

5 Views of main parties

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General

5.1. This chapter summarizes the views of BSkyB and Manchester United, the main parties in this inquiry, which were presented in a number of written submissions and at five hearings (three with BSkyB and two with Manchester United). The chapter deals first with the views of BSkyB and second with those of Manchester United.

BSkyB

Jurisdiction

5.2. The company accepted the MMC's provisional conclusion that arrangements were in contemplation which, if carried into effect, would result in the creation of a merger situation qualifying for investigation.

5.3. BSkyB also accepted that News International, with its 40 per cent shareholding in BSkyB, had the ability materially to influence the company, but considered that this ability did not raise any issues other than those arising as a result of BSkyB's proposed acquisition of Manchester United.

Interrelation with Restrictive Practices Court proceedings

5.4. The company noted that this reference would be completed prior to the decision of the RPC in the case brought by the OFT, on the questions whether:

- (a) the Premier League rule (known as the collective selling rule) requiring that no club should sell its TV rights directly unless the Premier League agreed; and
- (b) the exclusivity provisions of the current rights contracts between the Premier League and each of BSkyB and the BBC

were contrary to the public interest. BSkyB said it recognized that this raised a difficulty for the MMC in considering whether any aspect of the proposed merger might be expected to operate against the public interest.

Background

5.5. Discussing the background to the proposed acquisition, BSkyB explained that News International had acquired a majority shareholding in Satellite TV plc in 1982. This company was renamed Sky Television plc in 1988. Separately, in 1986, British Satellite Broadcasting (later known as BSB Holdings Limited) was formed by a consortium. Both companies were formed to provide satellite TV broadcasts in the UK and the Republic of Ireland. Sky TV and BSB merged in November 1990. In December the new company changed its name to British Sky Broadcasting Limited. Following a reorganization in 1994 a new subsidiary, British Sky Broadcasting Limited, was created with all the main trading assets while the original British Sky Broadcasting Limited became a holding company and was renamed British Sky Broadcasting Group plc (BSkyB). This was then floated on the New York and London Stock Exchanges in December 1994. On 9 September 1998 BSkyB announced

the terms of its recommended offer to acquire Manchester United. Its intention was that, initially, Manchester United would be a subsidiary of the group holding company, BSkyB.

5.6. BSkyB said that its principal activities were:

- (a) the creation of channels which were broadcast via DTH satellite, in both analogue and digital form, and offered for redistribution via cable and DTT; and
- (b) the DTH distribution via satellite of its wholly-owned channels, the channels of eight joint ventures (in which BSkyB had equity interests of between 20 and 50 per cent), 44 audio channels and up to 28 TV channels of third party broadcasters.

Through its subsidiary, SSSL, BSkyB provided conditional access and customer management services in respect of Sky's channels and third party channels.

The relevant markets

5.7. In BSkyB's view the relevant markets in relation to the proposed merger were the markets for broadcasting, leisure services and merchandising within the UK. BSkyB operated primarily in the broadcasting market; Manchester United operated principally in the leisure services market; and both were involved in merchandising, although the market shares of each were small.

5.8. Within the broadcasting market BSkyB operated as:

- (a) a broadcaster of TV channels and pay-per-view services;
- (b) a retailer of DTH satellite services;
- (c) a provider of conditional access and subscriber management services; and
- (d) a retailer and installer of DTH satellite equipment.

It faced competition for programming rights and viewers from all other broadcasters to the UK. In addition it faced competition, as did other broadcasters, from the potential for vertical integration from the owners of programming rights such as sports bodies, film studios and the owners of programming libraries.

5.9. Others, typically the cable operators, had claimed that BSkyB competed in a separate narrow pay TV market. From one perception, however, this was no more than market definition by adjectives, defining narrower and narrower markets by adding more and more adjectives—progressing from pay TV market to premium channel market, then to sports premium channel market, to pay TV football market and to Premier League football pay TV market. There was no intellectual basis for this kind of approach. On another perception a separate pay TV market was defined because of the different means by which channels were funded. This ignored the fact that viewers were obliged to pay figures of the same order per year as a basic subscription charge by way of licence fee to the BBC, making it and commercial terrestrial channels bundled with it just as much a form of pay TV as any subscription service.

5.10. The claim that pay TV channels had the advantage in sport, particularly football, was contradicted by the facts. The £670 million which BSkyB was paying for rights to Premier League matches (60 a year for four years) amounted to £2.8 million a match, and less if account was taken of BSkyB's entitlement to replay each match twice. ITV's payment of £75 million for the rights to the UEFA Champions' League for three years represented an effective price per live match of £2.1 million, if one assumed that its first year showing of 12 matches was continued. However, from next season the offering would comprise 16 live matches (on Wednesdays) plus the final. A further 32 live matches would be broadcast on Wednesdays and Thursdays on First ONdigital. ONdigital had indicated that the First ONdigital basic channel would be available free of further charge to those subscribers taking at least the £7.99 basic tier. Rights were hotly contested by both subscription and public service broadcasters, all of whom sought exclusivity to a greater or lesser extent for their

showing of each item of programming. BSkyB said that ITV companies had bid for the Premier League rights in 1992 and 1996; if they wanted to do so again, they were in a position to do so, on a free-to-air and/or pay TV basis.

5.11. There seemed to be no basis for excluding from the market sports events that were not ongoing throughout the year. The company said that the question for a football fan was whether, overall, free-to-air TV provided an adequate diet of football programming taking into account the FA Cup, the Champions' League, the UEFA Cup, the Cup Winners' Cup, Italian football, international qualifying away matches and an international competition every second summer. It stated that it was not necessary for each individual component to be an adequate substitute for the Premier League programming in itself. Commenting on a fan survey¹ which had found that 92 per cent of Sky subscribers usually tried to watch live Premier League games on Sundays, BSkyB said that this finding would lead to a forecast of around 3.6 million viewers. In fact, however, the average viewership for live Premier League matches was only 1.4 million, indicating that only 36 per cent of subscribers actually watched a particular match. BSkyB also said that the fan survey did not appear to deal with the extremely popular Champions' League matches and other live European competition matches.

5.12. Simply because terrestrial broadcasters did not charge prices at the margins for their services did not mean that BSkyB and other pay TV broadcasters were able to set prices in isolation from free-to-air TV. The quality of the free-to-air TV product meant that people had to be persuaded to part with money for something extra. The fact that people who took subscription services also continued to watch free-to-air TV did not mean that the two did not compete: an obvious example was the competition between news programming on the public service mixed genre channels, and on the newer 24-hour channels, both pay TV (for example, SkyNews) and free-to-air (for example, BBC 24 Hour News). Indeed the arrival of the latter had had a direct impact on the ability of BSkyB to obtain cable distribution for Sky News.

5.13. BSkyB said that a focus on product characteristics and whether two products were different reflected an approach that pre-dated the general worldwide move to a hypothetical monopolist framework. It referred to DGIV's definition guidelines which stated that:

... product characteristics and intended use are insufficient to show whether two products are demand substitutes. Functional interchangeability or similarity in characteristics may not, in themselves, provide sufficient criteria, because the responsiveness of customers to relative price changes may be determined by other considerations as well. ... differences in product characteristics are not in themselves sufficient to exclude demand substitutability since this will depend to a large extent on how customers value different characteristics.²

BSkyB also said that most popular domestically made UK series had appeared first on free-to-air TV and were repeated on pay TV channels. Highlights of popular events were almost invariably shown on free-to-air TV if the events were not shown in full in either live or delayed transmission.

5.14. Nor was it the case, as had also been claimed, that terrestrial broadcasters could not compete with pay TV broadcasters because they did not have the capacity or time in their schedules to offer all that pay TV could offer. For example, in the 1997/98 season, while BSkyB broadcast 60 live Premier League games per season, there were 140 top-quality live football matches on the five terrestrial channels. In any case the claim had been overtaken by developments in technology. Digital broadcasting had relieved capacity constraints on free-to-air TV as well as subscription services. Both ITV and BBC had started one or more additional free-to-air channels and appeared to have a capacity for more.

5.15. The fact that BSkyB had been able to raise its retail prices over the last five years or so had also been used as a basis for the claim that there was a narrow pay TV market. However, this ignored three key issues: first, when BSkyB was first established it was necessary to provide services at low, promotional prices; second, a simple price comparison ignored the enormous changes in the quantity

¹The Premier League Fan Survey for 1996/97, carried out by the Sir Norman Chester Centre for Football Research, Leicester University.

²Commission Notice on the definition of the relevant market for the purpose of Community competition law, Official Journal of the European Communities, 97/C 372/03, paragraph 36.

and quality of programming retailed by BSkyB; and third, price rises had occurred against a background of steeply rising costs, resulting in narrowing margins.

5.16. Focusing on changes in quality, BSkyB said that the fact that its margins had either remained the same or declined was consistent with all of the price change being accounted for by changes in quality and the costs of supply. In 1993 its top-tier package had consisted of 11 basic encrypted channels, 2 films channels with 1 bonus and 1 sports channel. In 1998, however, the top-tier package in digital comprised 41 basic channels, 2 films channels and 2 bonus channels (multiplexed to cover 11 screens), 2 sports channels, 1 bonus channel and 10 audio channels. The 50 per cent nominal price increase over the period was 27 per cent in real terms, or 4 per cent increase in real terms each year, and BSkyB said that it did not seem at all unreasonable to claim that the observed quality increase accounted for the price change. The situation was not dissimilar as far as concerned the increases in wholesale prices for the more popular packages that had occurred between January 1994 and October 1998. These had equated to an annualized increase of some 5 to 6 per cent. BSkyB said that the overall level of wholesale price increases was reasonable and did not indicate an unconstrained ability to raise prices. The cost of supplying the channels had risen significantly during the period. And the costs of premium content had risen faster than the increases in the wholesale costs of premium channels supplied to cable operators. Sports costs, for example, had risen by 252 per cent in real terms. In addition, during the same period bonus channels had been launched and the broadcast hours of premium channels had been extended. Both of these were significant reasons for the increases in wholesale costs.

5.17. Acknowledging that there had been changes in consumer demand over the five years from 1993/94 to 1997/98 as between the numbers of subscribers to its basic package ([\approx] per cent up) and those for its basic and full premier package ([\approx] per cent), BSkyB said that these demand changes suggested that consumers had substituted between the basic and premium packages in response to changes in relative prices which in its view implied that the two types of packages were in the same market on demand-side grounds. BSkyB also said that these demand changes indicated that its sports and movie channels were becoming less important in attracting subscribers.

5.18. BSkyB faced competition in two principal activities, distribution and programming, in each of which there was a wide range of competitors. In distribution the UK had, in addition to analogue terrestrial TV, three further competing platforms for the distribution of TV services: DTH, cable and DTT. The three main cable operators, for example, had between 60 and 80 per cent of cable and satellite homes in the areas in which they were active. Cable companies were now bundling telephony and TV in ways that were not readily replicated by other TV retailers. BSkyB was under fierce attack from these companies and had lost subscribers. In programming there was competition for rights from other broadcasters and from third parties (such as sports bodies), and for subscribers and viewers. Once a home had subscribed to pay TV, there was fierce competition for viewers both among subscription broadcasters and between these and free-to-air broadcasters. The latter accounted for about 65 per cent of viewing in pay TV homes.

5.19. In short, a narrow definition of the relevant market as one for pay TV was incorrect. Although the OFT had used this definition in its 1996 review of BSkyB, it was important to note that this was an assessment of the *wholesale* supply of channels to pay TV retailers. The OFT had reached no conclusion about markets in the context of *retailing* TV services. In any event, there had been developments since 1996 which had affected the OFT conclusions: the significant strengthening of the cable industry, the establishment of a new platform (DTT), the development of digital technology and the entry of competing film and sports services (for example, FilmFour, Carlton Cinema, Front Row). BSkyB said that free-to-air TV and all forms of pay TV were part of the same market because all broadcasters competed for programming rights, viewers and advertising revenue.

5.20. More specifically, it argued that the key question was whether the programming offered by free-to-air broadcasters would constrain the price set by a single pay TV broadcaster (protected from competitive entry) broadly to the competitive level—that is, the level that would apply if there were many pay TV broadcasters. BSkyB said that it believed this question could best be answered by a ‘simple thought experiment’ in which BSkyB (assumed for these purposes to be the sole pay TV supplier) faced entry from a new pay TV supplier which had acquired a portfolio of rights previously controlled by free-to-air TV broadcasters. If BSkyB were to drop its prices, this would indicate a pay TV market because clearly the entry of this second pay TV operator would represent a higher degree

of pricing constraint than would the same programming on free-to-air TV. But BSkyB said that it would not drop its prices because there was no reason to do so. The relevant change in the market was that certain programming that was available free of charge to 100 per cent of TV homes had suddenly become available to only a subset of homes that had purchased the necessary reception equipment. Those with reception equipment were now required to pay for programming that they used to obtain free. There seemed to be no reason for BSkyB to respond by dropping its price. In economic terms, from BSkyB's position, the change represented an increase in the price of a substitute good which would suggest that the most likely price response for BSkyB would be to increase prices.

5.21. One argument that was consistently put forward was that pay TV was different from free TV because of the difference in funding mechanism. But BSkyB said that there was no evidence to indicate that the TV market was not best described simply as a collection of differentiated products (programmes) that was distributed around a number of broadcasters with differing forms of funding mechanism. There was no evidence that there was any reason to conclude separate submarkets on the basis of funding mechanism. The reality seemed to be that pay TV broadcasters faced particularly severe competition from free TV precisely because it was free. BSkyB did not, therefore, accept the DGFT's reasons for concluding that there was a separate pay TV market. It denied that capacity constraints seriously inhibited the ability of free-to-air broadcasters to compete and it challenged the proposition that pay TV broadcasters were able to pay more for broadcasting rights than free-to-air broadcasters.

5.22. The company's business began with all TV households. It could not start from a definition of pay TV households, because it competed for people's leisure time and how they used their TV set. The free-to-air TV product was a high-quality one which placed constraints on the prices charged by pay TV. Just looking at football, and in particular at the 60 Premier League matches shown on Sky and the 140 live top-quality football games on free-to-air TV, it was very hard to maintain that these were not substitutable to some degree.

Manchester United

5.23. BSkyB said that Manchester United was in the leisure services market and participated in football competitions and saw itself as competing with other clubs. The operation of a football club was its main business though it was also active in merchandising and (largely indirectly through the Premier League) in broadcasting rights. As to the claim that demand for Manchester United's football activity was relatively price-insensitive, because the club's fans would not accept other football clubs' matches or other sports as substitutes, BSkyB considered that there were in practice substitutes. A few Manchester United fans might indeed switch to another club on price grounds, but most would find something else to do locally with their leisure time.

Barriers to entry

5.24. The company said that a firm seeking to enter the broadcasting market as a channel operator had a choice of an enormous range of programming available to it. There were few barriers in respect of a market entrant's ability to acquire such programming. In the films area, the challenge from free-to-air broadcasters and the emergence of Front Row, Carlton, Granada and FilmFour showed that new entry, whether as a pay-per-view service, a premium channel or a basic channel, was achievable and successful in genres where it had been alleged that BSkyB would prevent the emergence of competition. More generally, there were reasons to believe that entry as a pay TV broadcaster was easier today than it was even in 1996. Chief among these was the simple fact that there were more homes today with equipment for TV subscription services (satellite, cable and digital terrestrial) than in 1996. This meant that entry difficulties for a channel were lower because the channel had immediate access to a greater number of potential customers. On this basis, whatever the conclusion reached on market definition, BSkyB stressed that there was no basis to conclude that BSkyB enjoyed market power because there were no material barriers to entry.

5.25. BSkyB said that its pricing structure did not act as a barrier to entry. It said that most of the claims about the effect of BSkyB's discount on entry had relied on an assumption that a subscriber

must drop a BSkyB channel in order to take the channels of a new entrant. But it said that it was possible for the subscriber to take the new channel in addition to its existing channels. Assuming that the new channel provided something different, there was no reason to think that a sports fan would not subscribe to all the sports channels. It said that there was already evidence for this sort of behaviour following the recent launch of FilmFour. [§] per cent of FilmFour subscribers took the channel in addition to BSkyB's two film channels. It said that it seemed that the new service was providing something different: hence subscribers were willing to take a third subscription channel. Entry had not, therefore, been foreclosed.

5.26. As to sports, there was a constant stream of rights contracts which were expiring, and a vast quantity of product not acquired by any broadcaster which was available for development or purchase. A new entrant would face an easier task than that faced by Sky or BSkyB, since the entrant would have access to an installed base of DTH subscribers as well as potential access to a cable subscriber base ten times the size of the cable base when BSkyB was launched. A number of relevant UK and overseas companies had comparable financial resources to those of BSkyB. The idea that only BSkyB was sufficiently well funded to pay the prices now being demanded by rights holders was wholly incorrect.

5.27. BSkyB said that it did not regard the costs of the sports rights themselves as an entry barrier. It was not normally appropriate to regard as a barrier to entry any cost that must also be borne by market incumbents. If the Premier League rights were to cost £[§] next time, then there was no basis for believing that BSkyB was unique in its ability to pay the sum. The claim that free-to-air broadcasters were unable to compete for top sporting rights was directly contradicted by evidence. The Champions' League rights had recently been sold to ITV and ONdigital at prices per match approaching those paid for the Premier League, even though several matches might not feature any English club. In the USA the National Football League (NFL) rights had recently been bought by three free-to-air TV broadcasters and one pay TV basic channel provider for a total of \$2.2 billion per year. BSkyB said that in Premier League terms, adjusting for population and exchange rates, this equated to a figure in the region of £275 million per year or £1.1 billion for four years; but the NFL had only an 18-week regular season. On this basis, there was no reason why advertiser-supported broadcasters in the UK could not bid for Premier League rights.

5.28. It was wrong to claim that it was not possible for any other broadcaster to enter as the provider of a sports channel because the live Premier League rights were held exclusively by BSkyB. The current contract expired in 2001 and it would again be open to any broadcaster to bid against BSkyB in order to try to secure the rights. It was also clear that the Premier League rights were not the only basis for an attractive sports channel. There were many others. The Chief Executive of Front Row was reported as saying as much in January 1999. (By way of example, British Eurosport had launched recently without any Premier League matches, and Front Row, First ONdigital, BBC Choice and ITV2 were all providing sports broadcasting.) This was also illustrated by the existence of the successful Sky Sports 2 channel which did not show any Premier League football. It was not necessary for a new entrant to have the rights to year-round or almost year-round events such as the Premier League championship. And it also seemed possible for an entrant to offer a pay-per-view TV service based around a selection of one-off events. To the extent that there was a year-round demand for sports, it seemed that this could be met using a collection of sports rights such that while no individual event provided year-round coverage, there was year-round sports coverage in combination. Beyond films and sport, there was a wide range of programming available to any entrant.

5.29. For the DTH platform, there was technically a lack of capacity in analogue transponders. But this was less of a problem in practice than in theory. A secondary market in transponder capacity had emerged, from which new entrants could benefit, and BSkyB had itself been able to launch new services by sub-leasing, or taking an assignment of, transponder capacity from other broadcasters. In the case of digital there was no shortage of capacity. Assuming the Astra 2B satellite was launched by SES in summer 1999, as expected, there would be some seven spare transponders on Astra satellites 2A and 2B. Taking Astra 2A alone, the two spare transponders coupled with the spare transponder capacity available on the various leases meant that there was enough capacity for another 90 channels or so. Although it was difficult to estimate the spare capacity likely to be available for sub-leasing on Astra 2B, because the device had not yet been launched, it was likely to be similar to that on Astra 2A.

5.30. When it came to cable, however, whose operators had complete control over access to the cable network, the only option was for a channel operator to seek carriage from each of the three major cable operators—CWC, NTL, Telewest—and from the few remaining smaller operators. A similar single option was available from the DTT retailer (ONdigital) with further limited capacity held by SDN although opportunities were more limited because of DTT capacity constraints caused by the limited availability of terrestrial frequencies and might at some point require a new entrant to wait for the expiry of existing carriage contracts, though this position had not yet been reached.

Market power

5.31. BSkyB said that, to the extent that there were pockets of market power within the broadcasting market, this typically arose from the fact that certain competitors had been awarded exclusive and long-term access to non-replicable assets (such as the analogue terrestrial spectrum, the DTT multiplexes, and the ability to build and operate a cable network). BSkyB did not enjoy any such privilege. The company had been successful in building up its sports broadcasting, but this could not be equated with dominance. Both the BBC and ITV would claim to be the leading sports broadcaster. There were numerous broadcasters who were well positioned to market a dedicated sports channel and there were numerous examples where BSkyB had been outbid by terrestrial or advertising supported channels for sports rights. Most recently ONdigital and ITV had been awarded the rights by UEFA to Champions' League matches for a four-year period. As a result of this some Champions' League matches would be shown exclusively by ONdigital on DTT.

5.32. The company considered that it had no ability to dictate to consumers or that it had any clout in the distribution sector. On the contrary, BSkyB was suffering in the cable franchise areas [*Details omitted. See note on page iv.*]. Furthermore, even though BSkyB was the only source for live Premier League content, this did not put it at any advantage in negotiating the sale of Sky Sports to cable companies, as there was regulatory control to ensure access on fair, reasonable and non-discriminatory terms. The cable companies were the growth engines of multichannel TV; their negotiating strength was enormous and they did not necessarily regard access to Sky Sports channels as essential—a large proportion of their subscribers did not take these channels. Their claims that BSkyB used its power at the wholesale level to give itself an advantage as a retailer were simply untrue.

5.33. As to the negotiations for Premier League live TV rights, although BSkyB had been given a matching right clause in the 1992 long form contract to operate, if need be, at the end of that contract (a normal clause in sporting contracts, and one inserted as a quid pro quo for the Premier League's right to require BSkyB to continue on the same terms as previously for a further five years at the end of the 1992 contract), no use was made of this clause in the 1996 round. BSkyB had no first mover advantage. When it won the Premier League contract for TV rights in 1992 it had defeated ITV despite the latter being the incumbent broadcaster and despite BSkyB having no track record. In 1996 it had gained the contract after a competitive bidding process. Although a cable operator (or broadcaster aligned with a cable operator) would have guaranteed distribution on its own network and guaranteed access to the DTH platform, BSkyB had to bid with a level of uncertainty as to whether it would obtain access to a cable network and as to the price it could negotiate.

5.34. The company acknowledged that its practice of discounting (also known as deep discounting) for second, third and fourth premium channels acquired by other operators was under investigation by the ITC, but said that wholesale pricing was intended to provide incentives for the sale of its premium channels and also the fact that the cost of supplying a second, third and fourth channel was very much lower than the cost of supplying the first.

Reasons for the merger

5.35. In addressing the reasons for its proposed acquisition of Manchester United, BSkyB said that the rationale focused on a football club being a good strategic fit for BSkyB, considering its ability to add economic value by assisting with brand development and new business opportunities. Manchester United was considered by BSkyB to be the best option, primarily because of the strength of its management team, its quality revenue streams and the breadth of its supporter franchise.

5.36. Expanding on this, BSkyB also noted that football, the world's most popular sport, was a key media asset with further growth potential, and TV revenues were critical to future growth. It was the leading sport in the European TV sports rights market by a considerable distance; vigorous competition in the future, with more 'players', would mean higher bids for those rights. Sports were not necessarily the endgame in or of themselves; they were purchased to build the value of TV networks and/or distributors. A significant proportion of the value of football had been, and would be, generated by BSkyB; and the company wanted to capture a greater proportion of the value to be created by the introduction of digital TV. The value of sports teams for media groups went beyond their direct cash flows. They were purchased to build the brand and the value of TV networks and/or distribution.

5.37. Initially, in documents prepared below board level during an early study phase, possible reasons for making the bid had had a somewhat defensive flavour:

- (a) Acquisition of a football club would be 'buying a seat at the table'. Although this could be done more cheaply by acquiring a different club, Manchester United (along with Liverpool and possibly Arsenal) provided the additional, and perhaps crucial, opportunity to get a seat at the table of a potential European Super League.
- (b) Were the RPC to deem the collective selling of TV rights to be illegal, this would benefit top clubs like Manchester United. In any event some of the large clubs on the Continent were pressing for an end to the collective selling of TV rights.
- (c) Manchester United would provide BSkyB with a solid UK base around which a compelling soccer package could be built in almost all conceivable scenarios and, given its very large fan base, the club was likely to be a major beneficiary of pay-per-view when that was launched.
- (d) Ownership of Manchester United would provide the company with significant leverage over Manchester United's domestic and European rights.
- (e) The possibility of a European Super League might be counter-productive for BSkyB, given its UK business base, but acquisition of Manchester United might allow it better to control/influence events, as ownership of 20th Century Fox had done in movie negotiations.

BSkyB senior management decided that, with the exception of the first sentence of subparagraph (b) above and subparagraph (c), the reasons advanced in the above quoted memoranda were flawed and not borne out on a full examination of the legal and factual situation affecting the sale of rights to Manchester United's matches. BSkyB's senior management decided nevertheless that there were the following powerful and important reasons for the merger:

- (i) Sport was an accepted part of BSkyB's (and its competitors') brand-building strategies.
- (ii) The acquisition of Manchester United would represent a significant step in the company's strategic development into content ownership, whether or not BSkyB retained control of the club's rights (under collective selling).
- (iii) It would assist BSkyB to take advantage of the impending developments in the digital world.
- (iv) Above all, BSkyB believed that it could expand the value of the Manchester United enterprise and in so doing add value to BSkyB itself and to its ability to grow its business.

5.38. BSkyB also emphasized that the proposed acquisition was part of a wider policy of having an ownership stake in more of the content of all its channels—the three principal areas where it felt that this was important being general entertainment, films and sport. The more the company invested in sports rights, the more sensible it was for it to participate in the value it hoped thereby to create. It was proceeding here on the assumption that the collective selling of TV rights would continue—it would have been problematic to operate on other hypothetical assumptions. If individual selling replaced collective selling, it felt that the relevant Manchester United values could be higher, although BSkyB would prefer to see collective selling continue.

5.39. BSkyB accepted that, under collective selling, there was a possibility that the rights might go to another broadcaster (or stay with the Premier League, if it decided to establish its own channel). It did not, however, consider that this would cause it insuperable problems. For a start it had other attractive sports rights (for example, in football, rugby union, rugby league, cricket, etc) and was working hard at getting more, including rights for more non-Premier League football. Second, it would work hard to be successful in the following round some four or so years later.

5.40. BSkyB's aim for Manchester United was to secure a successful team in domestic and European competitions, spectator facilities of the highest quality and capacity crowds. It had a commitment to the continuing success of the Manchester United team and the club, and this commitment would include ensuring continued investment in world class players and active promotion of the Manchester United team and brand, both in the UK and abroad through BSkyB, and by marketing to distribution networks worldwide.

5.41. The company said that it intended to behave sensitively in dealing with Manchester United and its many supporters. It understood the instinctive reactions to change which much of the public comment had embodied. It considered, however, that much of this comment had been of a generalized nature protesting about what were perceived as the adverse effects for football of the change in ownership, and that very few tangible public interest issues appeared to have been raised. Little of the comment had raised any issue specifically related to competition and much of the comment was an expression of the desire to hold back changes which were more generally regarded as inevitable.

5.42. BSkyB believed that there were a number of public interest benefits from the acquisition. Although some of them might be achievable without a merger, BSkyB, with its history of interest in football and close relationship with it, made it unlike a typical institutional shareholder; it was one that was concerned with benefits other than purely financial ones. It would be a more sympathetic owner, and BSkyB pointed out that this view had also been expressed recently by Sir Bobby Charlton. The public interest benefits that BSkyB considered would arise included the confidence in the football sector which BSkyB's £623 million investment in Manchester United would engender. Following the merger it could be expected that the value of other clubs would increase as the market responded to this confidence, resulting in increased ability to raise finance to invest in themselves and in the game, for example to improve stadiums and to acquire the best players in an increasingly costly market.

Effects of the merger on competition

General

5.43. BSkyB said that it was difficult to find any reason in a competitive broadcasting market why a broadcaster should not acquire a controlling interest in a Premier League club. There were 20 clubs in the Premier League and a third to a half of the Nationwide League First Division clubs were in contention for promotion to it. Most Premier League clubs would not have sufficient assets for their acquisition to qualify for investigation by the MMC. Many of the issues which had been raised in connection with the future of broadcasting and of football were issues which arose, or would arise, whether or not this acquisition went ahead.

Advantages over other broadcasters

5.44. BSkyB did not accept that it already had advantages over other broadcasters from being the incumbent, as far as the live TV rights to Premier League matches was concerned. It was important to take proper account of the size, resources and experience of other likely bidders, including the ITV companies that had offered large sums of money in the 1996 auction. Further, Disney owned GPSN, the leading US sports broadcaster, and Time Warner ran Home Box Office (another very successful service in the USA). Both of these companies were well resourced and had channels in other genres in the UK. BSkyB said that most ITV companies were also in pay TV, and the BBC, with its vast sports experience, was in a joint venture with Flextech.

5.45. Assuming the continuation of collective selling, BSkyB would have no influence over the decisions of the Premier League on the sale of TV rights as a result of the merger. Manchester United had no say in the sale of those rights (or those for the FA Cup, the Football League's Worthington Cup or European competitions—with the exception of the qualifying rounds of the UEFA Champions' League and the UEFA cup where each participating club could sell its home games itself). And as only one of 20 clubs, Manchester United was in no position to sway any vote on the sale of TV rights to Premier League games, which required a two-thirds majority (14 votes). It would only be theoretically possible for Manchester United, at BSkyB's behest, to persuade enough other clubs of the merits of a deal favouring BSkyB rather than the front runner.

5.46. In reality there would be more leverage in those other clubs banding together against Manchester United if it was in their interests to do so. If these clubs took the view that BSkyB's bid was the best, it would not be because of the influence of Manchester United, it would be because it was in their self-interest, which was to optimize their value. Hence, anything BSkyB could do to persuade the majority of clubs to support its bid, it could do without owning Manchester United. Any attempt by BSkyB or Manchester United to cut across this, for example by promoting BSkyB's bid, would be counter-productive. There would be immediate hostile publicity which would pose problems for BSkyB's core subscriber business.

5.47. No part of the value which BSkyB put on Manchester United could be attributed to its increasing, or maximizing, the likelihood that it would obtain the Premier League TV rights at the next rights auction. If it lost the bid in 2001 this would be accepted by the company. It did not regard live Premier League football as essential programming for its sports channels. It would still have access to other top-quality football. And its subscribers would largely remain loyal because it would be most unlikely that BSkyB would not carry Premier League live matches; the successful bidder would be most likely to need distribution on all platforms, including DTH, in order to recover the cost of the bid. One claim that had been made was that ownership of Manchester United would put BSkyB in a strong position to make offers which other clubs could not afford to refuse. But if this were the correct strategy, and it was not, it could be implemented without the merger and without waiting another three years.

5.48. Separately, the merger would not give BSkyB any privileged access to information concerning the rights auction or other broadcasters' bids. The Premier League already had to deal with this issue as several clubs had directors with media interests. In fact, in 1996 the Premier League had adopted a process in which first and final bids were presented to the clubs and voted on immediately, allowing no opportunity for leakage of information or revised bids. The constitutional structure of the Premier League placed the management of the Premier League, not the clubs, in charge of the selling of rights. It was in the interests of the Premier League to maintain a level playing field in future rights sales so as to maximize the value of the rights. This was distinct from the discussions which BSkyB held with clubs about issues such as the structure of the bid to be put in, pay-per-view, etc. There was nothing damaging to competitors in this process or advantageous to BSkyB. It would continue after the merger, and all other broadcasters would do the same. In practice BSkyB might have to work harder than the others to overcome the suspicion that it had a vested interest. It was, therefore, possibly a disadvantage to BSkyB of the merger. It was in BSkyB's own interests to have a fair selling process, as information leaks might work to its disadvantage.

5.49. Nor was it credible to claim that BSkyB would be acquiring a seat on both sides of the negotiating table for Premier League TV rights and, therefore, an advantage over other potential bidders for rights. This was not how the Premier League worked; the clubs were not involved in the

negotiations. In reaction to the reported claim of one media concern that, if it were to be interested in acquiring a club, one of its main reasons would be precisely to be able to have a seat at the table and to have access to information and to influence matters, BSkyB said that the Premier League's processes simply did not allow for this. Certainly there was a great deal of formal and informal contact between all sports broadcasters and the clubs, and in the 1996 round some of these contacts by certain broadcasters would have included promotion of their bids. However, any such information that was discussed at one of the Premier League's meetings of clubs would immediately become public knowledge. There would, therefore, be no reason for BSkyB to use Manchester United as its information source or mouthpiece because it would not need to do so.

5.50. The only way BSkyB could get a competitive advantage through ownership of Manchester United would be by obtaining details of a competitor's bid. But this was not feasible, as the formal bid process was conducted separately from the clubs and in the last round no club had known the details of the three bids put in until the day on which the decision on the winning bid was taken. Also, a process that leaked this sort of details would be just as likely to disadvantage BSkyB. If details of its bid were leaked to competitors, BSkyB would be severely disadvantaged.

5.51. Another advantage attributed to BSkyB, should the merger go ahead, was that its 'toehold' stake in the Premier League could give it a significant advantage over its competitors for TV rights, that it would also enable BSkyB to bid more aggressively than its rivals and that it would deter some of them from bidding in the first place. The rationale for this claim was that, assuming BSkyB was the only broadcaster to own a Premier League club, it could afford to bid more than another broadcaster as, if successful, part of the bid would be returned as revenue to Manchester United.

5.52. One major problem with this argument was that it relied heavily on the assumption that the rights auction would be of the ascending bid auction, that is, English auction, type. In fact the issues identified in this theory disappeared with the sealed-bid, first-price type of auction which was what the Premier League had used in 1996. The Premier League had both the incentive and the means to retain first-price, sealed-bid auctions for the future. In a sealed-bid context, a 5 per cent stake improved the chances of winning an auction with two bidders from 50 to only 51 per cent. This was insignificant, particularly as the issue arose only in the unlikely circumstance that BSkyB was the only broadcaster with a stake in a Premiership club. A second drawback to the theory was that it assumed that the bidding costs were large and hence that other bidders would be deterred. For the Premier League contract, however, the costs of preparing a bid were very modest indeed—one page of A4, faxed through on the day of the decision. Finally, the theory focused on the situation in which BSkyB was the only broadcaster owner of a stake. But it was possible, indeed likely, that other broadcasters would own similar stakes in other clubs, and would even combine to have, in aggregate, a larger stake than BSkyB's.

5.53. It was also claimed that the toehold theory meant that the proposed merger would precipitate other similar deals that otherwise would not occur. This logic was, however, flawed because if the toehold theory truly applied, then there was already an incentive for other broadcasters to acquire other clubs regardless of the outcome of this merger (and not all such deals would attract regulatory scrutiny). It was possible to become overly theoretical on this type of issue. As a business, BSkyB would not be discouraged from bidding for TV rights if a competitor had a toehold stake, nor would such a toehold be relevant to the amount of the bid.

5.54. Nor was it likely, as had been argued, that the size of a toehold might change if the Premier League's method of allocating TV revenue between clubs were changed, for example by increasing Manchester United's share. This change was unlikely to arise in practice because, to the extent that the toehold effect was material, the Premier League member clubs had an incentive to ensure that the revenue sharing system did not change. BSkyB said that the clubs were unlikely to vote for such a change.

Exclusivity

5.55. The company was aware that it had been argued that, assuming continuation of collective selling, there might nonetheless be advantages for the Premier League and for broadcasters and the public if the TV rights were to be sold non-exclusively—for example, 60 live matches to one broadcaster, 60 to a second, highlights to a third and pay-per-view to a fourth. In its view, however, this non-exclusivity would severely damage the value of the rights. Ability to add value to its brand by being able to claim that it was, in essence, the home of Premier League football was a large part of the value for which BSkyB was willing to pay £670 million. It became a subscriber driver. Second, exclusivity was important because it was the way to get distribution on the closed networks, that is, cable and DTT. The only way to obtain this distribution was by having something the cable or DTT operator did not. In this way a consumer would not have to worry about making the wrong subscription choice or buying the wrong equipment. Conversely if the rights were sold non-exclusively, consumers wishing to have access to the whole Premier League championship would need to invest in a variety of platforms, equipment and channels. This would certainly not be in their interests.

Manchester United and the Premier League

5.56. The company had addressed the idea that Manchester United might threaten to leave the Premier League, or together with BSkyB persuade a number of other clubs to leave the Premier League, unless BSkyB was successful in winning the TV rights contract. BSkyB rejected this idea. It was not BSkyB's intention to withdraw from the Premier League. Put simply, although the company believed that the Premier League would survive without Manchester United, Manchester United could not do without the Premier League. It would be a public relations disaster and not only would Manchester United be damaged, but so also would BSkyB's core subscriber base. Nor, for the same reasons, would BSkyB contemplate starting a breakaway league in an effort to win the rights contract; it would put BSkyB's core business at risk. In any event it was not necessary to acquire a club in order to try to set up an alternative league. That could be attempted with or without a merger.

5.57. A permutation of this idea was that BSkyB would not actually have to threaten a breakaway league, but simply structure a deal, through its ownership of Manchester United, that was attractive to enough other leading clubs such that the others would have no option but to fall in line and agree BSkyB's bid. It could happen whether or not there was a merger, however, and it was open to exactly the same objections. BSkyB said that it would not instigate such discussions and was prepared, in principle, to give an assurance to that effect. Another fall-back option put to BSkyB was that if it looked as if its bid for Premier League rights was not going to be successful, Manchester United could come to the meeting of the Premier League at which final rights bids from broadcasters were due to be considered armed with authority from BSkyB to make an improved bid on BSkyB's behalf. Although it would take 13 clubs (plus Manchester United) to support BSkyB's revised offer in order for it to be accepted on the day, it would take only six clubs (plus Manchester United) either to support this offer or to favour a further round of bidding in order to prevent any other bidder from winning on the day. BSkyB's reaction to this option was that it had already been established that it was in the best interests of the Premier League and of individual broadcasters that any auction of collective rights should be conducted on a first-price, sealed-bid basis. Such an approach would preclude the possibility of second and subsequent bids being submitted. If the Premier League did not adopt such an approach, it would be open to other broadcasters to authorize clubs to make improved bids (up to a specified maximum) in the event that it appeared the broadcasters in question were going to be outbid. Ownership of a club was not a prerequisite for behaving in this fashion. Overall, therefore, the suggestion that BSkyB could use its ownership of Manchester United in this way was untenable.

5.58. Conversely, BSkyB regarded the ability of the Premier League to expel a club, such as Manchester United, which contravened its rules as a credible one. Some of the major clubs, including Manchester United and Arsenal, had begun talks with Media Partners during 1998 about the possibility of forming a European Super League. However, they had quickly backed down when the Premier League had intervened to insist that it, rather than the clubs, should undertake any such negotiations and backed up its insistence by the threat of expulsion from the Premier League. BSkyB believed that the Premier League rules were enforceable in this way. However, it discounted the idea

that the Premier League would need to apply such sanctions because BSkyB also believed that having Manchester United outside the Premier League would be unacceptable. BSkyB said that it could not do anything which was inconsistent with the rules of the Premier League. It was not realistic to risk Manchester United being expelled. In any event the club depended on the Premier League for 76 per cent of its profits (before transfers).

5.59. The question was put to BSkyB whether (assuming the DGFT lost the case currently before the RPC) collective selling would survive if this merger proceeded and was followed by a number of other mergers of broadcasters and leading Premier League clubs, all of which could be expected to want to retain their clubs' broadcasting rights for themselves. BSkyB considered that individual selling in these circumstances was an unrealistic scenario. It was a condition of membership of the Premier League that the rights were negotiated and sold collectively. Hence the clubs would have to put themselves outside the Premier League if they wished to sell their rights individually. They could hardly expect to take the majority of Premier League clubs with them as they would, in effect, be proposing a rights deal from which only the leading clubs would benefit. The leading clubs hardly needed mergers with broadcasters to be able to judge where their commercial interests lay. BSkyB regarded its participation in wrecking activity of the kind envisaged as certain to damage its reputation and its subscriber base and would not have any part in initiating such a change.

5.60. The company also discounted the idea that there were any parallels with the actions of News in Australia in 1994 and 1995. This referred to events when News, an Australian subsidiary of News Corporation, had in 1994 proposed to the Australian Rugby League and Channel 9 (a commercial TV channel which had the broadcasting rights for rugby league matches) the formation of a Super League. Part of the proposal involved a broadcasting rights deal whereby some of the live Australian Rugby League matches would be shown on Foxtel, a pay TV broadcaster 50 per cent owned by News. This proposal was rejected. News subsequently signed up enough players and coaches from clubs in the Australian Rugby League (and from UK rugby league clubs) to form a Super League of a dozen clubs. The quality of the Australian Rugby League was affected by the migration of its players to the Super League. In BSkyB's view, however, these events confirmed its strongly expressed view that the formation of a breakaway league would necessarily be an acrimonious activity which could not be undertaken without alienating a substantial number of people. Unlike Foxtel at the time of the formation of the Super League, BSkyB currently had approximately 7 million subscribers, and it would not be willing to jeopardize its relationship with these people and thereby its core business.

Individual selling of television rights

5.61. BSkyB believed that ownership of leading sports clubs by media groups and other forms of close links would inevitably occur. Therefore whether or not the DGFT was successful in the action in the RPC to have the Premier League collective selling rule held to be invalid, BSkyB believed that several of the major Premier League clubs would come to be owned by, or form long- or short-term associations with, different broadcasters unless all broadcasters were blocked by regulation from owning football clubs. Thus there could be no expectations of a single broadcaster forming the centre of a 'halo' so that all the leading clubs were attracted to sell their rights to that broadcaster alone, and there could be no foreclosure of competition from BSkyB's ownership of Manchester United. Indeed, the DGFT's case before the RPC would, at the very least, be severely undermined if there were such a 'halo' or 'magnet effect'. Hence in the event that there was individual selling of sports rights, it would be wrong if a broadcaster that held a rights contract lasting four years, and was already nearly halfway through it, were prevented from buying one of the clubs, while a potential rival on renewal of the rights could buy another important club unhindered.

5.62. It had been claimed that, if BSkyB owned a leading club, it would have an unfair advantage over other broadcasters; this was because it might be in a position to attract and buy the rights of the next most important club as well (and perhaps others) whereas no other broadcaster could do that and also buy the rights to the leading club. Once it had obtained the rights to other leading clubs, BSkyB would be able to outbid any other broadcaster for the rights to the remaining clubs. BSkyB regarded this magnet effect scenario as misconceived. Three of the four top clubs could be bought by three significant broadcasters, for example by Carlton, Granada and UNM (all ITV franchisees, two of

which were investors in ONdigital) who, jointly, would be in a much stronger position than BSKyB. Nineteen clubs could then go one way, and only one in BSKyB's direction. In any case there was no assurance that Manchester United would continue to be the leading club.

5.63. Magnet effect scenarios like the one outlined did not appear to be realistic. First, if they were attractive to the clubs (or two-thirds of them) then BSKyB could propose it now, without the need for a merger. It could, for example, simply propose to guarantee two-thirds of the clubs more appearances at the expense of the other third. Ownership of Manchester United was not required for this strategy. Second, BSKyB said that if such a structure was more attractive to the necessary majority of clubs (two-thirds), they could adopt that structure themselves and make it a condition of the bidding round in 2000. The two-thirds of clubs that would benefit could simply outvote the remaining one-third. The clubs did not need BSKyB to propose such a structure. But it seemed likely that a significant number of clubs would not vote for such proposals because they would be concerned that they might be among the third of disadvantaged clubs at some time.

Supply of live matches or highlights to other broadcasters

5.64. If rights were sold individually, BSKyB said that it would be its intention to use whatever rights it held. It did, however, believe that the availability of highlights on terrestrial TV was an important component of the game and it believed that this should be continued.

Media access to Manchester United and cross-promotion

5.65. The company said that there was no truth in the idea that newspapers owned by News International might be given preferential access to Manchester United. This could not happen; it was important to BSKyB that this consumer business was written about in all newspapers and that all Manchester United's fans were catered for. BSKyB had a vested interest in seeing that Manchester United was as popular and as accessible to journalists as it had always been. In any event the players and team manager, under their contracts, had freedom to speak to anyone they wished. It was important for the club to have a good relationship with the local media and Manchester United was on good terms with, for example, the *Manchester Evening News*, Radio Piccadilly and BBC Radio in Manchester. None of these were News International concerns. The *Manchester Evening News* was the most important newspaper for Manchester United as it reached the majority of its local supporters.

5.66. Another concern put to BSKyB was that if Manchester United were to be owned by BSKyB, Sky News would be consistently better treated than its rivals, such as ITN, which might not be allowed to interview players and officials of Manchester United and be forced to rely on 'pooled' interviews conducted by Sky News and carrying its logo; and further that BSKyB would seek to control the behaviour of other news organizations in their reporting of any Manchester United matches broadcast on a pay-per-view basis, by threatening to deny access to Manchester United's players, officials and premises. BSKyB's response to this was that:

- (a) The overall impartiality of Sky News was one of BSKyB's strengths which would not be compromised; and the ITC had confirmed that it was 'impressed by the way in which Sky News covered the bid for Manchester United by BSKyB which seemed to be a model of balance and impartiality in difficult circumstances';
- (b) Sky News had never received, nor had it sought, favourable treatment from the Premier League or its member clubs, notwithstanding the coverage of Premier League football on Sky Sports;

- (c) material developments concerning Manchester United would be announced at press conferences—any attempt to exclude broadcasters such as ITN would result in substantial unfavourable comment both in the broadcast and written media;
- (d) the individual players and management staff at Manchester United entered into their own arrangements with media companies, the terms of which were not specified by Manchester United; and
- (e) if this were a viable way in which to proceed, Manchester United could already have adopted MUTV as the vehicle for news stories concerning Manchester United in order to drive subscriptions to that channel. But such a course had not been adopted because the adverse consequences (in terms of negative coverage on other services such as ITN) would greatly outweigh the benefits.

In the circumstances, it was clear that Sky News could not, and would not, be given more favourable treatment than its rivals, such as ITN, in respect of Manchester United. BSkyB was aware that it had also been said by ITN that BSkyB had tried to prevent TV news organizations from reporting results of pay-per-view boxing matches until a considerable time after the event; and that it feared that BSkyB might use its ownership of Manchester United as a means of similarly limiting news reporting of the results of pay-per-view TV football matches. In reply BSkyB said that:

- (i) It had not tried to prevent TV news organizations from reporting the results of pay-per-view TV boxing matches. There was an industry code of practice which stated that for a sports event taking place during the night no news broadcaster should use actual footage of the event until after the first daytime showing by the original broadcaster. And in respect of boxing matches taking place in the USA which BSkyB covered live on a pay-per-view basis overnight on a Saturday/Sunday, BSkyB had requested TV news organizations not to show the knock-out punch until teatime on the Sunday, following the second rebroadcast of the match by BSkyB earlier that day (rebroadcasts at 9.00 am and 12 noon were available to all purchasers of the pay-per-view event at no additional charge);
- (ii) This arrangement not to show the knock-out punch did not apply in respect of boxing matches which were broadcast live during prime time in the UK and;
- (iii) In this regard, ITN, BBC News, Sky News and Sky Sports News were being treated in the same way by BSkyB.

In the circumstances, ITN's allegation that BSkyB might use its ownership of Manchester United to limit access to pay-per-view TV football matches was unfounded.

Influence of Manchester United on the Premier League

5.67. BSkyB said that it was improbable to suggest that the company might use Manchester United to secure changes to the Premier League rules to suit its own ends. An example quoted was the possibility that Manchester United and BSkyB might find it in their interests to have individual selling of rights and would therefore use Manchester United's influence to encourage the break-up of collective rights. First of all BSkyB supported collective selling. Second, there were 19 other clubs, and a rule change would require 14 clubs to vote in favour. So, if Manchester United were to try to persuade this number of clubs that it was in their interests to make a change, that persuasiveness would have to be through swimming with the tide rather than against it. Generally, however, BSkyB believed that what it wanted for the game, for the Premier League and for Manchester United was completely consistent with what Manchester United wanted.

5.68. If, for example, a number of top clubs were owned by broadcasters and wanted a different way of doing things, what would bring them back into line would be the appreciation of the commercial value to them of the Premier League and the fact that they needed to be in a competition with a large number of games so as to maximize gates and TV revenue. This was separate from the issue whether, for example, there would be disagreement between the big clubs and the others over rules on the distribution of TV revenue. Issues such as this would surface whether BSKyB was the owner of a club or not, but BSKyB said it was unthinkable that it would do anything to damage the Premier League.

Effects of other possible club/broadcaster mergers

5.69. BSKyB considered that there was a high probability that there would be a number of other mergers between football clubs and broadcasters, and that this would occur regardless of whether or not BSKyB's proposed acquisition of Manchester United went ahead. The company rejected the notion that this development would arise as a result of competitors seeking to neutralize any alleged toehold advantage BSKyB might obtain. The driver here was media companies' perception that the ownership of content was important. And if some of these competitors were to form an alliance, for example Granada and Carlton via their jointly-owned DTT company, ONdigital, BSKyB might even find itself at a disadvantage.

Barriers to entry

5.70. The company also disagreed with the view that, given BSKyB's supposed first mover advantage, it would be more difficult as a result of this merger for a new entrant to establish a sports channel. On the contrary it was easier than when Sky first started because there was an installed base of subscribers to approach and because sports rights became available over time. Certainly BSKyB's prices were constrained by, among other things, the threat of entry. Recent examples of new entrants included the launch of British Eurosport, First ONdigital and ITV2, all of which broadcast sports.

Effect of the merger on consumers

Prices

5.71. BSKyB said that it had no immediate plans to raise ticket prices for Manchester United matches. Ticket prices, as now, would be a matter for Manchester United. Its management had developed a very successful commercial formula. To force Manchester United to raise prices would be against BSKyB's interests as the negative consequences of bad publicity would far outweigh any gains that it could reasonably expect. Furthermore it did not regard as realistic the concern that, as owner of Manchester United, BSKyB would effectively have control of its prices both at the games and on TV. The TV rights would be bid for again in 2001 and there was no certainty that BSKyB would win the contract. The company would, in any event, run Manchester United in a way that optimized its value in the community and the company's relationship with the fans. As a TV broadcaster, BSKyB wanted to see full stadiums, excited crowds and great competition. It would, therefore, be a more benevolent shareholder in that sense than a more detached shareholder interested strictly in financial outcomes.

Scheduling of matches

5.72. People had claimed that BSKyB had switched the times and dates of matches, and would do so more in the future, in order to suit its interests as a broadcaster, thus ignoring the interests of the fans. This was not true, however. Sunday football had not been introduced by BSKyB, but by ITV before BSKyB first obtained the Premier League contract in 1992. Broadcasting had indeed affected the scheduling of matches but this had occurred with the active support of the Premier League and the clubs who wanted to sell their TV rights. The one change BSKyB had asked for was Monday night football—affecting no more than 25 matches out of the 380 played in a season—and the issue was

treated sensitively. There was, for example, no question of asking fans from Southampton to travel to Newcastle on a Monday night; a recent example, Leeds United against Coventry City, was a much more manageable journey. Research at the end of the first season's playing of Monday night matches showed that attendances had risen 7 per cent. Commenting on examples of matches shown at unusual times (for example, Saturday mornings), allegedly for broadcasting purposes, BSkyB said that the main reason for these unusual times was to accommodate the wishes of the police or the clubs themselves. Above all, there was no question of the company asking clubs to schedule matches at times when fans could not practicably attend; an extreme example would be a 3.00 am live showing to catch US prime time TV. If the fans could not get to the match, that would prejudice the quality of the product.

Support for Manchester United

5.73. Two contrary arguments had been put to BSkyB about its support for Manchester United. One was that, with BSkyB as its owner, Manchester United would become even more predominant in English football: it would be able to buy even more of the best players and, in effect, distort competition in the game. The opposing view was that, as a broadcaster, BSkyB would want a close-run competition because this made for more exciting TV, so Manchester United would be prevented from buying some players that it would have bought if it had remained independent. Where both claims coincided was in seeing the interests of a broadcaster interfering with the interests of a club. BSkyB rejected both views. It would certainly support and develop the business, given the level of its proposed investment in buying the club, but BSkyB would not interfere with the management of the business. It had said this publicly. It was not in its interests to buy the club only to hold it back artificially or run it down.

Broadcasting interests and football interests

5.74. It had been suggested to BSkyB that there was some fundamental problem of a general public interest nature in the ownership of a club by a broadcaster in that the interests of the two were different and conflicting. In BSkyB's view, however, there was generally a convergence, not a divergence, of interest between the broadcaster and the sport as a whole. It was in the interests of the owner of a club to look after its business and develop it and, where that business depended on its local roots for a key part of its income, as Manchester United did, to foster strong connections with the locality. Football was such an important part of BSkyB's business that it would not be in its commercial interests to act in ways that were detrimental to the game.

5.75. BSkyB said that its interests were aligned with those of the club. If there was going to be a greater European slant to the game in the future, that would result from market forces, not from whether or not BSkyB owned a football club. BSkyB would not attempt to damage the integrity of the game by interfering in team selection.

5.76. Any pressure on the Premier League to change its rules, for example so as to avoid a breakaway league being formed, or to accommodate possible changes in the tradition of replays for club matches, would come from market forces, or from UEFA, not from BSkyB. There was a difficulty for BSkyB in understanding exactly what the problem with a broadcaster's involvement was. There would be no commercial sense for BSkyB to do anything that might threaten the huge success of the Premier League. Any changes in the Premier League rules, for example to adjust to greater European participation, would only come about by agreement of the clubs themselves. Of course Manchester United should participate in those discussions where value might be created for Manchester United. What was in Manchester United's best interests was in BSkyB's, as BSkyB would not want to own a declining asset. Successful teams in other jurisdictions had been owned by broadcasters for several years.

Remedies

5.77. BSkyB did not believe that there was any potential detriment arising from the merger which would justify any of the hypothetical remedies put to the company for consideration (see paragraphs 5.80 to 5.107). If the Premier League believed that it needed to change its rules to ensure fair play in any future rights auction then it would be free to do so; and BSkyB would support such a move provided that any changes applied equally and not distortively to all clubs and broadcasters involved in similar mergers. In fact BSkyB's overriding concern was that remedies should not impose obligations on it which did not also apply to any other such broadcasters and retailers. The company also said that, in so far as any remedies were shown to be necessary, they should be time-limited because both football and broadcasting were changing quickly and there was a risk that remedies intended to promote competition would, over time, distort it instead.

5.78. BSkyB was prepared, in any event, to offer the following assurances:

- If BSkyB were intending to bid in a future collective sale of TV rights by the Premier League, Manchester United would recuse itself from receiving any information from the Premier League about competing bids in advance of all final bids being received.
- Manchester United would abstain from voting on the future collective sale of TV rights by the Premier League, if BSkyB were to bid for those rights.
- If collective selling continued and a valid and binding contract in respect of the collective TV rights was entered into by the Premier League and another broadcaster, BSkyB would:
 - (a) not commit the tortious act of inducing a breach of that contract;
 - (b) not initiate discussions about the formation of a breakaway league in lieu of participation in the Premier League; and
 - (c) only become involved in any such discussions if it were invited to do so by two other Premier League clubs and if the discussions had not been initiated by a shareholder in BSkyB which had a representative on the board of BSkyB (or any holding company of, or subsidiary company to, such a shareholder).
- Where the Premier League continued to engage in the collective sale of TV rights on behalf of its member clubs by means of a fair bidding process, and if the Premier League entered into a valid and binding contract with a broadcaster in respect of such a collective sale, Manchester United would not unilaterally seek to exploit, on an individual basis, the rights to broadcast its Premier League matches which were the subject of those collective arrangements.
- In the case of individual selling where BSkyB controlled the UK TV rights to Premier League matches featuring Manchester United, BSkyB would make available on reasonable commercial terms a highlights package for televising on a public free-to-air TV channel, distributed via all available UK delivery platforms.
- BSkyB would maintain Manchester United as a separate corporate entity, which would continue to publish and file separate annual reports and accounts.

5.79. Against this background, BSkyB's reactions to the hypothetical remedies put to it for consideration were as follows.

(a) The merger should not be allowed to proceed

5.80. BSkyB considered that the competition and other public interest concerns put to it (many of which did not arise as a consequence of the proposed merger) did not lead to a conclusion that the

proposed merger might be expected to operate against the public interest. Even if the MMC were to reach an adverse conclusion, BSkyB considered that any residual concerns would be capable of being addressed by undertakings or assurances. To prohibit the merger would, therefore, be both unjustified and disproportionate. Prohibition would also produce an anomalous result. Other than preventing Manchester United being owned by BSkyB, it would not prevent any Premier League club (including Manchester United) being owned by a broadcaster or any club, even Manchester United itself, becoming a broadcaster.

5.81. Many, if not most, of the concerns which had been expressed to the MMC during the course of this investigation would similarly arise in those circumstances. These concerns were not BSkyB/Manchester United-specific but applied equally to any merger of a media company with a football club. Indeed, they could extend beyond media companies to ownership by anyone with a vested interest in how TV rights were exploited. For example, a manufacturer of cable boxes but not DTH boxes who owned a club might consider that they had something to gain by the contract for exploitation of Premier League live rights being granted to a cable operator.

5.82. BSkyB's investment in Manchester United was a sign of confidence in the sector as a whole. Following this merger, the value of football (and perhaps other) clubs should increase as the market responded to this confidence, increasing the ability of clubs to raise finance and invest in themselves and the game. This would result in a public benefit of improved stadiums and facilities and the acquisition of the best players by English clubs. Prohibition of the merger would:

- (a) significantly disadvantage two successful UK businesses. As the markets in which they operated became increasingly international, they would both be disadvantaged if they were prevented from merging, when competing broadcasters and football clubs (in the UK and abroad) were free to merge without constraint;
- (b) be inconsistent with trends in content ownership worldwide as broadcasters in the USA and the rest of Europe were able to own sports clubs and, in particular, football clubs; and
- (c) unfairly penalize Manchester United, in particular, as the MMC had, in BSkyB's view, confirmed that it could only seek to prohibit this merger and could not generally prevent broadcasters owning football clubs. Domestic and foreign broadcasters would, therefore, be able to buy other Premier League football clubs without attracting regulatory attention because such transactions would not exceed the relevant merger thresholds. Arsenal, for example, did not, as BSkyB understood it, satisfy the assets test contained in the FTA and its acquisition by a broadcaster, such as Carlton or even BSkyB, would not therefore be a merger qualifying for investigation.

5.83. The effect of a prohibition of this specific merger would send a message to the market that football was being singled out by regulators in order to determine who was or was not fit to own a club. This could have a depressive effect on the value of clubs—it would disincentivize the growth and expansion of clubs as they would know that, once they passed the gross assets test, they would lose their appeal to potential media investors. This could result in their keeping themselves artificially small, or selling themselves prematurely whilst they were still below the gross assets threshold.

5.84. In summary, as BSkyB understood the concerns expressed by the MMC to arise through ownership of a football club by a broadcaster, whoever were the parties involved, then prohibition of this particular merger would create, rather than remove, distortions. It would produce a situation where football clubs could be purchased by media companies before they exceeded the gross assets test, or indeed, clubs could simply choose themselves to become broadcasters, without any regulatory restraint on their activities. In particular, each of the concerns expressed regarding (a) access to confidential information, (b) a 'seat at the table', and (c) undue influence over Premier League activities by threatening to break away, would all be equally applicable but there would be no regulatory redress.

5.85. If prohibition of a specific merger was likely to create distortions in the ways described, BSkyB suggested that it would be inappropriate to deal with these general concerns by blocking a specific merger. This led to the conclusion that any rules that were applied to ownership of clubs by broadcasters should be applied to all, and should deal not just with merger situations qualifying for investigation by the MMC but also with the abilities of clubs themselves (or the Premier League) to become broadcasters. The consequences of this would be that if broadcasters were to be prohibited from owning clubs, then clubs should themselves be prohibited from becoming broadcasters. BSkyB's view was that the correct forum for dealing with the concerns raised by the MMC was the Premier League, which was entrusted with the responsibility of ensuring that its affairs were run in a fair and non-distortive way. It was clearly within the Premier League's power to run its affairs in a way which did not advantage any particular bidder for the broadcasting rights. Irrespective of whether the Premier League changed its rules, BSkyB was also prepared to give the voluntary assurances set out in paragraphs 5.78, 5.87(b) and (c), 5.93, 5.94, 5.95, 5.99 and 5.107.

(b) If collective selling of TV rights continues, Manchester United should give undertakings not to participate in the decisions of the Premier League on the sale of TV rights and should receive no information about the competing bids

5.86. The company said that vested interests already existed within the Premier League; directors of certain clubs were, or had in the past been, directors of media companies, and the owner of Tottenham Hotspur also owned a business which supplied DTT and DTH reception equipment. Notwithstanding such vested interests, BSkyB believed that current Premier League rules and procedures were already robust enough to ensure that the collective sale of TV rights was undertaken in a way that ensured fair and effective competition among broadcasters. BSkyB would be very surprised if the Premier League did not agree that it was capable of running its affairs in a way which ensured that no bidder obtained an advantage, whether through ownership of a club or otherwise. The Premier League was interested in ensuring that the value of the Premier League rights was maximized, and any system whereby confidential information about one bid could be passed to a competing bidder would serve only to reduce the amount that the winning bidder would pay, as it would know how much it had to beat to win the bid. The Premier League had both the power and the incentive to ensure that its affairs were conducted in such a way that no information about competing bids, which could be used to another bidder's advantage, should leak out to anyone, club owners or otherwise. BSkyB believed that the system adopted during the last rights auction accomplished this goal successfully. It was wholly within the power of the Premier League whether it passed information to the clubs in advance or kept it confidential until all bids had been received; and there was no scope for gazumping. BSkyB had not heard any reason why the last bidding round did not produce the desired level of confidentiality and would be very interested to hear why such a system was not considered sufficiently robust, if that was the conclusion.

5.87. Nevertheless, BSkyB would support appropriate changes to the Premier League rules and procedures if there were shown to be real deficiencies in the current arrangements. There were a number of stages in the process of the sale of TV rights. In BSkyB's view, the only stage where a competing bidder could get an advantage was if it were able to obtain specific information about a competing bid before its own final bid had been made. Such a risk was easily addressed, and existed whether or not any potential bidder owned a club. Taking each stage in turn:

(a) Participation in the structure of rights. Before any bidding for the next round the Premier League would need to consider what parameters, if any, it wished to place on the scope of the next bidding contest, for example whether it would be inviting offers for the full package of live rights, or whether it would be splitting these live rights, or dealing separately with pay-per-view or highlights rights. How it chose to set these parameters would be dictated by what the Premier League considered was best calculated to maximize the value of those rights, while protecting the interests of football as a whole. As a potential bidder BSkyB expected to have frequent discussions with the Premier League and discussions with the clubs themselves as to the structure which would best appeal to it and, likewise, BSkyB would expect all other potential bidders to be having the same debate. BSkyB did not need Manchester United as a mouthpiece in these matters. As a broadcaster it was better equipped to make these arguments itself directly. So it would be unfair if Manchester United were unable to have any input into this process and excluding it would be unnecessary. Furthermore, discussions as to the

structuring of rights were intrinsically linked to discussions about redistribution of revenues. For example, if the Premier League decided to sell some rights on a pay-per-view basis, Manchester United would have a legitimate interest in taking part in those discussions which would inevitably involve the question of how those pay-per-view revenues should flow through to the clubs. It could not be excluded from these discussions, and its involvement in them would give BSkyB no advantage as regarded bidding for the TV rights. Manchester United could not, uniquely, be the only industry player not allowed to participate in these discussions when all other clubs, broadcasters, media consultants and journalists were having a full debate about the issues.

(b) *Information about competing bids.* After the structure around which bids were to be invited had been set, the next question was how to ensure that Manchester United did not get information about competing bids which it could pass on to BSkyB. BSkyB did not believe that this was a concern which would arise in practice because it was the Premier League, and not the clubs, which negotiated with broadcasters regarding the collective sale of TV rights. The Premier League could choose whether or not to pass this information to clubs. Clearly, passing such information to clubs could jeopardize the fairness of the entire bidding process, as there would be a strong possibility of leaks, either to other bidders or to the press, and ownership of any club by a broadcaster was largely irrelevant to this danger. The 1996 bidding process successfully avoided any such information leak occurring. There was no scope for any club with an interest in the result (for whatever reason) to pass information to bidders enabling them to change their bid at the last minute. The first time the clubs received any information from the Premier League about the bids was on the afternoon when the vote was taken and the rights were awarded. BSkyB presumed that this sort of approach would be adopted in the future, in which case there was no need for a remedy which sought to restrict access by Manchester United/BSkyB to information about other bids. In this context, BSkyB noted that, if the Premier League decided to run its own channel, then either:

- (i) the Premier League would not invite tenders for the rights at all, in which case BSkyB said that if fair bidding for the rights was considered to be of paramount importance by the MMC, it should be borne in mind that the Premier League could simply decide not to invite bids at all but keep all the rights to itself. This possibility was particularly relevant in considering whether or not to prohibit the merger; or
- (ii) it could put up its own channel for consideration alongside the other bids, in which case the Premier League would be at a great competitive advantage because it would necessarily have details about all the other bidders, and could fashion its channel proposal in such a way as to 'outbid' all of the others.

Nevertheless, BSkyB said that it was prepared to offer the voluntary assurance that if BSkyB were intending to bid in a future collective sale of TV rights by the Premier League, Manchester United would recuse itself from receiving any information from the Premier League about competing bids in advance of all final bids being received. For example, if, for some extraordinary reason, it was necessary at a meeting between the Premier League and the clubs to discuss the specific details of any individual bid prior to final bids being received, then Manchester United would agree to leave the room whilst such discussions took place and would rejoin the discussion when it reverted to more general matters. This was not dissimilar to non-executive company directors excusing themselves from board meetings whilst the board discussed any matters in which they or the companies they represented were interested other than through their shareholding in the company itself.

(c) *Participation in the vote.* The final stage of the process was where bids were received and revealed by the Premier League to the clubs, discussed among the clubs and voted upon. Manchester United had one vote among 20 and had no power to influence the decisions (individually or collectively) of the other clubs. The other 19 clubs had every incentive to ensure fair play and would exercise their rights and votes only by reference to their best interests. The practical result of the merger with Manchester United would be to make future negotiations for the rights more, not less, difficult for BSkyB. BSkyB considered strongly that Manchester United should be allowed to participate in these discussions. There was nothing that Manchester United could do at this point to advantage BSkyB in any way as all final bids

would have been received. Manchester United would be able to provide valuable input in relation to this process which would be of benefit to other clubs in evaluating the various proposals. Were Manchester United simply to toe the BSkyB line in these discussions this fact would be immediately apparent to the other clubs and its views would be taken in that light. As regarded the actual vote, depriving Manchester United of its one vote (and a comparable right to participate in the Premier League's decisions in the same way as other clubs) would be undemocratic. It could, for example, result in an adverse deal being imposed upon Manchester United in respect of which it had been unable to vote. Nevertheless, in merging with Manchester United, BSkyB was not seeking to secure one of the 20 votes in a future collective sale of TV rights by the Premier League. BSkyB was, therefore, prepared to give the voluntary assurance that Manchester United would abstain from voting on the future collective sale of TV rights by the Premier League if BSkyB were to bid for those rights. BSkyB considered this to be a major concession, particularly in view of the fact that, if BSkyB were to purchase a football club with gross assets worth less than £70 million, it would equally have gained one vote out of 20 from which it could not be disenfranchised.

5.88. Where clubs with similar vested interests were able to participate fully in the Premier League's activities, BSkyB could not reasonably be expected to prevent Manchester United from voting, or receiving information about bids. Similar vested interests would arise if, for example, Arsenal were owned by Carlton, Newcastle were owned by NTL or one or more clubs were to start broadcasting in their own right or to become part of the same corporate group as a broadcaster or a distributor of TV services. However, it would be inappropriate if a general rule were applied which precluded all broadcaster-owned clubs from voting. If similar assurances were sought, for example, by the Premier League, were several other clubs to merge with broadcasters or hold their own ITC licences, the future collective sale of TV rights by the Premier League could ultimately be decided by a non-representative sub-set of the clubs (most likely the least popular and least successful clubs). Thus the voluntary assurance on participation in voting described above would fall away if at least three Premier League clubs were to satisfy either of the following:

- (a) the Premier League club was owned or controlled by a broadcaster or a distributor of TV services, or by any entity in the same group as such broadcaster or distributor ('media entity') or if any such club (i) had a shareholder who was a media entity who had one or more director representatives appointed to the board, or (ii) had directors on its board who were also directors of executives of a media entity; or
- (b) the Premier League club itself, or subsidiary company of the Premier League club, or any entity owned or controlled by two or more clubs acting together, held a licence from the ITC; or
- (c) if at least one but less than three Premier League clubs satisfied the requirements of subparagraph (a) above but did not each agree with the Premier League a similar assurance on voting to that offered by BSkyB above.

5.89. As regarded the voluntary assurance on information about competing bids, BSkyB proposed that this would continue indefinitely, and would fall away only in circumstances where one or more other Premier League clubs satisfied the requirements of subparagraph (a)(i) or (ii) above but did not give equivalent assurances as regards receipt of such information themselves.

(c) Manchester United should give undertakings that, if collective selling continues and BSkyB fails to gain the TV rights, it will not leave the Premier League or break the collective agreement by selling its own rights individually

5.90. BSkyB said that it had been demonstrated that Manchester United had no ability to threaten credibly to leave the Premier League because the losses that it would suffer would be very considerable whereas the effect on the remaining clubs would be minor. The company believed that Manchester United had indicated that 76 per cent of its profit (before transfers) was linked to its participation in the Premier League. Quite simply, therefore, a unilateral decision by Manchester

United to leave the Premier League would result in it having no teams against which to play. For the reasons previously given, the substitution by Manchester United of all its domestic fixtures by European games would not be viable as this change would also materially damage Manchester United.

5.91. BSkyB would not, however, be able to give an undertaking that Manchester United would remain within the Premier League under all circumstances when the same constraint did not apply to other clubs. In a scenario where a group of clubs decided to leave the Premier League and set up an alternative competition, Manchester United alone, under those circumstances, would be forced to remain. BSkyB understood the concern to be that BSkyB's ownership of Manchester United could result in Manchester United breaking away from the Premier League if, for example, BSkyB lost the next bidding process for the collective sale of rights. However, aside from the fact that BSkyB wholeheartedly believed that no such threat was credible, it was very hard to see how this could occur:

- (a) The OFT's case at the RPC was that each of the clubs was bound by the terms of the contract between the Premier League and the broadcaster. Depending upon the terms of the next contract between the Premier League and the broadcaster, not only would such an action place Manchester United itself in breach of contract, but if Manchester United sought to take other clubs with it then this would also constitute an inducement to breach the contract.
- (b) As the majority of other clubs would have voted for the deal with the new broadcaster, it was hard to see how they could be lured into a breakaway league which enshrined individual selling when they could stand to lose out from such a structure. (Clearly, any breakaway league would have to be based on individual selling of rights—if collective selling were to carry through then those clubs in the breakaway league would again run the same risk, that is, that their broadcaster-owners would fail to win the rights.)

5.92. Thus there was little that Manchester United could do to form a breakaway league, even if it were minded to, after the next contract had been voted on and approved. In any event, such a strategy, whether undertaken by BSkyB or any other broadcaster/owner, would be extremely risky: not only was it likely to fail, but it guaranteed that, when the bidding process came round again, not a single club would be likely to cast their vote in favour of that broadcaster. On the possibility of other clubs breaking away if their broadcaster-owners did not win the next bidding round, BSkyB believed that such a threat was not credible, just as it was not credible with Manchester United. If it were credible it could happen in the absence of ownership by any of those broadcasters—a simple contractual arrangement between the broadcaster and the clubs to achieve the same result would be significantly cheaper and less risky than purchasing a club and then attempting to achieve such a result.

5.93. BSkyB also pointed out that recent evidence given at the RPC case showed the club chairmen to be overwhelmingly in support of collective selling, so there appeared to be little or no support for individual selling within the Premier League as a whole. Even though Manchester United could not credibly threaten unilaterally to leave the Premier League, BSkyB offered the voluntary assurances that, if collective selling continued and a valid and binding contract in respect of the collective TV rights was entered into by the Premier League and another broadcaster, BSkyB would:

- (a) not commit the tortious act of inducing a breach of that contract;
- (b) not initiate discussions about the formation of a breakaway league in lieu of participation in the Premier League; and
- (c) only become involved in such discussion if it were invited to do so by two other Premier League clubs and if the discussion had not been initiated by a shareholder in BSkyB which had a representative on the board of BSkyB (or any holding company of, or subsidiary company to, such a shareholder).

5.94. BSkyB could not undertake not to participate in discussions which had been initiated by any shareholder in BSkyB as it was a publicly quoted company and it would be open to another broadcaster to purchase a share in BSkyB and then initiate such discussions in the knowledge that Manchester United/BSkyB would be disadvantaged as they could not participate without breaching the assurance. BSkyB could, however, give the assurance that it would not participate in such discussions if they had been initiated by its principal shareholders, that is, those which had representatives on its board. The fact that discussions had taken place between two other Premier League clubs before

Manchester United and/or BSkyB were invited to participate would be susceptible to independent verification. It was a condition of joining the Premier League that rights were sold by the Premier League. Manchester United would not, therefore, be able to remain within the Premier League and sell its rights individually. Thus there would be no need for, or point in, a remedy related to individual selling for so long as collective selling by the Premier League were to continue.

5.95. Nevertheless, BSkyB was prepared to offer the voluntary assurance that where the Premier League continued to engage in the collective sale of TV rights on behalf of its member clubs by means of a fair bidding process and the Premier League entered into a valid and binding contract with a broadcaster in respect of such a collective sale, Manchester United would not unilaterally seek to exploit, on an individual basis, the rights to broadcast its Premier League matches which were the subject of those collective arrangements. These voluntary assurances would fall away if their existence were used by other clubs to disadvantage Manchester United in a discriminatory fashion, for example by putting its right to share in distributed revenues on a different basis to other clubs.

(d) BSkyB should give undertakings that, if collective selling continued, it would not make an agreement with the Premier League giving it exclusive rights to all or some proportion of live broadcasting of Premier League matches

5.96. The proposed remedy involved prejudging the issue of exclusivity which the RPC was already considering. In such circumstances, public policy clearly required that there should not be conflicting decisions between two regulators considering the same issues. Given that the issue which appeared to underpin the proposed remedy arose completely independently of the merger, BSkyB had difficulty in identifying the adverse effect arising from the merger which this remedy sought to address let alone whether the proposed remedy was requisite. In any event, the proposed remedy was disproportionate and as such could not be acceptable. It could shut BSkyB out of bidding for Premier League rights for an indefinite period since the Premier League (not BSkyB) decided on the rights packages it offered. This would impose a very material restriction on a major area of BSkyB's business that did not apply to its competitors.

(e) BSkyB and Manchester United should give undertakings that, if individual selling of TV rights occurred, Manchester United would sell its rights at arm's length (ie no preferential treatment for BSkyB)

5.97. No single club had market power: as such the proposed remedy was both disproportionate and discriminatory. It risked distorting competition. BSkyB's proposed acquisition of Manchester United was part of a wider strategy of increased content creation and ownership, and in an environment of individual selling BSkyB would expect to exploit such content itself. It would not be prepared to give an undertaking that it did not have full access to the rights of a club that it owned. Given:

(a) that other broadcasters had approached at least Arsenal and, BSkyB believed, Manchester United before the announcement of this proposed merger; and

(b) that NTL was proposing to acquire Newcastle United, and that other clubs would be acquired by broadcasters who would wish to retain the rights for themselves,

it would be inequitable to single out Manchester United's rights for additional regulation.

(f) BSkyB should give undertakings that, if individual selling of rights occurred, it would not purchase the rights of more than a specified proportion of Premier League clubs

5.98. The proposed remedy did not appear to be a consequence of any adverse effect of the merger. The circumstances concerned could obtain equally without it. The remedy also prejudged the outcome of the RPC proceedings. If the RPC struck down the current arrangements then it would be open to the Court also to make an order in respect of the degree of future collectivity and exclusivity which would be permissible. It would be wrong for the MMC to make a potentially inconsistent recommendation in respect of Manchester United. BSkyB would be concerned to agree undertakings with one regulator which might not be acceptable to another. A likely consequence of individual selling would be that viewers wanting to watch all the clubs in the Premier League would be obliged to purchase several set-top boxes and also to take a multiplicity of services. This clearly forced up the price paid by the consumer. This remedy would exacerbate the likelihood of such an outcome.

(g) BSkyB and Manchester United should give undertakings that they would agree to the sale on reasonable terms of match highlights and recorded matches to broadcasters other than the one who had (or ones who had) the rights to live broadcasts (whether the sale of rights was collective or individual)

5.99. BSkyB would regard the existence of highlights for Manchester United games on free-to-air TV as inherently desirable. As such, BSkyB offered the voluntary assurance that, in the case of individual selling, where BSkyB controlled the UK TV rights to Premier League matches featuring Manchester United (including live and highlights rights) BSkyB would (subject to Premier League and other applicable rules) make available on reasonable commercial terms an appropriate highlights licence for the rights to Premier League games featuring Manchester United for televising on a public free-to-air TV channel distributed via all delivery platforms. However, an assurance of this nature would need to be couched so that it did not, by virtue of its indefinite length, actually create competitive distortions at some time in the future. For example, in an individual selling environment it was inevitable that other broadcasters would purchase football clubs and control the TV rights to those clubs' games. In addition it was inevitable that other non-owning broadcasters would purchase only the TV rights to certain clubs' games. (Indeed, it seemed to BSkyB that the key issue was ownership of TV rights and that ownership of a club was irrelevant to this result as it could happen in the absence of such ownership.)

5.100. In these circumstances, it would be open to those broadcasters to exploit the live and/or highlights rights to their clubs' games exclusively on a single delivery platform, giving that platform a competitive advantage over the others. In such a case, an obligation on BSkyB to offer highlights of Manchester United's games for delivery via, *inter alia*, that platform would serve to exacerbate this advantage and would lead to competitive distortions between platforms. It would be necessary, therefore, for any such assurance given by BSkyB to fall away at a point in the future when one or more owners of TV rights of Premier League clubs failed to exploit such rights in a non-discriminatory way between platforms, for example by exploiting live rights to particular clubs only on cable or by failing to offer highlights to a public service channel which was available on all delivery platforms.

(h) Premier League matches should be designated as either Category A or Category B listed events under the Broadcasting Act 1996

5.101. This had been considered and rejected by the Secretary of State for Culture, Media and Sport as recently as June 1998. It was clear that all 380 Premier League games did not have a 'national resonance', were not a 'shared fixed point on the national calendar' and were not a 'force for cohesion in society'. The events which were currently listed were either discrete (for example, the Grand National) or periodic and not lasting for more than a month (for example, the Football World Cup every four years). The inflexible arrangements governing the broadcasting of listed events were not, therefore, applied to an 'event' such as the Premier League which took place during the majority of weeks every year.

5.102. A Category A listing would be against the public interest. The effect would be to reserve exclusive live coverage of every Premier League match to the BBC, ITV and Channel 4. Such a listing

would mean that as a result of BSkyB's acquisition of Manchester United, the opportunity to bid for exclusive live Premier League rights would be denied not only to BSkyB but also Channel 5, ONdigital, Front Row, Mirror Group and others. In a limited auction of future TV rights to these matches, the three terrestrial broadcasters would be unlikely to pay full market rates (as was the case with the former BBC/ITV duopoly). The results would decimate the value of the Premier League rights and severely damage the Premier League itself. A Category B listing would result in very inflexible arrangements requiring regular involvement of the ITC. Although the BBC was entitled, contractually, to show Match of the Day from any point after 7.00 pm on a Saturday, it chose to schedule these highlights later. A Category B listing would anticipate that highlights of a minimum 30 minutes' duration should be broadcast within two hours of the end of live coverage of each match. The ITC would need specifically to consent to each live broadcast of a match for which such 'secondary coverage' was not provided. This could introduce an unnecessary layer of bureaucracy into the activity. In any event, Category B status could not be justified by a change in the ownership of Manchester United when it had so recently been rejected for the Premier League rights as a whole.

(i) BSkyB should give undertakings not to purchase the TV rights for matches which it did not intend to broadcast

5.103. BSkyB said that it had bought all the rights that the Premier League was currently prepared to sell. It was important to remember that it was the Premier League, and not BSkyB, that decided that only 60 live matches would be broadcast. BSkyB would willingly broadcast more live matches but the Premier League and the clubs chose to allow only 60 to be broadcast. Given that there was uncertainty as to the outcome of the RPC proceedings and as to the nature of the rights packages which would be available in the future, BSkyB could not agree to undertakings whose impact and value it was impossible to assess today.

(j) BSkyB should give undertakings that it would supply its TV channels (or pay-per-view services if introduced) showing Manchester United matches on non-discriminatory terms to other pay TV retailers

5.104. The proposed remedy addressed an issue which could arise in the absence of the proposed merger: in the absence of the merger, BSkyB could purchase TV rights to Manchester United games (either from the Premier League or Manchester United itself, as the case might be) and (subject to general competition law) there would be no requirement to supply the channels or pay-per-view TV services on which the games were shown on non-discriminatory terms to other retailers. It was hard to see why this remedy should be appropriate as a result of the merger.

5.105. Further, it was disproportionate because its effect was not limited to Manchester United matches but rather applied to the channel on which the matches were shown and would therefore impose requirements in relation to a number of other sports. BSkyB could not enter into a binding undertaking of this nature while other broadcasters were free to withhold their channels containing similar programmes (for example, Arsenal matches) from BSkyB's DTH platform. This would mean that the home matches of a number of major clubs could be withheld from BSkyB's DTH platform by other broadcasters safe in the knowledge that BSkyB could do nothing to redress the resulting competitive imbalance. The fact that BSkyB could not respond competitively would make such an outcome more likely and would be to the detriment of people who had bought DTH reception equipment.

(k) In order to allow its non-discriminatory pricing to be monitored, BSkyB should be required to publish audited annual accounts which separate its channel operation/programming business, its distribution business and Manchester United

5.106. Given that the opportunities for cross-subsidy between BSkyB and Manchester United were not evident, it was not clear what adverse effect such a remedy would address. BSkyB already prepared audited accounts on a half-yearly basis which separated out the programming business from the distribution business. These were submitted to the OFT but were not published. BSkyB had consistently submitted to the OFT that publication would be unfair because it would reveal confidential commercial information to BSkyB's competitors and would, as a result, distort competition. BSkyB

said that the OFT had accepted these arguments. There was no reason why the merger should cause the OFT to reconsider that conclusion. No equivalent information about BSkyB's competitors was currently available to BSkyB, despite the fact that many such competitors were vertically integrated and had interests that span the broadcasting industry. For example, there was no accounting separation for cable operators despite the market distortion which arose from their unique position as retailers of combined telephone and TV packages. Similarly, no accounting separation was required of Carlton or Granada which enabled competitors, customers or regulators to check whether there was cross-subsidy between their role as suppliers of programmes to the ITV network, operators of ITV licences and shareholders in ONdigital.

5.107. Nevertheless BSkyB was prepared to offer the additional voluntary assurance that it would maintain Manchester United as a separate corporate entity which would continue to publish separate annual reports and accounts.

Manchester United

Jurisdiction

5.108. Manchester United accepted the MMC's provisional conclusion that arrangements were in contemplation which, if carried into effect, would result in the creation of a merger qualifying for investigation. The company made the point, however, that its joint venture TV channel—MUTV, in which both BSkyB and Granada had stakes—would be unaffected by the merger: the joint venture would remain deadlocked with the other shareholder, Granada, such that BSkyB could not obtain control of the venture by owning Manchester United.

5.109. The company expected that News International, as an almost 40 per cent shareholder in BSkyB, had the ability to influence BSkyB to some degree, although the company stated that it was not privy to the internal decision-making arrangements at BSkyB. In any event, it did not consider that this raised any particular public interest issues. There was no question, for example, of News International journalists having privileged access to Manchester United.

Background

5.110. Since 1991 Manchester United's shares had been listed on the London Stock Exchange. Its turnover in the year to 31 July 1988 was almost £88 million. For the same period its profit, before tax and transfer fees, was nearly £30 million.

5.111. Manchester United's origins went back to 1878 and the foundation of the Newton Heath LYR Football Club. As Newton Heath LYR FC, the club was admitted to the Second Division in 1892. It changed its name to Manchester United Football Club in 1902, and had moved to its present Old Trafford site in 1910. Only after the Second World War, however, did Manchester United begin to establish itself as one of the leading English football clubs, principally as a result of the leadership of Sir Matt Busby. Since then the club had played in the top division of the English League in all seasons except 1974/75, and had been particularly successful in the new Premier League. Since the Premier League's inaugural 1992/93 season when Manchester United secured the Premiership title, the club had won three further Premiership titles, had completed two Premier League and FA Cup doubles, and had been runner-up in the two seasons in which it had not been the League winner. It had been the first English club to play in European cup competitions, in 1956. The 55,000 all-seater Old Trafford stadium was the largest English club ground. Its average home attendances were higher than other English clubs, and it planned to increase capacity to 67,400 over the period 1999 to 2001.

5.112. However, its recent performance in European competition had not been as successful as might have been expected, given its record domestically. This had coincided with a more general under-achievement by English clubs in European competitions.

English football

5.113. Manchester United said that in the late 1970s and early 1980s English clubs had dominated European competitions, winning the European Cup in six consecutive seasons from 1977. However, following the 1985 Heysel stadium disaster in Brussels when 49 people died during the European Cup final between Liverpool and Juventus, English clubs were banned from European competitions. Since readmission in 1990 they had not recaptured their earlier level of success.

5.114. Until the 1990s, attendances at English football matches had dwindled since the all-time peak in the 1930s, apart from a temporary rise following England's 1966 World Cup victory, and average attendances at English First Division matches had dropped from just under 39,000 in 1948/49 to a low point of 17,000 in 1988/89, the year of the Hillsborough disaster (1989). The Taylor report, following this tragedy, had recommended development of all-seater stadiums; and this, combined with the use of new TV revenues, had strongly contributed to an upward rise in match attendances. The Premier League was formed in 1992, and by 1997/98 average attendances at its matches had risen to over 29,000. Recovery in attendances from the 1980s low had been greater in the First Division than in the Premier League.

5.115. Currently ten Premier League clubs were listed on the London Stock Exchange or on the Alternative Investment Market; one club's shares traded on the Ofex facility, and various other clubs were backed by venture capital funds.

The relevant markets

5.116. In Manchester United's view the relevant markets for the purposes of this reference were domestic and European football and the media, especially TV. The company did not consider that the football market definition should be narrowed to top-quality or to Premier League football given that interest in the game was developing across all four Premier League and Football League divisions. In aggregate, attendances at First Division matches in 1997/98 were not dissimilar from Premier League match attendances (8 million and 11 million respectively). There was no segmentation between the Premier League and the Football League on the basis of ticket price either. Some clubs in the Football League charged as much or more than clubs in the Premier League. And while many people supported, say, a local non-Premier League club, they liked to watch Premier League matches as well. Some Oldham Athletic supporters, for example, were also close followers of Manchester United. While fans did tend to stay loyal to one club, the existence of this loyalty, and competition for it, meant that competition in football took place in a particular way. It did not imply that there were separate football markets.

5.117. Nor did Manchester United consider that the relevant media market should be restricted to sports pay TV channels. It was no expert in the media market but it considered that TV coverage of football had meant that people had a wider choice of what to watch and which football teams to follow. Whereas before the advent of live TV coverage a typical Premier League club might have had a hard core of local fans, it was now in a position to attract a wider supporter base and the relevant coverage was free-to-air TV as much as pay TV.

5.118. Looking at Manchester United itself, the company explained that its principal activity was football, which at both player and coaching/other football staff levels was an international market. Manchester United's football activity could be subdivided into four categories:

- (a) *Competition/rivalry*. Its core product was the football played at its Old Trafford stadium. It was the competitive game and its uncertain outcomes, enhanced by local and historic rivalries and by the significance of the matches to the team's league positions, which were of value to the spectator. Without these factors, winning would lose most of its value. The club played in a number of tournaments, especially the Premier League, and the FA and Worthington Cups. Based on performance, the club might also qualify for a place in European competitions: the Champions' League, the Cup Winners' Cup or the UEFA Cup.

- (b) *Viewing products.* In broad terms Manchester United sold access to its matches to members of the public, to tournament organizers and, directly or indirectly, to broadcasters who acquired rights to broadcast filmed and/or audio footage of matches. There were varying degrees of substitutability, and some degree of complementarity, between different viewing products. There was some evidence that live broadcasting reduced gate figures at some matches. On the other hand it was also the case that attendance at matches and watching matches at home were not necessarily close substitutes as they were different viewing experiences. And given that the crowds at the match were one of the inputs to the TV product, attendance at the match and watching at home were complementary activities.
- (c) *Impact of broadcasting.* Broadcasting of live matches had greatly increased the potential size of football audiences. In the past clubs had been able to realize only a small fraction of the value to viewers (expressed as revenue) of broadcast transmission, because of various characteristics of the TV market—for example, financial constraints, limited competition between broadcasters and limited number of channels. The position was being transformed by the development of pay TV and pay-per-view TV and the proliferation of broadcasters and other intermediaries.
- (d) *Football in competition with other forms of entertainment.* Both as regarded match spectators and TV viewers, football clubs competed with other forms of entertainment for a share of consumers' leisure time and disposable income.

5.119. Manchester United also sold opportunities for content owners to advertise their products/services either through sponsorship or ground perimeter advertising opportunities (although 20 hoardings at each ground were sold centrally by the Premier League to the League's sponsors). The company also sold a wide range of merchandising products—income here depended on the club's success—and engaged in the sale of other products and services, including catering, conference facilities, hospitality packages, admission to the club's museum, financial services and, in the future, hotel accommodation. In its comments on Table 4.27 showing average match-day ticket prices, Manchester United said that it was fundamentally flawed. Averages had been calculated on different bases; for the Premier League, the top 15 clubs had arbitrarily been selected, whereas for the Football League all the clubs in each division had been used; and a median price had been used for the Premier League whereas the Football League figures had used weighted averages. Manchester United said that a median price for each club was likely to be higher than a weighted average as almost all clubs had a greater number of lower-price seats than expensive seats. More fundamentally, a comparison of average prices in each division was irrelevant to market definition. Market segmentation between the Premier League and the Football League could only be established if there was a clear cut-off between the lower-priced club in the Premier League and the most expensive club in the Football League. But this was clearly not the case. Manchester United provided the following comparison of some ticket prices in the Premier League and in the Football League.

TABLE 5.1 A comparison between Premier League and Football League ticket prices

<i>Premier League clubs</i>	<i>Price range (£)</i>	<i>Football League clubs</i>	<i>Price range (£)</i>
Middlesbrough	20–22.5	Sunderland	15–22
Wimbledon	14–20	Crystal Palace	16–25
Aston Villa	17–22	West Bromwich Albion	13–18
Manchester United	14–20	Manchester City	10–18
Everton	15–20	Bolton	14–19
Average*	18.45	Average*	17

Source: Manchester United.

*Simple average of the mid-points of the ranges.

5.120. Manchester United said this showed that:

- (a) in all cases there was an overlap in the price ranges for clubs in the same area, even in respect of Manchester United and Manchester City, notwithstanding that the former was at the top of the Premier League and the latter was in Division 2;

- (b) Wimbledon's prices were below those of Crystal Palace, though the two clubs shared the same stadium;
- (c) the price ranges of Sunderland and Crystal Palace were higher than those of Manchester United, Everton and Wimbledon; and
- (d) the price ranges of Bolton Wanderers and West Bromwich Albion were close to those of Manchester United, Everton and Wimbledon.

5.121. Manchester United also said that attendance and viewing figures were more appropriately measures of market share and not market definition. It said that even if this were an appropriate factor in defining the market, any segmentation argument between the Premier League and the Football League was undermined because, for the 1997/98 season, the top clubs in the First Division attracted more fans than the clubs promoted to the Premier League.

Market power

5.122. Manchester United did not believe that it had any market power. The other Premier League clubs were not dependent on Manchester United for a material portion of their home gate receipts, such as to give it 'clout' in its dealings with other Premier League clubs. Although the gate receipts of other clubs rose, on average, in their home matches against Manchester United, each such match was only 1 in 19 Premier League home matches, and the attendances for home matches against Manchester United were only 0.55 per cent higher than they would have been if Manchester United had attracted an average crowd for each venue.

5.123. The company attributed its financial success during the 1990s to professional management and the development, ahead of other clubs, of its off-field activities such as merchandising. Success on the field had generated success in other areas—people were not going to visit Old Trafford for its hospitality and merchandising unless the team was performing successfully and attractively. This success did not, however, lead to power. In line with past evidence on the links between competitive success and revenues it could not be expected that one club possessed market power. If Manchester United were to have an unsuccessful season, its revenues could be expected to drop compared with those of its rivals. Manchester United said that failure to qualify for Europe would have a very serious impact on its revenues and profits. For example, in 1997/98, when Manchester United was relatively successful but won no trophies, its revenues were flat, while those of Chelsea, which won the Cupwinners' Cup, doubled from £23.7 million to £55.3 million for its continuing operations (£88.3 million including acquisitions).

5.124. Other clubs had noted Manchester United's success and then sought to emulate it and to close the gap. Chelsea and Arsenal, for example, were doing just that. And while Manchester United had been one of the clubs in the old First Division which had actively encouraged the formation of the Premier League, this did not mean that it or a few major clubs had power. To begin with, the formation of the Premier League had been a central part of the FA's blueprint for the future of football—as a catalyst for improving standards, raising the finance necessary for better stadiums and promoting the national team's position. In addition, a majority of First Division clubs agreed with the FA's policy, and their votes were necessary to make the new Premier League a reality. In Manchester United's view, had the FA not promoted the development of a Premier League it could have exerted effective sanctions on any clubs that might have been tempted to go their own way.

5.125. Similarly, the recent discussion between Media Partners and three Premier League clubs, including Manchester United, did not indicate that Manchester United had a more powerful voice than the majority of Premier League clubs. The Media Partners' proposal would have benefited a total of ten Premier League Clubs in its proposed Super League and Pro-Cup competitions. The three founder members (Arsenal, Liverpool and Manchester United) plus one invited club would have played in the Super League while six clubs would have been invited to play in the Pro-Cup competition. The new UEFA proposals (effective from 1999/2000) would benefit six English clubs—three in the Champions' League and three in the merged UEFA Cup. As with the Champions' League, the arrangements for

the domestic league would have been unaffected, and qualification for the European level would generally have been dependent on performance in the domestic league.

5.126. Manchester United had realized that any proposal would have needed to be considered first by the whole of the Premier League, and if a majority had voted against it, that result would have been accepted by the club. As it happened, a vote was taken that the Premier League should handle any continuing negotiations, at which point Manchester United had stepped back from them, albeit reluctantly. There was no sense in risking expulsion from the Premier League or any other sanction. However, one of Manchester United's main concerns, that UEFA should engage in dialogue with the clubs, had, as a result, been met. While Manchester United might have more influence in matters arising from European competition than some of the smaller Premier League clubs, this arose because of its greater experience of European competitions. It did not mean that could force changes in the Premier League's rules.

5.127. In response to other issues put to Manchester United concerning the degree of its influence in the Premier League and market power, the company made the following points:

- (a) It could not afford to leave the Premier League unilaterally. Participation in the Premier League accounted for around 75 per cent of its operating profit. There could be no realistic prospect of a significant number of European clubs leaving their own domestic leagues to form a new pan-European competition (it said that the Media Partners proposal was for a league that existed in conjunction with domestic leagues). Accordingly, if Manchester United left the Premier League, it would have no one to play. A study that it had undertaken jointly with BSkyB indicated that there would be little, if any, net adverse financial impact on the other 19 Premier League clubs if it left the Premier League; whereas its assessment of the impact on Manchester United showed a loss of £[] million—some [] of its operating profit. There was, therefore, no realistic chance of Manchester United leaving the Premier League.
- (b) By contrast the company regarded the possibility of expulsion from the Premier League as a credible threat if the circumstances warranted it.
- (c) Manchester United's size and strength had no effect on its level of influence within the Premier League. This was because the Premier League operated on a one-club-one-vote basis. There had been several examples since its formation where the Premier League had voted against Manchester United's wishes. For example, it had voted for ITV in the 1992 TV rights auction while two-thirds had voted for the deal with BSkyB (the deal that was actually agreed). And in 1998 it had been one of the few clubs in favour of the idea of a pay-per-view TV pilot scheme, albeit with reservations about the terms offered by BSkyB. However, the majority of clubs were less keen on a pay-per-view TV pilot scheme—on any terms—so BSkyB's proposal was never put to a formal vote.
- (d) In common with a number of clubs Manchester United had for the last three or four years fielded weaker sides in the Worthington Cup—but not in any other competitions. This had been necessary because of commitments to the Premier League competition, the FA Cup and European tournaments. It was an essential measure because the club was unable to field the same players week in week out without giving them any rest. It was not the result of exercise of any power or influence in the Premier League and had been done with the full understanding of the Football League, whose competition the Worthington Cup was. In any event the sides fielded had not been weak ones, and had included several international players.
- (e) If it was accepted that no one club, however pre-eminent and financially successful, could unilaterally achieve its objectives regardless of what the other clubs wanted, there remained the questions whether Manchester United had power, as part of a group of leading Premier League clubs which, when their economic interests coincided, could either force through changes to the rules or act in defiance of the rules. Manchester United said that, in practice, there was no exercise of power in this respect either. As a two-thirds majority of clubs was required for any major decision in the Premier League, there was no evidence of any exercise of market power. All clubs had to act within the confines of the Premier League rule book.

- (f) Manchester United rejected the idea that its financial strength allowed it to acquire the best players and thus predominate in the Premier League. While not disagreeing that paying for players in terms of wages and transfer fees was of assistance in achieving success, many of the key ingredients of success were not wages-related, or not directly so—such as the appointment of a top manager and willingness to persist with that manager in years when success eluded the club, a sustained programme of developing new young players and an effective scouting system. There were several recent examples of Premier League clubs applying increased financial resources; but in the absence of the other essential ingredients of success, they had acquired a very large wage bill with no success to show for it.
- (g) Manchester United accepted that one of the reasons for the increase in the financial disparity between the better-off and less well-off clubs was the new levels of TV revenue coming into the game. However, there were two important factors to bear in mind: success was not dependent on financial revenues alone but on a complex amalgam of factors including effective management both on and off the field. Second, even allowing for the Premier League's greater wealth, the First Division of the Nationwide League now earned a great deal more than it did prior to the establishment of the Premier League. Within the Premier League, while any structure for the distribution of TV revenues would create arguments, the fact remained that the 50:25:25 split enshrined in Premier League rule C8.1 had been agreed by all founder clubs. As a founder member, Manchester United had agreed to this split as an efficient, effective and fair structure to distribute the TV income, and still considered it to be the optimum split for maintaining a competitive Premier League.
- (h) It might be argued that, if the OFT case in the RPC against the Premier League on the issue of compulsory collective selling and exclusivity were successful, Manchester United would be one of the clubs to gain from a change to individual selling. A report by consultants had indeed concluded that Manchester United's revenues would be greater if, from 2001/02, it assumed control of selling some of its rights, notably for pay-per-view TV, but it had said that there were advantages in Manchester United agreeing with the other clubs to continue to sell its other rights collectively. Manchester United did not necessarily agree with the report's conclusions but, in any case, remained a firm supporter of the Premier League's defence of the present arrangements. There were also considerable uncertainties over which rights each club would in practice own. It would not, therefore, be right to believe that Manchester United supported complete autonomy over its rights in the medium to long term, or that BSkyB would expect Manchester United to support such autonomy. In any event, even in an individual selling environment, Manchester United said that it would require the agreement of visiting clubs to sell its TV rights to matches at Old Trafford. Its ability to command a better slice of TV revenues would always, therefore, be limited by this basic fact.
- (i) Commenting on Table 4.19 (showing the live TV viewing figures for matches involving Manchester United, Arsenal and Liverpool, on the one hand, and matches involving the remaining Premier League clubs on the other), Manchester United said that the figures in this table were misleading because they were heavily loaded towards Manchester United, Arsenal and Liverpool by reason of including only matches involving these teams in their figures but not in the figures for the other teams. The percentages were therefore not valid; they were distorted because the figures were attributed to Manchester United and not to matches involving Manchester United. Every match involved two clubs and yet the effect of the figures was to say that all the viewers that watched Manchester United versus Newcastle United were attracted only by Manchester United. The trend shown in viewing figures for Manchester United, Arsenal and Liverpool over the five-year period was simply a reflection of the increased competitive success of those three clubs during those years. Since the three clubs occupied the top three positions in the Premier League in 1997/98, that year was inevitably a peak year for the competitive success of the three clubs taken together, and it could be expected that the proportion of viewing figures accounted for by them would tend to fall back in future years. And on Table 4.20 (dealing with the number of live TV appearances by the top clubs), Manchester United said that the trend in the number of live appearances varied with the level of competitive success—Blackburn Rovers and Arsenal gained the most viewers and appearances when they were challenging for the Premier League title, but these dropped away when they had less successful seasons. The figures showed that no club could be guaranteed a high share of viewing figures or appearances on TV, as shares depended to a high degree on

competitive success on the field. It could not, therefore, be concluded from these figures that any club had any sort of market power.

Reasons for the merger

5.128. The company said that the main objective of the board of Manchester United, in recommending the offer by BSKyB, was to secure the club's medium- and long-term future as a competitive force in both domestic and European football. In order to achieve the European success which had eluded it in recent years, Manchester United felt that it would benefit from being part of a group with greater financial and other resources, and one which was committed to the development of football in England.

5.129. The merger would represent a natural extension of Manchester United's business, and Manchester United had been encouraged by several positive precedents for broadcaster/club mergers in other countries. Ownership of, and involvement in, football clubs by broadcasters was an increasing European trend. Manchester United had also been influenced by the benefits which media involvement had brought to the game in England—attendances had increased, stadiums had been upgraded, quality of players improved and the family game reborn. On the advice it had received, Manchester United had concluded that the merger was in its interests, whatever the outcome of the RPC case.

5.130. Expanding on some key aspects of its reasons for recommending BSKyB's offer, Manchester United said that [*Details omitted. See note on page iv.*] But the club was not succeeding in its aim of being consistently among the top four or five in Europe; its total wage:turnover ratio had increased from 25 per cent in 1996/97 to 31 per cent in 1997/98; and wage pressure from its players and transfer fees had increased dramatically (in 1998 it had spent £28 million on acquiring just three players). [

Details omitted. See note on page iv.

] Manchester United felt that the BSKyB group was one that understood football and the traditions and history of the game, and was also one that was committed both to enhancing the value of any club it acquired and to ensuring that the culture fostered at Manchester United over a number of years was allowed to prosper. Further, its connections with the News International group, with its numerous overseas interests, would assist in wider promotion of Manchester United overseas, including the Far East, and in developing new markets for Manchester United's range of products, especially merchandising. It had also stated that it would be retaining the existing management team at Manchester United.

5.131. In addition BSKyB was expansionist in outlook, as was Manchester United. The company was strong on marketing, another area where there was an identity of interest and skill, and it was also innovative not least on the technological aspects of its businesses.

Effects of the merger on competition

General

5.132. Overall Manchester United considered that the ownership of Manchester United by BSKyB would enhance the naturally close relationship between football and media companies. Media owners of clubs were likely to wish to increase the popularity of the game and to encourage attendances, for example by maintaining ticket prices at levels which would continue to attract a loyal fan base—televised matches in empty stadiums did not have the atmosphere which attracted TV viewers. Football investments by media companies overseas had not given rise to concerns from competition authorities. For example, under Canal+ 's ownership, Paris St Germain had achieved at least a semi-final place in one of the three European competitions in each of the six years 1992 to 1997. There was a similar success story for AC Milan since its acquisition by Mediaset, although it should be noted that AC Milan had subsequently experienced a lean spell in the last two seasons. BSKyB's ownership of Manchester United would not distort competition among football clubs. Nor would competition among broadcasters be distorted, regardless of the outcome of the RPC proceedings.

Access to information

5.133. On the issue whether the merger would provide BSkyB with privileged access, as the owner of Manchester United, to confidential or other information in connection with the TV rights auction process, Manchester United considered that there was no such risk because the Premier League board had complete control of the auction process and could remove the risk. Hence BSkyB would not gain any advantage over its competitors in this respect. Prior to the formation of the Premier League, dealings between the Football League and the TV companies had generally involved representatives of the clubs. This had led to a number of disputes among the clubs. In 1991, therefore, when the Premier League was being formed, a decision was taken by the clubs to entrust the 1992 negotiations of broadcasting contracts to an independent executive board.

5.134. The process was refined in the 1996 round. There had been no involvement of the clubs in the bid process until the day on which the agreement was decided, a fact confirmed, according to Manchester United, by Rick Parry, the then Chief Executive of the Premier League. Manchester United had no knowledge of the kinds of breaches of confidentiality of these processes that had been alleged, and it expected the next TV rights auction, in 2001, to be conducted on similar lines—that is, by the clubs' Premier League board, advised by independent professional advisers, and without any club being involved or being party to any information relevant to the negotiating process or making any input at all.

5.135. Manchester United stated that, whilst the exact format of the 2001 rights auction was yet to be decided, it believed that it was certain that the Premier League board would ensure that no club (irrespective of whether it was owned by a broadcaster) would be able to distort the process by gaining information about competing bids. While clubs could, for example, make suggestions at open Premier League meetings about how much a given broadcaster might be prepared to pay in a particular set of circumstances, this would have to be put by the negotiators to the other bidders as well. If BSkyB thought—and Manchester United did not believe the broadcaster did—that it would gain some information advantage as a result of acquiring Manchester United then this would be a grave misjudgment.

5.136. Manchester United accepted that there might have been a degree of lobbying of clubs by different broadcasters interested in bidding for TV rights. But it had not itself been lobbied. Even if broadcasters had contacted other clubs this lobbying could not have hoped to achieve anything as far as the contracts eventually awarded were concerned, because the negotiations were not carried out by the clubs. The distinction between the negotiation process and the decision process was crucial: only at the latter stage did clubs become involved and receive information about the competing bids.

Manchester United's influence

5.137. Manchester United also discounted the claim that BSkyB could expect Manchester United to be able to influence the other Premier League clubs so as to secure the TV rights contract for BSkyB, or any other objective BSkyB might have. Manchester United pointed out that any vote on the sale of rights and on other shareholder matters would be by a two-thirds majority of the clubs. It was just one of 20 clubs and had no veto. Its size had no effect on its level of influence within the Premier League; there had been various examples (including the 1992 decision on TV rights) where the Premier League had acted against Manchester United's wishes. There was no evidence to suggest that Manchester United was such an influential body that it could change the behaviour pattern of other clubs; owned by BSkyB it would probably be viewed with greater suspicion by the others. As a result it could expect to be less influential than it might otherwise be. The knowledge that it was owned by BSkyB would simply serve to underline the point that any attempt by Manchester United to further BSkyB's objectives would be seen as a self-serving one.

5.138. Although Manchester United considered it unnecessary, the Premier League board could readily amend its procedures so as to eliminate any scope for BSkyB (or any other club-owning broadcaster) to be able to exploit any advantage from being 'on both sides of the table' during the negotiation process. It was an issue which, in any event, the Premier League would need to resolve regardless of whether this merger proceeded or not:

- (a) Other mergers of broadcasters and clubs were possible and most of these transactions would not qualify for investigation under the FTA. In Manchester United's calculation, 17 out of the 20 Premier League clubs did not have gross assets exceeding £70 million and there was no horizontal business overlap between a broadcaster and a football club that could create or enhance a share of supply of goods or services of 25 per cent or more as required by the FTA's jurisdictional rules.
- (b) There were already links between broadcasting companies and football clubs through cross-directorships.

Competition among broadcasters

5.139. In Manchester United's view the merger would not adversely affect competition for the broadcasting of English football. There were no significant horizontal overlaps between BSkyB and Manchester United in any broadcasting markets. It might well be reasonable to assume that BSkyB would do what it could to avoid losing the rights to Manchester United, as it was unlikely to want to see those going to any other broadcaster, but, while hopeful that it would win the contract next time, BSkyB was aware of the risks that it might not succeed and, should it not succeed, it would benefit from receiving Manchester United's share of the increased revenues to clubs.

5.140. It was not necessarily the case that BSkyB would have a significant advantage as the incumbent broadcaster in future auctions of Premier League rights. BSkyB was itself the new entrant in 1992; it had made the investment to challenge the incumbent, ITV, and had been rewarded with the contract. Manchester United said that, having proved itself over the life of the first contract, BSkyB was successful in getting the 1996 contract, but had still had to pay the top price. An incumbent used to operating in a certain way might fail to spot opportunities for value enhancement that others might spot—just as BSkyB had done in 1992. A further point offsetting any advantage that BSkyB might have as the incumbent was that the ITV companies, Channel 4, Channel 5 and the BBC were all active in the showing of live football (for example, the Champions' League, the FA Cup and the Worthington Cup) and all, therefore, had track records in broadcasting live football.

Competitive advantage

5.141. It had been put to Manchester United that BSkyB's ownership of the company would give BSkyB a decisive 'toehold' enabling it to bid higher than its competitors in any future Premier League collective rights auction on the basis that its net costs would be lower, because a proportion of the revenues from the sale of rights (and the club could be entitled to some 7 per cent) would return to BSkyB via Manchester United. However, Manchester United presented evidence to show that this argument was incorrect:

- (a) Economic theory demonstrated that such toeholds translated only into significant advantages in common value auctions using the English, or ascending bid, auction method. The Premier League auction was not a common value auction, however. Manchester United said that the Premier League's auction method was the first-price, sealed-bid method. In these circumstances any toehold would be greatly reduced in significance and would tend to have very small effects. Nor was there the credibility problem sometimes attributed to first-price, sealed-bid auctions (that is, could a company credibly commit to accept the highest bid and refuse to consider subsequent higher offers?). In the Premier League, unlike the sale of a company, the selling of rights was a repeated transaction. Credibility was, hence, more likely to be an issue for the Premier League if it changed the rules after the bids had been made. The effect on revenues from later auctions would be likely to be deeply damaging to the Premier League. Also, a well-designed auction could be expected to achieve high returns, so the extra revenues from varying the rules after the bids were in would be unlikely to be very high. Manchester United said that such a strategy for limited short-term gains, but potentially large long-term losses, would not be a revenue-maximizing one for the Premier League. There was therefore no basis for expecting that the Premier League would change the rules after bids had been made.

- (b) In view of the opportunity cost to a toehold bidder of winning the auction, the net costs of the bid to a winning 'toehold' bidder would not be as much as 7 per cent lower than for others; it would be less than 1 per cent lower.
- (c) Any minor toehold advantage could be counteracted through the acquisition by other broadcasters of other clubs. The fact that any such advantage was a minor one was underlined by experience in France, Italy and the USA where only a very small number of broadcasters owned sports clubs.
- (d) In any event, there would be compelling incentives for the Premier League to ensure that its auction processes did not favour toehold bidders, as future acquisitions by broadcasters of most other Premier League clubs would not be susceptible to regulatory scrutiny.

In any event a toeholder did not always win the auction. The toehold theory was shown to be of limited value in the recent battle for the US telecommunications company MCI. Manchester United said that even though BT had a 20 per cent stake in MCI, which was a much bigger stake than some had claimed BSKyB would gain by acquiring Manchester United, it was WorldCom (with no stake in MCI) that had bid more aggressively to win the bidding for MCI. Yet if the toehold theory was correct, WorldCom would have bid more conservatively and BT would have been incentivized to outbid WorldCom.

Credibility of a threat to leave the Premier League; and of expulsion

5.142. Manchester United dismissed the claim that it could credibly threaten to leave the Premier League if it was unable to secure BSKyB's objectives. As explained in paragraph 5.127 (a), secession would be contrary to its interests both commercially and on the field. The company could think of no circumstances in which it would ever suit it to leave the Premier League. There was no realistic alternative domestic football competition for Manchester United, and access to European competitions run in conjunction with domestic leagues, including the recently proposed Super League and UEFA's remodelled Champions' League, was through success in domestic ones; hence its departure from the Premier League would be self-defeating both financially and in football terms. Manchester United said that it noted that the Premier League board had recognized this limitation, and that a threat to leave the League could only be credible if there was someone else to play.

5.143. Furthermore, the suggestion that a group of, say, six of the major Premier League clubs including Manchester United might threaten to break away was equally unlikely. The idea canvassed was that if these clubs were owned by broadcasters who, under the current collective selling arrangements, failed to secure the TV rights contract, they might leave the Premier League and, with other leading Continental clubs, establish a separate European League. Ideas such as these were completely unsustainable:

- (a) Based on precedent in countries such as France and Italy, there was no expectation that a significant number of Premier League clubs would be acquired by broadcasters, either as a result of the BSKyB/Manchester United merger or otherwise, or that such broadcaster-owned clubs would find it in their interests to leave the Premier League.
- (b) The evidence was that top European clubs would not be interested in leaving their domestic leagues.
- (c) A separate six-club league (as an alternative to a new European League) would not be viable.
- (d) The remaining 14 Premier League clubs could still continue to offer a very attractive national club competition by admitting the six top teams from the First Division of the Football League to the Premier League.

Another hypothetical scenario was that these six clubs would not leave the Premier League, or threaten to do so; they would simply make their own TV rights deals. In Manchester United's view this scenario too was a very unlikely one. There could be no expectation that these clubs would have any financial incentive to secede from collective selling. Second, they could not expect that the other clubs

would allow them to remain in the Premier League—at the very least the majority would retain the rights to the away matches of the six. The six clubs would also need the consent of the other clubs to broadcast their home matches against the other clubs, which the other clubs could refuse to give. Finally, the Premier League and/or the successful broadcaster would sue the six clubs for breach of contract. The scenario was therefore totally unrealistic.

5.144. By contrast, Manchester United was in no doubt that the threat to expel a club which contravened the Premier League rules in order to further the aims of its broadcaster owner was a credible one. If, for example, it decided to withdraw from the collective selling arrangements and have its home matches shown on Sky Sports 1 because, say, BSkyB had lost the contract, this would be a violation of Premier League rules and could lead to its expulsion as well as being sued for breach of contract. The financial effects for Manchester United would be ruinous. The recent experience of England and the Rugby Union's Five Nations Championship Committee demonstrated that leading participants could not ride roughshod over the others, as they depended on participation in the league in order to survive. The speed of England's concession to the Committee demonstrated that it felt that it would be irreparably damaged by expulsion.

Individual selling of rights

5.145. Manchester United did not believe that the merger would distort competition between broadcasters if the DGFT succeeded in the current RPC case and the present compulsory collective selling arrangements for rights were changed in favour of individual selling. In any event Manchester United considered it highly speculative to look at the possible effects of the merger in an individual selling environment given the current status of the RPC case. BSkyB's ownership of Manchester United could not affect the ability of other broadcasters to compete for other Premier League clubs' rights, and would not of itself lead to other participating clubs signing up with BSkyB. In any case, even if the TV rights reverted to the clubs, it was still in Manchester United's interest to sell the bulk of its rights collectively. In its view the commercial imperatives would move the Premier League clubs towards voluntarily agreeing to sell their rights collectively.

5.146. One hypothesis was that BSkyB would have an unfair advantage under individual selling because it would be better placed to bid for the rights of other major clubs than its competitors were. As it would already own Manchester United, it could bid for a deal to include, say, Arsenal and Liverpool, thus producing a high-value package that was not available to any competitor to bid for because that competitor would not own Manchester United, the pre-eminent club. In Manchester United's view, there was no expectation that this merger would have the hypothesized effects. It could be shown that the probable TV audience for such a package would be little different from the share that these three clubs attracted under current collective selling arrangements. But in selling their rights to BSkyB, Arsenal and Liverpool (or whoever) would be selling them to the owner of a major rival from whom they might not expect to get even-handed treatment. In such circumstances it could not be expected that they would sell their rights to BSkyB in preference to other broadcasters.

5.147. Manchester United also rejected the notion that BSkyB would benefit from a 'magnet effect' (see paragraph 5.61) if, under individual selling, it owned Manchester United. It said that the idea that no broadcaster other than BSkyB could put together a package of all Premier League clubs if BSkyB owned Manchester United was incorrect. Any other broadcaster could put together such a package. There must be a price offered by a competing broadcaster at which a rational, profit-maximizing BSkyB would consider it more profitable to sell its rights in Manchester United to that other broadcaster than to exploit them itself. It was not aware of any evidence to support a conclusion that no other broadcaster would ever acquire the Manchester United rights. In fact the evidence in the European context was to the contrary: for example, AC Milan was owned by Mediaset yet its matches were broadcast on Tele+ . Nor did Manchester United accept that BSkyB would be in a position to bid more than competing broadcasters for the rights of other leading clubs. It said that the ability to charge more from owning multiple brands was through restricting supply. However, this would not be possible where a broadcaster acquired the rights to several clubs, as individual clubs would want to ensure maximum exposure and revenues. Manchester United also said that there was no evidence for the idea that the value of the Premier League rights was likely to be higher as a single block than if split. Different broadcasters reached different audiences and it might well therefore be optimal to split

rights ownership. The company gave as an example the live coverage of the FA Cup and Worthington Cup. This was split between BSkyB and ITV.

5.148. In addition Manchester United said that, even looking at a collective selling environment, it was unrealistic to assume that the other clubs would ever sign up to the kinds of agreement that had been suggested would occur, ones which would effectively institutionalize Manchester United, Arsenal and Liverpool as the three leading clubs getting maximum TV exposure and hence maximum TV revenues, with everyone else being also-rans especially when, in Manchester United's view, they would get nothing in return. Any such scenario would be defeated; no club with aspirations to get to the top reaches of the Premier League would sign up to such an agreement. Under the current arrangements, when clubs like Blackburn Rovers and Newcastle United had greatly improved on their previous competitive performance, their TV revenues had increased significantly. The scenarios suggested here would remove all prospect of these benefits accruing to any club outside an elite. They would also limit BSkyB's flexibility to maximize the number of attractive matches it could show. Many of the home matches of the elite clubs might be uninteresting, unexciting affairs with little at stake. The deciding championship match could be between, say, Chelsea and Aston Villa but the arrangements might not be flexible enough to allow BSkyB to show any match at the end of the season not involving one of the three elite clubs.

Influence over the Premier League

5.149. By buying Manchester United BSkyB was not, in Manchester United's submission, acquiring a position of influence over the organization, operation and rules of the Premier League. Certainly the Premier League's rules and principles could be changed, but only by a two-thirds majority, and, as already shown, Manchester United did not have any more voting power or influence than any other club.

Other mergers between broadcasters and football clubs

5.150. Manchester United accepted that, if this merger went ahead, it was likely that it would be followed by other mergers between broadcasters and clubs. Equally, the position that prevailed in continental Europe, with only one or two teams in France and Italy being owned by broadcasters, might just as likely prevail; there was simply no way of telling. It was unlikely, however, that there would be a rash of other such mergers. Separately, the company pointed out that in its view only three of the 20 Premier League clubs would qualify for reference to the MMC under the FTA. The Premier League board would need to ensure that the running of the Premier League and future rights auctions was not vulnerable to distortion by club-owning broadcasters irrespective of whether or not BSkyB acquired Manchester United. Accordingly, there was no likelihood that such mergers would lead to a reduction in competition or to the imposition on the Premier League of the priorities of TV companies as opposed to football priorities. The Premier League was very successful in financial terms and in terms of the response of supporters. So there was no reason why this merger or others should suddenly lead to structural changes in the Premier League.

The effect of the merger on consumers

Prices

5.151. Manchester United considered that the merger would have no adverse implications for Manchester United spectators or for the wider public interest. BSkyB had given a public assurance that ticket prices would remain a matter for the existing management of Manchester United. Indeed, to the extent that the merger might have positive effects on the size of the broadcasting audience for Manchester United games, and coupled with the planned increase in seating capacity at Old Trafford, the merger might possibly exert downward pressure on ticket prices. In any case media owners were likely to wish to increase the popularity of the game and to encourage attendance by maintaining ticket

prices at levels which would continue to attract a loyal fan base as televised matches in empty stadiums lacked the 'atmosphere' needed to attract viewers.

5.152. The club's ticket prices were set taking into account the need to maintain the long-term loyalty of its existing fans and to attract new supporters, and its prices were currently among the lowest in the Premier League. This allowed supporters the ability to afford other purchases, for example merchandising and catering. Indeed, overall, Manchester United supporters spent more per head at the ground than did those of other clubs. From a profit maximization aspect, Manchester United concluded that its current policy was the best one. Clearly cost pressures could force a rethink, however. There was no expectation that BSkyB could abuse the fact that it would ultimately control prices both at the ground and for live TV matches; BSkyB would damage the club's supporter base, which would certainly not be in its interests, if it asked Manchester United to raise its gate prices to unduly high levels.

Scheduling

5.153. Manchester United said that there could be no expectation that, if the merger went ahead, the scheduling of matches would be arranged more to suit broadcasters than to suit the match-going fans. The fans could not be ignored—if matches were arranged when they could not attend, for example during the working day or late at night, the stadiums would be empty which would make for very poor TV. Second, matches had to be scheduled in accordance with the Premier League rules (section E); clubs could not arrange fixtures at times that suited only themselves. The Premier League and their opponents would need to agree, not to mention the police and the local authority. These latter bodies would never agree to a match at anti-social times or times likely to increase the risk of disorder merely to suite overseas audiences. Third, the concern was only a theoretical one, as there was very little flexibility for scheduling changes left in the football calendar. The Premier League did not exist in isolation on this issue; there were European fixture dates and times, and similar constraints with other competitions like the FA Cup, the Worthington Cup and international fixtures.

Investment

5.154. One complaint has been that BSkyB might stop Manchester United from investing in new players in the interests, for example, of preventing the club from becoming too successful so that BSkyB had a more exciting championship to market for TV purposes. Manchester United did not, however, believe that in practice BSkyB's attitude to investment would differ from its own. During the earlier 1990s Manchester United's success in competitions resulted in the club buying very little new talent. It was only as a result of winning nothing in 1997/98 that Manchester United had recently invested, at great expense, in new players. It was most unlikely that BSkyB would behave any differently.

5.155. A contrary fear was that the top level game would be made less interesting because BSkyB might invest so heavily in Manchester United that it would always succeed and, as a result, be certain to qualify each year for European competitors. But the company pointed out that BSkyB was unlikely to do anything to undermine the competitive interest in matches which would attract viewers. In any event there was no simple relationship between levels of expenditure and success. And in practice, BSkyB did not need to do anything more or anything different to secure the goal of Manchester United's participation in European competitions. Since 1990/91, when English clubs were readmitted to European competitions, Manchester United had competed in them each year.

Interests of fans

5.156. Manchester United said that BSkyB had given a number of public assurances to football supporters, and to Manchester United's fans in particular, to reassure them that the present football management team would remain in control, including that the present manager would remain in charge of team selection and that he and the Manchester United board would remain responsible for player acquisition. In addition Manchester United was committed to maintaining its close links with the local

community: as part of the present stadium expansion programme (from 55,000 to 67,400), Manchester United was proposing to spend £1 million on local transport and community initiatives: and its training ground would continue to be in the Manchester area (the new £14 million facility was scheduled for opening in late 1999).

Wider issues

5.157. Manchester United considered that, overall, media involvement in football, particularly BSkyB's involvement, had had positive effects and that these would continue after the merger. Manchester United expected that there would be an improvement in its own and other English clubs' performance in Europe following the merger; the more that English clubs were involved in European competitions the greater the opportunity they had to gain a share of those revenues and the better it would be for English football as a whole.

5.158. There was no cause for concern in the thought that while at present the interests, conflicts and tensions in football were dealt with by people whose business was football, post-merger it would be BSkyB deciding them and doing so in the interests of BSkyB. Fundamentally what BSkyB wanted was exactly what Manchester United wanted, in terms of the success of the club and the competitions in which it played. There was no reason why the strategy should change.

Remedies

5.159. Manchester United had carefully considered the list of hypothetical remedies sent to the company for consideration. Its view was that the merger could not be expected to operate against the public interest within the meaning of the FTA; and that, consequently, no remedies were required. It emphasized the statutory requirement that there be an expectation of adverse public interest consequences as a result of the merger, before the MMC could reach an adverse conclusion. Manchester United considered that none of the hypotheses put to it discharged this burden of proof.

5.160. The company considered that, on the basis of continued collective selling, the merger raised no additional concerns which the Premier League board did not already face, since some clubs already had connections with broadcasters. These issues could also arise as a result of mergers between broadcasters and other clubs. Most such mergers would not be subject to regulatory scrutiny under the FTA (see paragraph 5.138(a)). Accordingly, the imposition on BSkyB of certain of the hypothetical remedies to cure perceived competition concerns would introduce asymmetries into an environment where vertical integration between other broadcasters and Premier League clubs potentially raised the same competition concerns and yet was immune from regulatory intervention under the FTA. Most of the hypothetical remedies had the potential to be unfairly discriminatory and to distort competition between broadcasters and between football clubs. Also a number were considered to be potentially against the interests of other Premier League clubs.

5.161. Manchester United also submitted that it was speculative and unsupported by evidence to conclude that detriments, if any, could be expected to result from the merger within the meaning of the FTA if the RPC prohibited compulsory collective selling. Until the RPC case was decided, therefore, it was inappropriate for the MMC to recommend remedies relating to possible detriments arising from the individual selling of Premier League rights. In any event, additional regulatory obligations or constraints should only be introduced where existing regulatory structures were clearly inadequate. From 1 March 2000, the new Competition Act 1998 gave the UK competition authorities effective powers to regulate any abuses of market power and anti-competitive agreements, while football's governing bodies already had effective powers of supervision and enforcement.

5.162. Manchester United's comments on the hypothetical remedies, subject to paragraphs 5.159 to 5.161, were as follows.

(a) The merger should not be allowed to proceed

5.163. A recommendation not to allow the merger to proceed would be wholly unjustified and disproportionate on the facts of the case. The merger did not raise any competition concerns or detriments to the public interest. In particular, such a recommendation would in itself distort competition, as BSkyB and other large and well-funded broadcasters would be able to acquire other leading Premier League clubs free of regulatory intervention under the FTA.

(b) If collective selling of TV rights continued, Manchester United should give undertakings not to participate in the decision of the Premier League on the sale of TV rights and should receive no information about the competing bids

5.164. The effect of excluding Manchester United from the decision-making process on the sale of Premier League TV rights would be disproportionate and would distort the sports rights market. Manchester United only had one vote in 20 and so could not be regarded as having any undue influence on the decision-making process. Processes were already in place (and could be adapted as necessary) to ensure that clubs did not gain access to confidential information about competing bids. The proposed remedy was therefore unnecessary. Also the remedy would itself be distortive of competition if it were not applied to other Premier League clubs which might become part of broadcasting groups. And if five or six clubs were owned by broadcasters and excluded from the decision-making process, the decision could in effect be taken by, say, ten Premier League clubs (two-thirds of the eligible vote) whose views, although 'independent' of broadcast interests, would not be representative of the Premier League clubs as a whole.

(c) Manchester United should give undertakings that, if collective selling continued and BSkyB failed to gain the TV rights, it would not leave the Premier League or break the collective agreement by selling its own rights individually

5.165. An undertaking not to break the collective agreement was unnecessary, as Manchester United already had legal obligations (under the Premier League rules) to the other clubs and to the Premier League in this respect. It would be liable for damages in the event that it unilaterally withdrew from collective selling and thereby caused the Premier League to breach its agreement with the successful broadcaster. It was demonstrably in Manchester United's economic self-interest to stay within the Premier League and it would be commercial suicide for it to leave the Premier League. There was simply no viable alternative for Manchester United—either nationally or in Europe. But it would be quite possible (and credible) for the club to be expelled from the Premier League for breach of a fundamental rule of the league. The proposed remedy was therefore unnecessary.

(d) BSkyB should give undertakings that, if collective selling continued, it would not make an agreement with the Premier League giving it exclusive rights to all or some proportion of live broadcasting of Premier League matches

5.166. The Premier League board and clubs were best placed to determine what was in the best interests of all clubs. If BSkyB offered the best terms, it would be detrimental to other Premier League clubs and, therefore, disproportionate to bar BSkyB from bidding for and, if successful, entering into an agreement which the majority of the clubs wanted. Separately, in Manchester United's view, it would be inappropriate (and contrary to Schedule 8, paragraph 3 of the FTA) for the MMC to impose a remedy in relation to an agreement or future agreements to which other competition legislation applied or might apply (if the DGFT was successful in the case currently before the RPC).

(e) BSkyB and Manchester United should give undertakings that, if individual selling of TV rights occurred, Manchester United would sell its rights at arm's length (ie no preferential treatment for BSkyB)

5.167. As stated under (d) above, Manchester United considered that it was inappropriate for the MMC to impose an undertaking on the parties now that related to circumstances which might not come about (that is, if the DGFT lost the RPC case) and, even if they did come about, whose shape and characteristics were unknown at the time of giving the undertaking. While Manchester United's

broadcasting rights were a valuable asset, it was just one of a large number of English football clubs whose TV rights would be available to broadcasters. There was no evidence to suggest that ownership of Manchester United would give BSkyB an unfair advantage in obtaining rights owned by other clubs. The remedy would therefore be unreasonable to the extent that it applied to BSkyB and not to other broadcasters (for example, if they acquired a smaller club thereby avoiding FTA scrutiny). Such an undertaking would also be difficult and costly to monitor and enforce.

(f) BSkyB should give undertakings that, if individual selling of rights occurred, it would not purchase the rights of more than a specified proportion of Premier League clubs

5.168. This undertaking required a large number of factual assumptions about the broadcasting and football environment in the future, including the outcome of the RPC case. Accordingly, in current circumstances, there was no basis for concluding that this particular concern would be expected to occur. As with remedy (e) above, there was no evidence to suggest that ownership of Manchester United would give BSkyB an unfair advantage in obtaining rights owned by other clubs. But in the event that the hypothesized circumstances did occur and the OFT concluded that they caused competition concerns, the Competition Act 1998 gave the authorities sufficient powers to tackle any problem that might arise out of broadcasters gaining a large share of any particular market and acting anti-competitively or concluding an anti-competitive agreement. This remedy was also likely to result in market distortions, as the limit was likely to be arbitrary.

(g) BSkyB and Manchester United should give undertakings that they would agree to the sale on reasonable terms of match highlights and recorded matches to broadcasters other than the one who had (or ones who had) the rights to live broadcasts (whether the sale of rights was collective or individual)

5.169. This was not currently within BSkyB's or Manchester United's gift: under Premier League rules, all TV rights were sold centrally, including the highlights. But in an individual selling environment, there did not seem to be any justification for such an undertaking either. The Premier League clubs would determine which was the optimum method for selling their TV rights (for example, through a voluntary collective arrangement or through individual bilateral deals, for individual packages of rights or for all packages) and the normal operation of the market would determine which broadcaster won each of these contracts. There was no evidence and nor could there be any expectation that the merger would give BSkyB an advantage in obtaining the rights to match highlights.

(h) Premier League matches should be designated as either Category A or Category B listed events under the Broadcasting Act 1996

5.170. This was not within the Secretary of State for Trade and Industry's powers under the FTA, as it was a matter for the Secretary of State for Culture, Media and Sport under the Broadcasting Acts 1990 and 1996. In fact, however, such a proposal had recently been considered and rejected by the Secretary of State for Culture, Media and Sport. The remedy would also damage all the other Premier League clubs, to the extent that it would result in a reduction in the money flowing into the game. It was therefore counter-productive not just to Manchester United but to football as a whole.

(i) BSkyB should give undertakings not to purchase the TV rights for matches which it did not intend to broadcast

5.171. This proposed undertaking would clearly address the DGFT's concerns about supply restrictions, which formed the basis of his case currently before the RPC. However, it would be inappropriate to order this remedy, as it prejudged the outcome of the RPC case; and it was not clear how the remedy was linked to possible public interest concerns arising from the merger. The current arrangement was to auction exclusive rights for sale to a single broadcaster. The proposed remedy would effectively exclude BSkyB from that process: BSkyB could only bid for a non-exclusive rights package while other broadcasters could bid for an exclusive package of rights.

5.172. Given the premium attaching to exclusivity, the rights package would inevitably be worth more to other broadcasters than to BSkyB. In any event, the remedy would be unworkable in the current selling environment: it would be impossible for BSkyB to identify at the start of the season a full list of those matches which it would wish to broadcast: mid-season battles and end of season championship/relegation deciders were simply not foreseeable at the start of the season. In the individual selling environment it would make no commercial sense for BSkyB to bid for, say, Liverpool or Arsenal's (or any other club's) live home rights and then not screen those clubs' matches. Those clubs were interested in TV exposure, not just for pay-per-view revenues but also to stimulate merchandising sales and to deliver the audiences sought by shirt sponsors and ground advertisers. Accordingly, each club would seek contractual undertakings from BSkyB that it would screen all or a large number of its home matches.

(j) BSkyB should give undertakings that it would supply its TV channels (or pay-per-view services if introduced) showing Manchester United matches on non-discriminatory terms to other pay TV retailers

5.173. This remedy was again aimed at a situation that could only arise in a world of individual selling and so the comments made under (d) and (e) were relevant once again. However, the remedy appeared wholly disproportionate: it presumed, contrary to the facts, that Manchester United matches were in some sense an essential facility for broadcasters, such that, without access to those rights, they would be at a severe competitive disadvantage in broadcasting markets. The reality was that an obligation on BSkyB to allow other broadcasters access to Manchester United's home games on non-discriminatory terms would allow BSkyB's competitors automatic access to Manchester United's home games while such competitors could retain exclusive access to the matches of other clubs (including Manchester United's away matches).

(k) In order to allow its non-discriminatory pricing to be monitored, BSkyB should be required to publish audited annual accounts which separated its channel operation/programming business, its distribution business and Manchester United

5.174. It was not clear precisely what it was that required monitoring. Manchester United considered that this remedy appeared to go much wider than anything that could be justified on the basis of concerns that had been raised in the current investigation. It would, however, remain a separate legal entity and its annual accounts would be published as a matter of course. Manchester United did not see any justification for any further requirements.