

**Virgin Group's response to the Competition Commission's
Remedies Notice concerning BSkyB's acquisition of 17.9% of ITV**

1 **Introduction and Summary**

1.1 The Virgin group of companies ("Virgin") notes the Provisional Findings of the Competition Commission ("CC") in connection with the acquisition by British Sky Broadcasting Group plc ("BSkyB") of 17.9% of the issued share capital of ITV plc ("ITV") (the "Acquisition").

1.2 Virgin agrees with the Provisional Findings as regards the conclusion that the Acquisition is likely to result in a substantial lessening of competition ("SLC") arising from the loss of rivalry between BSkyB and ITV. Notwithstanding the Provisional Findings, Virgin also believes that the Acquisition can be expected to result in other adverse effects – in particular in relation to media plurality (but those points are not addressed further in this submission).

1.3 For the reasons explained below, in the circumstances of this particular case, Virgin believes that it is appropriate for BSkyB to be required to divest its entire stake in ITV in order to address the SLC identified by the CC in its Provisional Findings. Virgin also believes that such a remedy would be both proportionate and reasonable.

2 **The appropriate remedy**

2.1 Virgin notes that the CC is considering three remedies options: complete divestment of BSkyB's shareholding in ITV; partial divestment of that shareholding; and behavioural remedies to accompany partial divestment.

2.2 Virgin also notes that in seeking to elicit views about the necessary/appropriate level of divestiture, the Remedies Notice specifically mentions thresholds of 10% and 15%. However, Virgin believes that only the complete divestment of BSkyB's shareholding in ITV can remedy the SLC identified in the Provisional Findings. This is for the following reasons:

- **Divestment to just below 10% or 15% does not address the SLC**

2.2.1 Permitting BSkyB to retain a stake of just under 10% or 15% would still leave BSkyB as ITV's largest shareholder, and by some margin¹. In light of the Provisional Findings such an outcome will not remedy the identified SLC

¹ Whilst in theory a third party could acquire a greater share than BSkyB, that prospect appears extremely unlikely given the remaining influence that BSkyB would retain so long as it retained a stake of c. 10% or more in ITV. In any event, it would not be appropriate to allow BSkyB to retain a stake of c. 10% or more on the basis that in time a third party might acquire a greater stake to counter BSkyB's position, especially as there is no guarantee that such an eventuality might arise. Indeed, the likelihood of a third party acquiring a greater stake than BSkyB appears very remote given the circumstances as described in the Provisional Findings.

because ITV would still be mindful of BSKyB's position when taking strategic decisions which may not be in the best interests of BSKyB. As the CC acknowledges, ITV would seek to avoid conflict with a major shareholder, so divestment of BSKyB's stake to just below 10% or 15% does not adequately address the issues identified in the Provisional Findings.

2.2.2 The adverse effects on competition of BSKyB retaining any stake in ITV are exacerbated by BSKyB's industry knowledge and standing. As the Provisional Findings state, BSKyB's position in the market is such that its views can be expected to be of particular interest to other shareholders such that "*if it wished to oppose a course of action favoured by ITV's board BSKyB's position would be significantly strengthened by its industry expertise*"². Therefore, the retention of anything other than a truly de minimis stake by BSKyB would fail to adequately address the SLC identified in the Provisional Findings.

- **The retention of any stake by BSKyB would be problematic**

2.2.3 Whilst BSKyB may argue that there is some level of shareholding at which no competition issues can arise, in the particular circumstances of this case, Virgin submits that given BSKyB's industry knowledge and the CC's provisional finding that "*BSkyB, through its acquisition of a stake in ITV, was looking to preserve the possibility of participating in any future bid for ITV*"³ only total divestment is an appropriate remedy.

2.2.4 Virgin notes that at 5% BSKyB would still be ITV's second largest shareholder (see Annex 2 to Appendix D), with the largest shareholder being a financial investor, Brandes Investment Partners, whose shareholding of 6.12% would only be slightly higher than BSKyB's. If Brandes were to sell or reduce its shareholding BSKyB could once again become ITV's largest shareholder.

2.2.5 Therefore, only a complete divestment would properly remedy the SLC and address the risk of it reoccurring through no fault of either BSKyB or ITV. In this context it should also be noted that minority shareholders have the ability to force listed companies to consider specific courses of action and/or alter their strategies. Recent examples include a sub-1% shareholder in HSBC calling for the bank to reconsider its strategy and a 2.98% shareholder in Cadbury Schweppes plc forcing the company to pursue options to split up its business⁴.

2.3 In short, for so long as BSKyB has any shareholding in ITV it will continue to have an incentive to reduce the intensity of the rivalry between BSKyB and ITV.

2.4 In this case the appropriate remedy would be the complete divestment of BSKyB's stake in ITV given both:

² Provisional Findings, at para. 3.54.

³ *ibid*, at para. 3.19.

⁴ See, for example, <http://www.plcdigital.co.uk/NewsArticle.aspx?articleid=2244> and http://uk.reuters.com/article/UK_SMALLCAPSRPT/idUKL1142654520070611. There are other recent examples too, such as The Children's Investment Fund forcing the resignation of the CEO and chairman of Deutsche Börse.

- 2.4.1 the ability of shareholders with only very small shareholdings to cause disruption to the management of a company (as highlighted by the examples in para. 2.2.5 above); and
- 2.4.2 the likelihood that large institutional shareholders might well want to discuss matters relating to ITV with BSkyB, even if it held only a small stake in the company, in light of its industry knowledge and the fact that certain shareholders discuss significant issues with each other such that “*BSkyB is likely to have opportunities to discuss significant issues, and the general strategic direction of ITV, with the other major shareholders*”⁵.

3 **Costs and proportionality**

- 3.1 Virgin notes the CC’s position that any remedy should be designed to achieve as comprehensive a solution as is reasonable and practicable and will have regard to costs and proportionality.
- 3.2 As regards costs, the CC’s guidance is quite clear that the fact that BSkyB may make a loss on its investment is not a relevant factor in assessing the reasonableness of a particular type of remedy⁶. Leaving the loss on its investment to one side, the actual costs of a full or partial divestment are unlikely to be materially (if at all) different. ITV’s shares are liquid assets traded on the London Stock Exchange, so it would be very easy to sell or place the shares.
- 3.3 A complete divestment of BSkyB’s shareholding in ITV is proportionate because:
- 3.3.1 for the reasons explained above, the retention of any stake by BSkyB would not remedy the SLC identified in the Provisional Findings;
- 3.3.2 the Provisional Findings state that BSkyB’s rationale for the Acquisition was not, as claimed, purely financial. BSkyB is not a financial investor so it would not be disproportionate to prevent it from owning any shares in a competing UK listed company; and
- 3.3.3 the risks associated with BSkyB retaining even a minimal stake in ITV are substantial given BSkyB’s industry knowledge and power and the likelihood that other shareholders may wish to discuss important strategic issues with BSkyB.
- 3.4 Therefore, Virgin considers that a complete divestment of BSkyB’s stake in ITV is required in order to achieve a reasonable and proportionate remedy to address the SLC identified in Provisional Findings.

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⁵ Provisional Findings, Annex 3 to Appendix D.

⁶ Merger References/ Competition Commission Guidelines, CC2, at para. 4.10.