

**ACQUISITION BY BRITISH SKY BROADCASTING OF 17.9 PER CENT OF THE SHARES IN
ITV PLC**

**VIRGIN MEDIA'S RESPONSE TO THE COMPETITION COMMISSION'S NOTICE OF
POSSIBLE REMEDIES**

1. INTRODUCTION AND SUMMARY

- 1.1 The Competition Commission's ("CC") starting point for a consideration of remedies is for it to identify a remedy which restores the competition that has been substantially lessened as a result of the merger.
- 1.2 In its Provisional Findings, the CC concluded that BSkyB's acquisition of a 17.9 per cent stake in ITV ("the Acquisition") would give rise to a substantial lessening of competition arising from a loss of rivalry between ITV and BSkyB in the all-TV market. In particular, the CC has identified that BSkyB has the incentive and ability to act to weaken ITV's competitive position in a number of different ways. Indeed, the CC has concluded that BSkyB's rationale for the Acquisition, to influence the course of future transactions involving ITV, was itself a factor leading to the finding of a substantial lessening of competition. Further, BSkyB has not sought to claim, and the CC has not found, any pro-competitive efficiency enhancing or other public interest benefits arising from BSkyB's shareholding.
- 1.3 Accordingly, on the CC's own analysis, the only reason for BSkyB to acquire and to continue to hold a shareholding in ITV is to achieve outcomes which the CC has concluded will lead to a substantial lessening of competition. This is important because, for so long as BSkyB has any shareholding in ITV, it will have an incentive to use that shareholding, in whatever way it can, to weaken ITV's competitive position (and thereby to strengthen its own competitive position).
- 1.4 In these circumstances, the simplest and most clear cut remedy to address the identified substantial lessening of competition is the divestment of BSkyB's entire shareholding in ITV. This is the only remedy that would be consistent with the objective of restoring the competitive *status quo ante* and removing the influence of BSkyB over ITV's strategic thinking and decision making.
- 1.5 A reduction in BSkyB's shareholding in ITV to below 15 per cent, to say 14.9 per cent (a reduction in BSkyB's stake of only 3 percentage points) would make no practical difference to the factors identified by the CC in its Provisional Findings as giving rise to the substantial lessening of competition:
- (a) BSkyB would still be able to vote shares representing almost 21 per cent of votes cast in general meeting. BSkyB would need shareholders holding only 2.9 per cent of ITV's shares to vote with it in order to block a special resolution of ITV in circumstances in which up to 4.9 per cent of votes were cast against resolutions at the last ITV AGM.
 - (b) BSkyB would remain by far the largest shareholder in ITV, with a shareholding of almost double that of the second largest shareholder. This would leave BSkyB with very significant scope to act as a "disruptive shareholder" in voting on ordinary and special resolutions and on other strategic matters. This threat would be more than sufficient to cause the ITV Board to seek to avoid such conflict as far as possible in designing and implementing its strategy.
 - (c) such a limited divestment would do nothing to address BSkyB's industry knowledge and standing, and its ability to discuss strategic matters with other ITV shareholders (in particular those with cross-holdings in BSkyB and/or NewsCorp) and influence their voting behaviour on key issues;

- (d) recent empirical research into the ability of minority shareholders to determine the strategic decisions and policy of investee companies shows that a shareholding at this level is more than sufficient to allow an activist shareholder to influence strategic decisions; and
- (e) with any shareholding above 10 per cent, BSKyB would remain able, on its own, to determine the strategic future of ITV, since any shareholding at or above 10 per cent would allow BSKyB to block the "squeeze out" of minority shareholders under a takeover offer.

1.6 As in the case of a reduction to below 15 per cent, there are a number of reasons why a shareholding of just below 10 per cent would fail to address the identified substantial lessening of competition:

- (a) BSKyB would still remain ITV's largest single shareholder by some margin and its ability to use that position, together with its industry knowledge and standing, to influence other shareholders would be unaffected;
- (b) such a divestment would do nothing to prevent BSKyB's ability to act as a "disruptive shareholder" and thereby influence the Board of ITV in designing and implementing its strategy;
- (c) recent empirical research into the ability of minority shareholders to determine the strategic decisions and policy of investee companies shows that a shareholding at this level is more than sufficient to allow an activist shareholder to influence strategic decisions; and
- (d) a divestment to 9.9 per cent would not prevent BSKyB from influencing the course of any future transactions involving ITV. This is because even this level of shareholding would effectively allow BSKyB to block the squeeze out of minority shareholders under a takeover offer.

1.7 In summary, even at a shareholding of just below 10 per cent, there remains a very material risk that BSKyB will continue to be able to exert unwarranted influence over the strategic decisions of ITV. This is not a risk that the CC should be prepared to accept when seeking to remedy, on a permanent basis (and without any remaining doubt), the identified substantial lessening of competition. Accordingly, the only acceptable remedy in this case would be for BSKyB to be required to divest its entire stake in ITV.

1.8 This being the case, Virgin Media does not consider that behavioural remedies either alone or in conjunction with a partial divestment would be sufficient to remedy, on a permanent basis, the identified substantial lessening of competition.

2. **THE CC'S PROVISIONAL FINDINGS OF A SUBSTANTIAL LESSENING OF COMPETITION**

2.1 In considering the appropriate remedies to address a finding that a merger has given rise to a substantial lessening of competition, section 47(9) of the Enterprise Act ("**EA**") provides that the CC must:

"have regard to the need to achieve as comprehensive a solution as is reasonable and practical to ... the substantial lessening of competition and any adverse effects resulting from it."

2.2 Further, the CC's Guidance on Merger References¹ states:

¹ Merger References: Competition Commission Guidelines – June 2003 ("Merger Guidelines")

"In addressing the question of which remedies would be appropriate, and would provide as comprehensive a solution as is reasonable and practicable to address the SLC, and any adverse effects resulting from it, the Commission will take account of how adequately the action would remedy, prevent or mitigate the competition concerns caused by the merger".²

2.3 Accordingly, before considering the most appropriate remedies, it is necessary clearly to identify the factors leading to the finding that a substantial lessening of competition has arisen. In summary, the CC concluded that the Acquisition was likely to result in a substantial lessening of competition arising from a loss of rivalry between ITV and BSkyB in the all-TV market. In particular, the CC found that:

- (a) ITV's financial position is such that in order to raise substantial funding for a major strategic move, it might wish or need to rely on non-pre-emptive share issues. In this context, ITV would need to secure the support of BSkyB giving it significant influence over major investment decisions.³
- (b) ITV's awareness of BSkyB's power, as well as BSkyB's ability to block a special resolution, could give BSkyB influence over other strategic decisions, for example, limiting ITV's appetite for pursuing certain strategies if these were likely to cause conflict with BSkyB⁴;
- (c) given the competitive constraint of the FTA offer on BSkyB's services, and the importance of ITV within the FTA offer, BSkyB would have the incentive to influence ITV's strategy in such a way as to minimise the constraint it offered to BSkyB⁵;
- (d) BSkyB would have the incentive to reduce ITV's investment in content in order to reduce the competitive constraint of FTA on BSkyB⁶;
- (e) if ITV sought to raise additional finance to support the acquisition of major sports rights, BSkyB would have an incentive to seek to disrupt this⁷;
- (f) BSkyB would have an incentive to seek to influence ITV's ability to raise funds to participate in any spectrum capacity auction⁸;
- (g) BSkyB could attempt to influence the course of any future transactions involving ITV to weaken the constraint that FTA services would otherwise provide, for example, by disrupting an acquisition of ITV that might otherwise strengthen ITV's competitive position, or by attempting to encourage the acquisition of ITV by another buyer who might act in BSkyB's interest⁹; and
- (h) BSkyB would be able to exercise its influence and industry knowledge and standing to disrupt the planned launch of the Freesat service with the BBC¹⁰.

² See paragraph 4.22 of the Merger Guidelines.

³ See paragraph 4.99 of the Provisional Findings.

⁴ See paragraph 4.99 of the Provisional Findings.

⁵ See paragraph 4.100 of the Provisional Findings.

⁶ See paragraph 4.102 of the Provisional Findings.

⁷ See paragraph 4.103 of the Provisional Findings.

⁸ See paragraph 4.104 of the Provisional Findings.

⁹ See paragraph 4.105 of the Provisional Findings.

¹⁰ See paragraph 4.106 of the Provisional Findings.

- 2.4 It is clear from the above findings that the concerns leading to the overall conclusion of a substantial lessening of competition are based on three key factors (each of which is important independently of the others). These are:
- (a) the ability of BSKyB to block a special resolution should it choose to do so (thereby enabling BSKyB to rule out some strategic options by limiting ITV's ability to raise funds);
 - (b) BSKyB's industry knowledge and standing, as a consequence of which the CC would expect BSKyB's views to be of particular interest to other shareholders, which would strengthen BSKyB's ability to oppose a course of action favoured by ITV's board; and
 - (c) BSKyB's ability to act as a "disruptive shareholder". In particular, a shareholder with the holding of the size of BSKyB could cause considerable disruption to the management of the company's affairs by using its voting power to vote against ordinary resolutions, opposing the declared strategy of the ITV Board in the press within the media sector and in possible alliances with other shareholders. As the Commission observed, the ITV Board would be likely to seek to avoid such conflict as far as possible in designing and implementing its strategy¹¹.
- 2.5 Against this background, it is clear that any remedies considered by the Commission must be sufficient to address permanently **each** of these mechanisms by which BSKyB can influence ITV. In other words, the remedies must be sufficient to:
- (a) remove the ability of BSKyB to block special resolutions; **and**
 - (b) remove the prospect of BSKyB's industry knowledge and standing allowing it successfully to oppose a course of action favoured by ITV's Board; **and**
 - (c) remove BSKyB's ability to act as a "disruptive shareholder".

Only in circumstances where **all** of these objectives are achieved will the remedies be sufficient to address the substantial lessening of competition identified by the CC.

3. **THE APPROPRIATENESS OF COMPLETE DIVESTMENT**

- 3.1 The CC's starting point for a consideration of remedies is for it to identify a remedy which restores the competition that has been lessened as a result of the merger.
- 3.2 In its Provisional Findings, the CC concluded that the Acquisition would give rise to a substantial lessening of competition arising from a loss of rivalry between ITV and BSKyB in the all-TV market. In particular, the CC has identified that BSKyB has the incentive and ability to act to weaken ITV's competitive position in a number of different ways. Indeed, the CC has concluded that BSKyB's rationale for the Acquisition, to influence the course of future transactions involving ITV, was itself a factor leading to the finding of a substantial lessening of competition. Further, BSKyB has not sought to claim, and the CC has not found, any pro-competitive efficiency enhancing or other public interest benefits arising from BSKyB's shareholding.
- 3.3 Accordingly, on the CC's own analysis, the only reason for BSKyB to acquire and to continue to hold a shareholding in ITV is to achieve outcomes which the CC has concluded will lead to a substantial lessening of competition. This is important because, for so long as BSKyB has any shareholding in ITV, it will have an incentive to use that shareholding, in whatever way it can, to weaken ITV's competitive position (and thereby to strengthen its own competitive position).

¹¹ See paragraph 3.55 and 3.59 of the Provisional Findings.

- 3.4 In these circumstances, the simplest and most clear cut remedy to address the identified substantial lessening of competition is the divestment of BSKyB's entire shareholding in ITV. This is the only remedy that would be consistent with the objective of restoring the competitive *status quo ante* and removing the influence of BSKyB over ITV's strategic thinking and decision making.
- 3.5 This is consistent with the CC's normal practice. In divestment or prohibition cases, the divesting company is not normally permitted to retain **any**, or more than an immaterial, shareholding or stake in the divested company. For example, in the Safeway case, which involved competitors potentially acquiring a public company, the three supermarket groups which were prevented from acquiring Safeway (Tesco, Sainsbury and Asda) were prohibited from owning any interest in the shares of Safeway plc, other than investments in the ordinary course of business of not more than 3 per cent of the share capital. In addition, in the three most recent cases (going back to 1991) in which the MMC/CC found a minority shareholding gave rise to material influence and an unacceptable reduction of competition, the required remedy was divestment of the entire stake acquired.¹²
- 3.6 The CC's Merger Guidelines indicate that the CC must have regard to the reasonableness of any remedy and that this will include a consideration of the costs of any action it may decide is appropriate. Further, the CC will aim to ensure that any remedy is proportionate to the identified substantial lessening of competition. For the reasons set out below, neither cost nor proportionality considerations would justify a remedy short of divestment of the entirety of BSKyB's stake in ITV.
- 3.7 As regards cost, BSKyB may argue that a requirement to divest its entire stake, as compared with divestment of a lesser stake, will impose on it a material cost given that the share price of ITV is currently trading below the price paid by BSKyB for its stake. The CC's own Merger Guidelines explain why such an argument is unfounded:
- "However for completed mergers, the Commission will not normally consider the costs of divestment to the parties as it is open to the parties' to make merger proposals conditional on competition authorities' approval....Since the cost of divestment was, in essence, avoidable, the Commission will not, in the absence of exceptional circumstances, accept that the cost of divestment should be considered in the setting of remedies."*¹³
- 3.8 Virgin Media does not consider that there are any exceptional circumstances that would justify the CC departing, in this case, from its stated approach on the relevance of the cost of divestment in completed mergers. Indeed, the opposite is the case; as the CC has provisionally concluded, BSKyB's motivation in acquiring the stake was entirely anti-competitive.
- 3.9 BSKyB will no doubt also argue that it would be disproportionate to require divestment of its entire stake in ITV. Again, in circumstances where the unambiguously anti-competitive rationale for the Acquisition was found by the CC to be a factor leading to the identified substantial lessening of competition, BSKyB cannot rely on the principle of proportionality to justify a requirement to divest less than its entire stake in ITV. This is because there is no reason, other than an anti-competitive purpose, for BSKyB to have any stake in ITV. Accordingly, as indicated above, for so long as BSKyB has any shareholding in ITV it will continue to have an incentive to use that shareholding, in whatever way it can, to weaken

¹² (i) Stora Kopparbergs Berglags AB/Swedish Match NV, and Stora Kopparbergs Berglags AB/The Gillette Company – 1991, (ii) Stagecoach Holdings PLC and Mainline Partnership Limited – 2005, and (iii) British United Provident Association Limited and Community Hospitals Group plc; and Salomon International LLC ad Community Hospitals Group plc - 2000. Note that in the Stagecoach/Mainline case, although the MMC recommended that Stagecoach be prohibited from increasing its holding in Mainline above 20 per cent, the Secretary of State did not consider that this would be sufficient to address the identified adverse effects and required Stagecoach to divest its entire 20 per cent holding in Mainline.

¹³ See paragraph 4.10 of the CC's Merger Guidelines.

ITV's competitive position. The only way to remove entirely the risk of this behaviour on the part of BSkyB is to require divestment of BSkyB's entire stake in ITV.

4. **RISKS OF PARTIAL DIVESTMENT**

4.1 Virgin Media notes that the CC's Remedies Notice identifies at paragraph 6(b) that it is considering whether it is appropriate for a divestiture remedy to be limited to a divestment which would take BSkyB's level of shareholding below a level at which material influence would arise. For the reasons set out above, Virgin Media does not consider that it would be appropriate or reasonable, given its provisional findings, for the CC to consider any divestment remedy short of the divestment of BSkyB's entire stake in ITV. Before considering the specific shareholding levels outlined in the CC's Remedies Notice Virgin Media would make a number of general observations on this approach.

4.2 First, Virgin Media considers that this approach is based upon a misapprehension of the purpose of the material influence test. The material influence test is a **jurisdictional** test, and it is inappropriate to use it as a benchmark for remedies. Its purpose, together with the definition of an enterprise, the turnover test and the share of supply test, is to identify those transactions over which the OFT and CC have jurisdiction to intervene. Once a transaction has fallen within the jurisdictional thresholds, the transaction as a whole is considered in light of all the relevant circumstances, and any remedies should address the factors giving rise to the substantial lessening of competition rather than focus on the jurisdictional threshold of material influence.

4.3 Second, the Competition Commission's guidance document "*Application of divestiture remedies in merger inquiries*"¹⁴ sets out that:

"The onus will be on the parties to demonstrate that their proposed remedy options will address the expected SLC and the resulting adverse effects."

4.4 Accordingly, Virgin Media considers that the burden of proof is on BSkyB to persuade the CC that a remedy short of total divestiture would be equally as effective in removing the identified substantial lessening of competition.

4.5 Against this background this memorandum considers in turn why reductions in BSkyB's shareholding to just below 15 per cent or just below 10 per cent, would not address the substantial lessening of competition identified by the CC in a clear cut and lasting way, whether or not accompanied by additional behavioural commitments.

Divestment to just below 15 per cent

4.6 A reduction in BSkyB's shareholding in ITV to below 15 per cent, to say 14.9 per cent (a reduction in BSkyB's stake of only 3 percentage points) would make no practical difference to the factors identified by the CC in its Provisional Findings as giving rise to the identified substantial lessening of competition.

4.7 First, with a shareholding of 14.9 per cent, BSkyB would still be able to vote shares representing almost 21 per cent of votes cast in general meeting. Accordingly, BSkyB would need shareholders holding only 2.9 per cent of ITV's shares to vote with it in order to block a special resolution. In this connection, it is important to note that the CC's own research shows that at the last ITV AGM, up to 4.9 per cent of votes were cast against resolutions.¹⁵

¹⁴ "*Application of divestiture remedies in merger inquiries: Competition Commission Guidelines*", December 2004, CC8, at paragraph 1.9.

¹⁵ See paragraph 24 of Appendix D of the Provisional Findings.

- 4.8 Further, with a shareholding that would still represent 21 per cent of the votes typically cast in general meeting, BSKyB would still very likely be able to "tip the balance" on key votes in respect of ordinary resolutions. In empirical research carried out by, for example, La Porta, and by Leech¹⁶, a shareholding conferring a 20 per cent share of votes was found to be sufficient effectively to confer control.
- 4.9 In this regard, although the CC concluded that the proposition that shareholders in ITV who were also shareholders in BSKyB or News Corporation might be likely to vote in line with BSKyB was too speculative on which to place reliance in reaching its conclusions on material influence, there nevertheless remains a real risk that this factor, together with BSKyB's industry knowledge, will lead to common shareholders voting in line with BSKyB. This is not a risk that a reasonable regulator should be prepared to accept when seeking to remedy, on a permanent basis (and without any remaining doubt), the identified substantial lessening of competition.
- 4.10 Second, with a stake of 14.9 per cent, BSKyB would remain by far the largest shareholder in ITV, with a shareholding of almost double the second largest shareholder. Virgin Media has previously provided the CC with analysis and copies of pre-existing third party empirical research into the ability of minority shareholders to determine the strategic decisions and policy of investee companies¹⁷. The findings of studies by Becht, Klein and Zur are that small shareholdings (even as low as around 5 per cent) allow an activist shareholder to influence strategic decisions.
- 4.11 This would leave BSKyB with very significant scope to act as a "disruptive shareholder" in voting on ordinary and special resolutions and on other strategic matters. This threat would be more than sufficient to cause the ITV Board to seek to avoid such conflict as far as possible in designing and implementing its strategy. Virgin Media has direct experience of this dynamic, having its own significant minority shareholders of whose interests its board is always acutely aware, and with whom management is in regular contact.
- 4.12 Third, such a very limited divestment would not address BSKyB's ability, as a significant industry player, to influence both ITV and fellow shareholders in respect of key strategic decisions on investment. In this context, the CC's own questionnaire to shareholders found that BSKyB is likely to have opportunities to discuss significant issues, and the general strategic direction of ITV, with other major shareholders.¹⁸
- 4.13 Fourth, with any shareholding of above or around 10 per cent, BSKyB would remain able to determine the strategic future of ITV, since any shareholding of this level would allow BSKyB, on its own, to block the "squeeze" out of minority shareholders under a takeover offer¹⁹. This was recognised by the CC as being relevant to BSKyB's options as regards the future of ITV.²⁰ In practice, the inability to squeeze out a significant minority shareholder such as BSKyB would be a very material deterrent to any potential bidder for ITV. As the ability of BSKyB to influence the course of any future transactions involving ITV (to weaken the constraint that FTA services would otherwise provide) was one of the factors identified as giving rise to a substantial lessening of competition, it is clear that a reduction in BSKyB's shareholding to 14.9 per cent would not be sufficient to remedy the concerns identified by the CC.
- 4.14 In this regard it should be noted that the BUPA/CHG case²¹ has particular parallels to this case. In that case SBUKE/BUPA²² acquired a stake of 26.8 per cent in CHG. That stake

¹⁶ [Redacted]

¹⁷ [Redacted]

¹⁸ See paragraph 4(c) of Annex 3 of the Provisional Findings

¹⁹ Section 979 of the Companies Act 2006.

²⁰ See paragraph 3.15 of the Provisional Findings.

²¹ BUPA/Community Hospitals Group/Salomon International (2000).

was found to confer material influence and to be contrary to the public interest. In particular the stake was found to create a damaging degree of uncertainty for CHG's shareholders and for prospective purchasers of CHG's shares about SBUKE's intentions in relation to its stake.²³

- 4.15 When considering remedies, BUPA argued that SBUKE should not be required to divest its stake below 15 per cent on the basis that it was inconceivable that public interest detriments could arise at that level. However, CHG asked the CC to require SBUKE to sell its entire shareholding on the basis that:

"If SBUKE were allowed to retain its current shareholding it would be highly detrimental to CHG in terms of its future operations. Even the retention of a small holding by SBUKE would blight the shares because it would be seen as evidence of BUPA's continuing influence." (Paragraph 2.213)

- 4.16 In the circumstances, the CC required divestment of the entire stake acquired by SBUKE. Virgin Media considers that there are clear parallels between this case and the current case and the CC should adopt the same approach and reject any suggestion that BSKyB be required to sell down only to 15 per cent (and, indeed, should reject any form of partial divestment).

- 4.17 Fifth, with a stake of 10 per cent or above in ITV, BSKyB would have the right to:

- (a) object to the company being converted from a plc to a private company²⁴ (which, for example, a bidder might need to do in order for the target company and its subsidiaries to give security to banks lending to the bidder);
- (b) object to a special resolution being passed by the company (assuming it has been converted successfully from a plc to a private company) in order to whitewash the grant of security over its assets;²⁵
- (c) bring an action for unfair prejudice in the event that it can successfully claim that as a minority shareholder it is being disadvantaged by any transactions that are entered into following a completed bid for ITV.²⁶

The mere threat of the exercise of some or all of these rights by BSKyB, and the prospect of having to deal with an obstructive minority shareholder would, again, act as a significant deterrent for any potential bidder for ITV. It would also be of considerable concern to financial institutions funding any bid for ITV.

- 4.18 In summary, a reduction in BSKyB's shareholding in ITV by three percentage points to just below 15 per cent would not address, in any way, the factors identified by the CC as leading to a substantial lessening of competition.

Divestment to just below 10 per cent

- 4.19 The CC has also asked whether a reduction in the shareholding of BSKyB in ITV to below 10 per cent may address the SLC concerns. As in the case of a reduction to below 15 per cent, there are a number of reasons why a shareholding of just below 10 per cent would fail to address the identified substantial lessening of competition.

²² SBUKE and BUPA were found to be associated persons.

²³ See paragraph 2.194 of the CC's report.

²⁴ Section 54 of the Companies Act 1985 (note: the relevant section of the Companies Act 2006 is not yet in force).

²⁵ Section 157 of the Companies Act 1985 (note: the relevant section of the Companies Act 2006 is not yet in force)

²⁶ Section 994 of the Companies Act 2006. Note that any shareholder has this right.

- 4.20 First, such a divestment would do nothing to prevent BSKyB's ability to act as a "disruptive shareholder" and thereby influence the Board of ITV in designing and implementing its strategy. In particular:
- (a) if BSKyB were to be required to divest to 9.9 per cent, it would still remain ITV's largest single shareholder by some margin, and one of only two shareholders with more than a 5 per cent shareholding;
 - (b) such a divestment would do nothing to address BSKyB's industry knowledge and standing, and its ability to discuss strategic matters with other ITV shareholders (in particular those with cross-holdings in BSKyB and/or NewsCorp);
 - (c) BSKyB would still retain the ability to "tip the balance" in voting on ordinary and special resolutions. A 9.9 per cent shareholding would allow BSKyB to vote shares representing 13.8 per cent of the votes in general meeting; and
 - (d) as indicated above, and in Virgin Media's previous submissions, third party empirical research into the ability of minority shareholders to determine the strategic decisions and policy of investee companies demonstrates that small shareholdings (even as low as around 5 per cent) may well allow an activist shareholder to influence strategic decisions.²⁷

Moreover, in practice, it is likely that the lower BSKyB's stake in ITV is, the greater the incentive for BSKyB has to act as a "disruptive" shareholder. This is because the financial downside for BSKyB of a poorly performing ITV decreases the smaller its stake becomes.

- 4.21 Second, a divestment to 9.9 per cent (or a similar level) would not prevent BSKyB from being able to influence the course of any future transactions involving ITV. This level of shareholding would still allow BSKyB to block the squeeze out of minority shareholders under a takeover offer. This is because it is invariably the case that, for one reason or another, a small rump of shareholders will not accept an offer for a public company. BSKyB would need only just over 0.1 per cent of other shareholders to choose not to accept the offer to prevent a bidder from utilising the squeeze out provisions. Accordingly, a shareholder with 9.9 per cent will effectively be able to prevent a "squeeze-out" from occurring because there is no realistic prospect in a normal offer scenario of the entirety of the remaining 90.1 per cent shareholders accepting the offer.
- 4.22 As indicated above, the prospect of a large minority shareholder, whose interests are not aligned with ITV, remaining in place following an offer would be a major deterrent to any potential bidder for ITV.
- 4.23 Finally, as indicated above, in circumstances where there is no reason, other than an anti-competitive purpose, for BSKyB to have any stake in ITV, BSKyB should not be permitted to retain a stake of just below 10 per cent in ITV. This is a quite distinct situation from the last non utility case (BP/Government of Kuwait - in 1988 – nearly twenty years ago²⁸) in which divestment to just below 10 per cent was accepted as a remedy to a minority shareholding that gave rise to material influence and resulted in an unacceptable reduction of competition. In that case, the MMC accepted that the acquisition had been made by the Kuwait Investment Office as a good faith financial investment (along side a range of other portfolio investments) and that the Kuwait Investment Office would be reluctant to use its influence in relation to BP.²⁹ BSKyB has no record of being a portfolio investor and, accordingly, the CC has reached the opposite conclusion in the present case.

²⁷ [Redacted]

²⁸ The Government of Kuwait and The British Petroleum Company plc – 1988.

²⁹ See paragraphs 8.40 *et seq* (and, in particular paragraph 8.56) of the MMC's report.

Divestment to 5%

- 4.24 The CC's remedies paper does not appear to consider a divestment to a level significantly below 10 per cent but short of total divestment. For completeness, Virgin Media notes that even at the level of 5 per cent the CC should be alive to the risk of BSkyB retaining influence over ITV's strategic decisions.
- 4.25 The relevant question for the CC is whether an activist BSkyB could continue to have the ability to influence BSkyB's strategy with a level of shareholding at around 5 per cent (when it would still be the second largest shareholder) . The findings of Becht, and Klein and Zur³⁰ would suggest that it would. In addition, a shareholding at this level would not address the ability of BSkyB to marshal and influence the votes of other shareholders. In other words, it would not address the fact that BSkyB is recognised by other shareholders as being an entity with particular expertise in the relevant sector. Nor would such a remedy address the ability of BSkyB to influence shareholders in ITV that also hold stakes in BSkyB and News Corp to vote in line with BSkyB's interests.
- 4.26 In such circumstances, the only way in which the CC can be sure the potential for influence has been removed is through total divestment.

5. THE INAPPROPRIATENESS OF A STANDALONE BEHAVIOURAL REMEDY

- 5.1 Virgin Media welcomes and agrees with the CC's decision, in its notice on possible remedies, not to propose behavioural remedies on their own as an appropriate or effective manner to address the substantial lessening of competition. Virgin Media nonetheless expects that the CC will receive representations from BSkyB that it should be permitted to retain its strategic blocking stake subject to a number of behavioural limitations on the use of that stake. As the CC has rightly identified, the holding of this stake on its own gives BSkyB the ability to determine the corporate future of ITV and in such circumstances it cannot be permitted to retain the stake.
- 5.2 Virgin Media notes that the CC's guidance indicates that, generally, it will have a preference for clear-cut structural remedies over behavioural remedies which may be difficult to police. This is particularly relevant to the present case, especially given that there is a clear structural remedy (divestment of the stake) which would entirely address the substantial lessening of competition and remove any need for continuing monitoring. In particular, allowing BSkyB to retain a significant stake in ITV would, for all the reasons set out above, provide it with the ability to interact with the management of ITV and other shareholders and give it the ability to influence the future strategies of ITV. It would be practically impossible to police any behavioural remedies seeking to address such concerns.
- 5.3 Virgin Media notes in particular, the MMC's findings in *Stora/Gillette*³¹ where Gillette's acquisition of a 22 per cent equity stake in the form of **non-voting** convertible loan stock was found to confer material influence on Gillette. In particular, the MMC noted that:
- "With these rights, Gillette could, in effect, determine the ultimate destination of the effective control of Wilkinson Sword or the assets of the business of Wilkinson Sword, keeping out another competitor or a potential competitor, and preventing the management from entering into a merger or joint venture with someone of whom Gillette did not approve."* (Paragraph 7.69)
- 5.4 Again, the MMC decided in that case that the appropriate remedy was the divestment of Gillette's entire interest.

³⁰ [Redacted]

³¹ *Stora Kopparbergs/Swedish Match/Gillette* (Cm 1473) 1991.

6. TIMING, INTERIM PROVISIONS AND CONTINUING OBLIGATIONS

- 6.1 Virgin Media considers that any divestment of the shares in ITV should take place as expeditiously as possible. As a listed public company, there is a fully liquid market for ITV's shares, as is demonstrated by the fact that BSkyB was able to acquire its 17.9 per cent stake in a matter of days after Virgin Media announced that it has expressed an interest in ITV.³²
- 6.2 Virgin Media has consulted with its financial advisors, who consider that Sky's 17.9 per cent stake in ITV could be placed in the market, through a variety of means including an accelerated book build or exchangeable bond offering bought by investment banks, in as little as a 48 hour period. Further, on the basis of past experience, while such a mechanism might have a limited negative effect on ITV's share price, it would only be a short term effect. Indeed, Virgin Media's financial advisors consider that there would be less impact on the share price of ITV if the entirety of BSkyB's stake were to be sold (relative to a partial divestment), as it would open the way for a potential bid for ITV by removing the deterrent for any bidder of Sky remaining as a disruptive minority shareholder, and by removing the possibility of any further sell downs by BSkyB in the future. In this regard, Virgin Media would observe that on the day of the publication of the CC's Notice of possible remedies, which raised the prospect that BSkyB may be required to divest all, or a proportion, of its stake, ITV's share price rose by 4 per cent.³³ Accordingly, there would be no reasonable justification for BSkyB being given more than one to two weeks in which to divest its entire stake in ITV.
- 6.3 In this context, it should in any event be noted that the substantial lessening of competition arising from BSkyB's stake in ITV has been continuing for nearly a year, and it is important that this adverse effect on competition is not permitted to persist for any longer than is absolutely necessary, particularly given the fast moving nature of media markets. Further, by the time the final decision is published and remedies are finalised, BSkyB will have been on notice of the risk of it being required to divest its stake for a considerable period of time. At the very latest, it has been on notice since publication, on 2 October, of the CC's Notice of possible remedies. Accordingly, quite apart from the fact that the risk of being required to divest its stake in ITV was avoidable,³⁴ BSkyB will have had more than sufficient time to prepare itself to divest its stake.
- 6.4 Virgin Media would emphasise that the divestment of tradable securities is very different from the divestment of businesses comprising assets, goodwill, intellectual property licences and customer contracts, together in some cases with ancillary manufacturing or other agreements between vendor and purchaser. Accordingly, the time period allowed for divestment in such cases is of no precedent value in this case.
- 6.5 Moreover, during the divestment period, BSkyB should be prohibited from voting its shares in ITV. This requirement has consistently been required by the CC/OFT/Secretary of State in cases in which a remedy requires the divestment of shares.
- 6.6 Finally, following divestment, Virgin Media would expect that the BSkyB's undertakings would contain the usual provisions including, for example, a prohibition on re-acquisition of shares or of any assets of ITV, a prohibition on participating in the formation of ITV's business strategy, and a prohibition from BSkyB employees or associates holding positions as directors or senior managers in ITV.

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³² Virgin Media made its announcement on 9 November 2006 and on 17 November BSkyB announced that it had acquired a 17.9 per cent stake in ITV.

³³ From 100 pence to 104 pence.

³⁴ See paragraph 3.7 above.