

## **BSkyB/ ITV Acquisition**

### **A Response to the Competition Commission's Remedies Consultation**

1. This is in response to the Competition Commission (CC)'s consultation on possible remedies to address the adverse public interest finding described in the CC's provisional findings report published on 4 October 2007.
2. We had expressed concerns relating to:
  - a) BSKyB's influence over strategy at ITV;
  - b) the confidential nature of any discussions held [between third parties and] ITV.
3. We comment below on each of the three possible types of remedy identified by the CC.
4. Option (a): Option (a), namely divestiture of the whole of BSKyB's shareholding in ITV, would certainly address the substantial lessening of competition expected to result from the acquisition. However it appears to us that if there are effective remedies that would neutralise the adverse consequences on competition of BSKyB's material influence without requiring divestment of the whole of BSKyB's stake, Option (a) might not be necessary.
5. Option (b): Option (b), namely divestiture of part of BSKyB's shareholding, might not, in our view be sufficient on its own to ensure that BSKyB ceases to have material influence over ITV. As a shareholder, BSKyB would retain a number of rights and privileges which would enable BSKyB to exercise indirect influence. For example, BSKyB would remain entitled to be treated equally as a shareholder and would be in a position to hold "frequent and regular meetings with ITV management"<sup>1</sup>. The ability to gain privileged information from a major rival at such meetings would in our view remain a concern even if BSKyB's shareholding were to be reduced.
6. Option (c): under option (c), the CC is considering behavioural remedies to accompany partial divestiture remedies.
7. Regarding the level of partial divestiture necessary, the appropriate level of shareholding which BSKyB should be entitled to retain would be that

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<sup>1</sup> See paragraph 3, Annex 3, Appendix D of the CC's Provisional Findings Report dated 4 October 2007.

- which, according to the record of votes at past AGMs and EGMs<sup>2</sup>, effectively gives Sky less than 25% of the votes.
8. We have considered the types of behavioural remedies which might in our view be appropriate, such as:
    - a) a requirement on B SkyB not to participate in any shareholder meetings with the management of ITV;
    - b) a requirement on B SkyB not to discuss significant issues affecting ITV (including ITV's strategy) with other shareholders<sup>3</sup>;
    - c) a requirement on B SkyB not to seek information from ITV which is not in the public domain, other than in the ordinary course of business;
    - d) a prohibition on exercising influence through directorships, including a prohibition on directors or senior managers in B SkyB also being directors in ITV.
  9. However, taking into account the CC's likely preference for clear and enforceable remedies that are practical to monitor, an appropriate alternative may be a discretionary trust for B SkyB's shares.
  10. Under this option, B SkyB would transfer its shares to a professional discretionary trust. This would allow the trustees to vote the shares (albeit without reference to B SkyB) while enabling B SkyB to retain the economic benefit of the stake. As for the appointment of monitoring trustees in divestment cases, there would have to be suitable undertakings regarding the independence and qualifications of the trustees, and for there not to be any community of interest with B SkyB.
  11. A trust arrangement would have significant advantages. The need for most of the behavioural remedies outlined in paragraph 8 above would fall away, this remedy could be more easily implemented and monitored, and any information released by ITV to its shareholders could be released to the trustee instead of B SkyB. In addition, the mechanisms for putting in place trust arrangements are well understood and rehearsed by the CC (albeit in the context of implementing divestment remedies).
  12. We would be happy to assist the CC with further information in relation to the options expressed in this document.

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<sup>2</sup> Using the evidence contained in Appendix D of the CC's Provisional Findings Report dated 4 October 2007.

<sup>3</sup> To be framed in view of the evidence provided to the CC (see Annex 3, Appendix D of the CC's Provisional Findings Report dated 4 October 2007).

15 October 2007