influence.

Relevant audiences

- 4.35 Although the CC has not applied the public interest consideration correctly, Virgin Media agrees with its approach in defining the relevant audiences. It is clear that the overlaps between BSkyB and ITV require the CC to look at national television news, and that a cross-media analysis is not only appropriate given the extent of News International's newspaper publishing interests, but also required by section 58 of the Act. The CC was also correct to consider audiences in parts of the United Kingdom as required by section 58(2C)(a).

Existing levels of plurality

- 4.36 Virgin Media agrees with the CC's approach to existing levels of plurality in paragraph 5.23 of the provisional findings. It is clear from the DTI guidance and Ofcom's report to the Secretary of State on the Acquisition that audience shares are an important indicator of plurality – looking at the number of media enterprises alone is insufficient²⁶. The CC is also right to emphasise the importance of television as a main source of news for many people.

²⁶ DTI Guidance Paragraphs 7.10 and 7.11. See also section 4 of Ofcom's Report to the Secretary of State on the Acquisition.

- 4.37 The CC appears to conclude in paragraph 5.28 of the provisional findings that television news programming is highly concentrated, and television news supply even more so. Virgin Media agrees with this analysis, and notes that the combination of BSkyB and ITV under common control presents an unacceptable concentration of plurality in television news, which is not counterbalanced by alternative television news sources. This is particularly the case when it is considered that both Channel 4 and Five are dependent on Sky News and ITN (both considered to be under common control of ITV and BSkyB for the purpose of the plurality assessment) for their news provision. In short, Virgin Media does not consider that sufficient plurality would remain after the Acquisition brings ITV and ITN under common control (for the purposes of the plurality assessment) with Sky News.
- 4.38 The CC correctly distinguishes between impartiality of news presentation and plurality of control in relation to Ofcom's Broadcasting Code. However, Virgin Media notes that the future evolution of the Code is relevant to the present assessment of plurality. Ofcom's recent publication "New News, Future News", which is referred to extensively in the provisional findings, questions whether universal impartiality of television news will remain enforceable in a digital environment, suggesting that channels could be allowed to offer partial news in the same way as newspapers and some websites do at present.²⁷ The CC should be wary of relying heavily on the protection of plurality by a series of rules which may well be abandoned in the near future.
- 4.39 Virgin Media agrees with the CC's conclusion that the current regulatory framework does not on its own ensure a sufficiency of plurality. Paragraph 5.30 of the provisional findings outlines ways in which the owner of a television channel can influence the news agenda. This is relevant because of the way News Corp and Rupert Murdoch have historically sought to influence editorial policy, **[Redacted]**²⁸.
- 4.40 ITV has acknowledged that its board could be involved in decisions relating to particularly controversial stories²⁹. Virgin Media notes the CC's finding that BSkyB's importance as an industry player and position as the largest shareholder "*could encourage the board to accommodate BSkyB's views to avoid conflict,*"³⁰ and considers this to be inconsistent with the CC's finding that there is "*insufficient evidence to suggest that the acquisition...would give BSkyB or its parent companies the ability... to exert editorial influence over ITV's news output*"³¹ and also notes that, in addition to being internally inconsistent, this assessment is inconsistent with the test which the CC is required to apply in assessing plurality.
- 4.41 The CC considers the influence News Corp exercises over the editorial decisions of its newspapers. Not only is such an assessment irrelevant in the context of the presumption set out by section 58A(5), but the CC also misses the point in stating that there are examples of News International newspapers taking different views on major issues³². The rationale for the presumption in section 58A(5) is not that News Corp will influence editorial decisions on every major issue – but that it will have the **ability** to do so on some major issues. As set out before, plurality is a binary issue, it either exists or it does not.

Impact of the acquisition on sufficiency of plurality

- 4.42 Virgin Media notes that the CC identifies a number of overlaps between the operations of BSkyB and ITV in paragraphs 5.37 to 5.44 of the provisional findings. In Virgin Media's

²⁷ Ofcom, *New News, Future News*, Issues for Debate and Response, page 71.

²⁸ **[Redacted]**

²⁹ Paragraph 5.32 of the provisional findings.

³⁰ Paragraph 3.59 of the provisional findings.

³¹ Paragraph 5.52 of the provisional findings.

³² Paragraph 5.35 of the provisional findings.

view, it is correct to do so. However, the CC does not go on to assess whether sufficient plurality remains after the Acquisition, a step which it is required to take under the Act.

4.43 The CC correctly identifies a number of factors which are relevant to the consideration of the impact of the Acquisition on plurality:

- (a) ITV and BSkyB are important providers of television news, together accounting for 30 per cent of television news viewing;³³
- (b) the transaction creates an ownership link between Sky News and ITN (paragraph 5.38 of the provisional findings). Sky News and ITN are two of only three significant providers of television news programming, together supplying four of the five channel providers with significant audience shares for television news³⁴;
- (c) considering cross media audiences, the Acquisition creates an ownership link between the second largest provider of television news with the largest provider of newspapers³⁵; and
- (d) some specific groups (e.g. the C2DE social-demographic group) are more likely to take their news from BSkyB, News International or ITV.

4.44 However, despite addressing the correct effects of the Acquisition, the CC focuses its analysis on individuals who currently take news from BSkyB, ITV **and** News International, but from no other source³⁶. Virgin Media submits that this approach does not consider the correct question of the extent of the combined group's influence.

4.45 The DTI Guidance confirms that section 58(2C)(a) of the Act is concerned with the ability of any one person "to influence opinions and control the agenda"³⁷. A news programme or a newspaper has the ability to influence opinions and control the agenda in relation to its entire audience or readership. This is the case irrespective of whether individuals take their news from other sources as well. It is a matter of the importance of the voice of the combined entity on key issues and the lack of a sufficiency of appropriate counterpoints that raises the plurality issue, rather than the effect of the Acquisition on a "captive audience", although this is clearly also relevant. The CC appears to accept this when it states that:

"Some sources of news can have a strong influence on the overall news agenda and thus public opinion, despite much smaller audience shares than some television news bulletins."³⁸

4.46 **[Redacted]**, Virgin Media refers to the extensive reach of BSkyB/ITV/News International after the Acquisition³⁹. 76.6 per cent of UK individuals spend at least 30 minutes a month watching Sky News or ITV News or reading News International newspapers, with the figure rising to 89.5 per cent of C2DE adults over 55. The CC should consider whether a combined reach of over 75 per cent and, in respect of some audiences up to 90 per cent, gives the combined entity an unhealthy ability to influence opinions and control the news agenda. In so assessing, the CC should have regard to the size and number of other voices with equivalent scale which might be able to represent sufficient alternatives to the merged entity to safeguard plurality. In this regard, Virgin Media considers that the CC

³³ See paragraph 5.37 of the provisional findings.

³⁴ Paragraph 5.37 of the provisional findings.

³⁵ Paragraph 5.39 of the provisional findings.

³⁶ Paragraph 5.42 and Appendix J of the provisional findings.

³⁷ DTI Guidance, paragraph 7.7.

³⁸ Paragraph 5.25 of the provisional findings.

³⁹ **[Redacted]**

should have due regard to the manner in which News Corp and Rupert Murdoch have historically sought to use their media interests to influence the news agenda and political decisions in the UK⁴⁰.

Conclusions

- 4.47 The CC is required under the terms of section 58(2C)(a) of the Act to consider whether, when ITV and ITN and Sky News and News International are properly treated for the purposes of the plurality assessment as being under the control of one entity, a sufficiency of plurality remains.
- 4.48 The CC has correctly identified in its provisional findings a number of the relevant issues which arise from this combination. Indeed, the CC acknowledges at the end of its provisional findings that "*we may in other cases, where there are, for example, different degrees of control, arrive at a different conclusion in relation to the impact of any acquisition on plurality.*"⁴¹ Given that the CC has misapplied the test which it is obliged to apply under section 58(2C)(a) of the Act and effectively conducted a "substantial lessening of plurality" assessment, Virgin Media considers that the present situation requires a different conclusion on the impact of the Acquisition on plurality.
- 4.49 In particular, the CC must consider in its final report whether the combined media block represented by ITV, ITN, BSkyB and News International represents a unique media voice, accessing three quarters of the population (and 90 per cent of some demographics), that is so powerful in comparison to the other media enterprises serving the television news and cross media news audiences that such other voices provide insufficient balance. In this regard, Virgin Media is, for the reasons set out in its submissions to the CC, of the view that plurality will be insufficient following the Acquisition. Further, Virgin Media considers that the evidence set out in the provisional findings indicates that, if the CC were to apply the correct legal test, it would also reach the same conclusion.

⁴⁰ [Redacted]

⁴¹ Paragraph 5.59 of the provisional findings.